IN THE SUPREME COURT OF FLORIDA

STEPHEN TODD BOOKER, Petitioner, v. RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida, Respondent.	CASE NO. 70,928

RESPONSE TO RESPONDENT'S RETURN TO ORDER TO SHOW CAUSE AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

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This case is controlled by a quartet of cases decided by this Court in the wake of Hitchcock v. Dugger, 107 S. Ct. 1821 (1987): Downs v. Dugger, No. 71,100 (Fla. Sept. 9, 1987); Riley v. Wainwright, No. 69,563 (Fla. Sept. 3, 1987); Thompson v. Dugger, Nos. 70,739 and 70,781 (Fla. Sept. 9, 1987); and Morgan v. State, No. 69,104 (Fla. Aug. 27, 1987). The State's response to these cases is to ignore their force or to contend that this recent and virtually unanimous precedent -- some of it only 12 days old -- should be revisited.[1/]

Mr. Booker recognizes that Hitchcock is an issue familiar to this Court. We therefore will not extensively re-explore the territory covered by this Court's post-Hitchcock cases, nor will we re-argue the points covered in the Petition for Writ of Habeas Corpus.

Placed in logical sequence, the State's arguments proceed in three stages. First, the State contends that although Mr. Booker's capital sentencing occurred prior to Songer v. State, 365 So. 2d 696 (Fla. 1978) (on rehearing), there was a procedural default because Mr. Booker did not raise a Hitchcock claim at trial or on direct appeal.[2/] The State's procedural default argument is questionable as a matter of fact: The advisory sentencing portion of Mr. Booker's sentencing proceeding was completed prior to Lockett, and, following Lockett, Mr. Booker's counsel raised trial level objections based on Lockett and

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1/ Return to Order to Show Cause and Motion to Dismiss Petition for Writ of Habeas Corpus, at 11-15 (filed Sept. 15, 1987). This Court's August 28, 1987 Order to Show Cause specified that the State's Return was to be due on September 14 and that Mr. Booker may "serve his response on or before September 24, 1987." The State's Return was in fact filed at the close of business on September 15; the certificate of service states that the Return was placed in first class mail to Washington, D.C. on September 17. As of the time this Response is being sent for filing, undersigned counsel still has not received the State's Return. Had undersigned counsel been unable to make independent arrangements to obtain a copy of the Return, meaningful response by September 24 would have been almost impossible.

2/ Return at 4-6, 8-10.

pursued the issue on direct appeal. Booker v. State, 397 So. 2d 910, 918 (Fla. 1981).[3/]

More fundamentally, the State's procedural default argument is simply irrelevant as a matter of law. This Court's post-Hitchcock opinions make clear that the United States Supreme Court's decision in Hitchcock was a substantial change in law so as to forgive procedural defaults. Downs, slip op. at 2-4; Riley, slip op. at 6-7; Thompson, slip op. at 3-4. The State aggressively asserted procedural default in all of these cases, and in each case this Court cut through the procedural screens and commanded relief.

This Court's opinion in Thompson shows that the "class of petitioners" potentially affected by Hitchcock consists of those sentenced prior to the Songer decision on December 21, 1978. Thompson, slip op. at 3-4. All sentencing proceedings in Thompson occurred in September 1978,[4/] three months after Lockett was decided and three months before Songer was decided. Thompson, slip op. at 3. By contrast, the jury portion of Mr. Booker's sentencing proceedings occurred even before Lockett;[5/] the final judge sentencing[6/] took place during the

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3/ Petition for Writ of Habeas Corpus ¶¶ 7-8 (filed July 28, 1987).

4/ The State incorrectly writes that the jury recommendation in Thompson took place prior to Lockett. Return at 4. Lockett was decided in July 1978. This Court's opinion in Thompson states that Thompson's sentencing occurred in September of 1978. Thompson, slip op. at 3. Thompson entered a guilty plea on September 18, 1978. An advisory jury recommended death and the trial judge immediately imposed death on September 20, 1978. See Application for Stay of Execution and Summary Initial Brief for Appellant and, if Necessary, Motion for Stay of Execution Pending Filing and Disposition of Petition for Writ of Certiorari in the United States Supreme Court, at 4, Thompson v. State, Nos. 70,739 and 70,781 (Fla. Sept. 9, 1987).

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. Lockett was decided in July 1978.

6/ The trial court sentenced Mr. Booker to death on October 16, 1978. Songer was decided on December 21, 1978.

time period covered by Thompson: after Lockett but before Songer. Mr. Booker clearly is within the Hitchcock "class" -- more so, in fact, than was Thompson.

The State's second argument is that the judge's October 1978 sentencing order showed no indicia of Hitchcock error.[7/] This attempt to distinguish Hitchcock, Morgan and Riley from Mr. Booker's case must fail.[8/] Once again the State's contention is wrong on the record: The sentencing order in Mr. Booker's case and the proceedings leading up to it do show clear indicia of Hitchcock error,[9/] as did other sentencing orders by

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7/ Return at 5-7.

8/ Return at 4-5.

9/ See Petition ¶ 26. The State seizes upon the word "anything" in the sentencing order. See Return at 6. But this one word can hardly outweigh the order's clear focus on the statutory mitigating factors. See Petition ¶ 26. Read in context, the word "anything" can mean only anything relevant to the statutory mitigating circumstances.

Equally unpersuasive is the State's argument that it is "especially telling that the sentence order did not repeatedly refer to the enumerated statutory mitigating circumstances." Return at 7 (emphasis added). The key word here is "repeatedly," for it is beyond dispute that the sentencing order discussed only the enumerated statutory mitigating circumstances, one by one. Booker v. State, 397 So. 2d 910, 915-16 (Fla. 1981) (quoting sentencing order). 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 So. 2d 910 (Fla. 1981). Given the quantity of that evidence, the sentencing order permits no other conclusion but that the judge considered only as it went to the statutory factors.

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

[Footnote continued next page]

other judges in the pre-Songer era. E.g. Jacobs v. State, 396 So. 2d 713 (Fla. 1981); Perry v. State, 395 So. 2d 170 (Fla. 1981).

But more fundamentally, the State's argument is irrelevant under this Court's post-Hitchcock cases. The State, in ignoring the penalty phase jury in Mr. Booker's case, has disregarded a central teaching of Riley, Thompson, Downs and Morgan: That the "jury's determination of the existence of any mitigating circumstances, statutory or nonstatutory, as well as the weight to be given them, are essential components of the sentencing process." Riley, slip op. at 3 (emphasis added). The State does not -- and its silence bears impressive witness that it cannot -- dispute that the jury error in this case is indistinguishable from the jury error in Riley, Thompson, Downs and Morgan.[10/] This Court mandated that the defendants in these cases be resentenced with properly instructed juries. So, too, must Mr. Booker be resentenced by a property instructed jury.

The State's reliance on an egregious misunderstanding of the "essential" role of the jury in Florida's trifurcated sentencing process, Riley, slip op. at 3, completely undermines its attempt to distinguish Thompson and Morgan.[11/] With respect

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[Footnote continued from preceding page]

invalidated by this Court's December 1978 opinion in Songer. 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"). There is no indication that Judge Crews' view changed between Songer and the time he sentenced Mr. Booker; indeed, Judge Crews' remarks at Mr. Booker's trial strongly indicate that his view of mitigating circumstances remained restricted.

10/ See also Magill v. Dugger, ___ F.2d ___, No. 85-3820 (11th Cir. July 28, 1987) (mandating resentencing, with jury, based on combination of Hitchcock error and ineffective assistance of counsel); Adams v. Wainwright, 804 F.2d 1526, 1529 (11th Cir. 1986), modified on other grounds, 816 F.2d 1493 (11th Cir. 1987), rehearing en banc denied, __ F.2d __ (11th Cir. June 10, 1987) (mandating resentencing, with jury, based on Caldwell v. Mississippi, 472 U.S. 320 (1985)).

11/ Return at 4-5.

to Riley, the State only argues that Riley -- an opinion rendered 20 days ago -- was wrongly decided and should be revisited.[12] The State ignores the Downs decision altogether.

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 presented at Mr. Booker's trial, the jury and judge considered that evidence only as relevant to the statutory factors. The State does not -- and cannot -- dispute these facts; instead, by its silence, it suggests that this Court simply ignore them.

The State's third argument is that any Hitchcock error in this case is harmless because of the horror of the crime and because Mr. Booker said at sentencing that one guilty of such a crime should be executed.[13] We fully agree that the facts of this crime were awful; so were the facts of the slow torture-murder in Thompson[14] -- so were the facts of Hitchcock and Downs and Morgan and Riley. But that is not the point. The point is that there are two sides to a constitutionally valid capital sentencing equation: an aggravation side and a mitigation side. The facts of the crime were fully considered in the aggravation side; the Hitchcock error in Mr. Booker's case is that the mitigation side was muted in an unconstitutional way.

12/ Return at 11.

13/ Return at 10-15.

14/ Thompson v. State, 389 So. 2d 197, 198 (Fla. 1980).

As outlined in the Petition,[15] substantial evidence of nonstatutory mitigating circumstances was presented to the jury and judge in Mr. Booker's case -- far more than was presented in Hitchcock, 107 S. Ct. at 1824, or in Downs, slip op. at 5-6. But as this Court's post-Hitchcock cases demonstrate, "mere presentation" is not enough. Riley, slip op. at 7; Downs, slip op. at 3-4. The jury and judge must be permitted to consider the evidence that is presented. They must be permitted to listen. Even with the Hitchcock error, the sentencing jury in Mr. Booker's case split 9-3. Compare Morgan, slip op. at 2 (7-5 jury recommendation of death indicates Hitchcock error not harmless).

The Hitchcock error here is unaffected by the fact that at trial Mr. Booker asked for the death penalty. At least three of Mr. Booker's jurors did not deem the "request" controlling: Even though infected with Hitchcock error, Mr. Booker's jury split 9-3 on penalty. The State's ipse dixit notwithstanding,[16] no court, state or federal, has rejected Mr. Booker's Hitchcock claim on this basis,[17] and for good reason. Mr. Booker's documented mental difficulties -- outlined in the Petition -- place the quality of his "request" in substantial doubt,[18] as does the fact that Mr. Booker himself testified in mitigation on his own behalf and permitted his attorney to argue for a life sentence. The Hitchcock errors in this case were a brooding omnipresence that surely affected all trial level decisions and actions, including this one. Moreover, it does not follow that a capital

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15/ Petition ¶¶ 15, 16, 18, 19, 21, 23, 25.

16/ Return at 14.

17/ Booker v. State, 397 So. 910, 918 (Fla. 1981); Booker v. State, 413 So. 2d 756 (Fla. 1982); Booker v. Wainwright, 703 F.2d 1251, 1259-61 (11th Cir. 1983).

18/ Cf. Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986) (condemned inmate's direction to trial attorney that attorney not investigate inmate's personal history held not to relieve attorney of duty to investigate).

defendant who expresses remorse and asks for a death sentence thereby deserves the death penalty. His very remorse shows the kind of openness to rehabilitation that invites mercy, and this may well be the reason three of Mr. Booker's jurors voted for mercy despite the Hitchcock error.

In analyzing 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. This standard, recently reaffirmed in Fead v. State, No. 68,341 (Fla. Sept. 3, 1987), provides that 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.[19/] Had Mr. Booker's jury recommended life imprisonment, the nonstatutory mitigating evidence before the jury would have made an override improper under Tedder.[20/] Analagously, the exclusion of such nonstatutory mitigating evidence from consideration by the jury means that the Hitchcock error that actually occurred cannot be deemed harmless.

"If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." Riley, slip op. at 5. Like Hitchcock, Downs, Riley, Thompson and Morgan, Mr. Booker's penalty phase jury understood -- because they were told repeatedly -- that under the law they could consider only the statutory list of mitigating circumstances. Like Hitchcock, Downs, Riley, Thompson and Morgan, substantial nonstatutory mitigating evidence was presented to the

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19/ E.g. Herzog v. State, 439 So. 2d 1379, 1381 (Fla. 1983); Washington v. State, 432 So. 2d 44, 48 (Fla. 1983); Gilvin v. State, 418 So. 2d 996, 999 (Fla. 1982); Welty v. State, 402 So. 2d 1159, 1164-65 (Fla. 1981).

20/ See generally Radelet, Rejecting the Jury, 18 U. Cal. Davis L. Rev. 1409, 1422-24 (1985); Mello & Robson, Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases, 13 Fla. St. U. L. Rev. 31, 52-55 (1985) (three-quarters of jury overrides imposed at trial level are reversed by this Court on direct appeal).

jury; but, as Hitchcock and its progeny make clear, "mere presentation" is not sufficient. Like Hitchcock, Downs, Riley, Thompson and Morgan, Mr. Booker's death sentence violates the eighth amendment.

For these reasons, as well as the reasons stated in the Petition, the Court should grant the writ and remand for a new sentencing proceeding with a jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21th day of September 1987, I caused a true and correct copy of the foregoing Response to be sent by Federal Express, addressed as follows:

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