IN THE SUPREME COURT OF FLORIDA

STEPHEN TODD BOOKER,

Appellant,

v. Case No. 93,422

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR ALACHUA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 0271543
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR APPELLANT

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PRELIMINARY STATEMENT

Stephen Todd Booker has been before this Court several times over the last twenty-two years. This case involves only a resentencing. Nevertheless, the record is very long. The record on appeal consists of eight volumes of pleadings, motions, orders, and the like. References to it will be by the letter "R." The record also has 24 volumes of transcripts. References to it will be by the letter "T."

STATEMENT OF THE CASE

This case has a long procedural history. An indictment filed in the Circuit Court for Alachua County on December 12, 1977, charged the Appellant, Stephen Todd Booker, with one count of first-degree murder, one count of sexual battery, and one count of burglary of a dwelling (1 R 11). He was convicted of those offenses, and sentenced to death for the murder in 1978 (1 R 134-42). He received a 55-year sentence for the sexual battery and a 30-year sentence for the burglary (1 R 140-41). The latter terms of imprisonment run consecutively to each other and follow the death sentence.

This Court affirmed Booker's convictions and sentences in 1981. Booker v. State, 397 So.2d 910 (Fla. 1981). In 1982, Governor Graham signed a warrant for his execution, but that was never, obviously, carried out.

He filed several post-convictions motions, which the trial court denied, and this court affirmed. Booker v. State, 413 So.2d 756 (Fla. 1982). The United States District Court for the Northern District denied his petition for a writ of habeas corpus, but the Eleventh Circuit Court of Appeals granted Booker a stay of execution, Booker v. Wainwright , 675 F. 2d 1150 (11th Cir 1982), although it ultimately denied him any relief. Booker v. Wainwright, 703 F. 2d 1251 (11th Cir 1983).

The governor signed a second death warrant in November 1983, and Booker filed a second motion for post-conviction relief, which the trial court again denied, and this Court affirmed. Booker v. State, 441 So.2d 148 (Fla. 1983). A third motion for post-conviction relief fared no better. Booker v. State, 503 So.2d 888 (Fla. 1987).

In 1988, Booker filed a petition for a writ of habeas corpus seeking to set aside his death sentence in light of the United States Supreme Court's decision in Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed. 2d 347 (1987). This Court agreed the jury had been limited in what it could consider as mitigation, but found the error harmless. Booker v. Dugger, 520 So.2d 246, 248 (Fla. 1988).

Subsequently, the Northern District Court accepted this Court's conclusion regarding the Hitchcock violation, but found the error sufficiently prejudicial to warrant a new sentencing hearing. The State appealed that ruling, and the Eleventh Circuit Court of Appeals affirmed it. Booker v. Wainwright, 922 F. 2d 633 (11th Cir 1991). The United States Supreme Court also refused to consider the State's petition to consider its case.

The case returned to the state trial court for resentencing. While Booker awaited resentencing, the United States Supreme Court decided Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), that made it easier for a state to show that a constitutional violation did not prejudice an habeas

petitioner's case.[1] In light of that change in the law, the State moved the District Court to vacate its judgment setting aside petitioner's death sentence. The court refused to do so, and the Eleventh Circuit approved that decision. Booker v. Singletary, 90 F.3d 440 (11th CA 1996). Booker finally returned to the Circuit Court in Alachua County for resentencing in 1997.

He filed many motions, notices, or requests regarding that proceeding, and the ones particularly relevant to this appeal were:

1. Request for Judicial Notice at Penalty Phase of the other crimes and sentences that have been imposed on Booker (5 R 828, 1064). Denied (7 R 1239)

2. Memorandum in opposition to defense motion to request judicial notice (5 R 988).

3. Motion in Limine to prohibit the state argument that if Booker received a life sentence he would be eligible for parole after spending 25 years in prison (5 R 901, 1067). Granted (24 R 2826-27).

4. A special jury instruction that although Booker's conviction for murder was upheld an appellate court remanded the case for a

[1] "In Brecht, the Court held that Chapman's [Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)], standard of "harmless beyond a reasonable doubt" was inapplicable to habeas corpus review. Brecht at 622-23, 113 S.Ct. at 1713-14. In place of Chapman, the Court substituted the standard established by Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), for resolving the harmless error issue on the direct review of a criminal conviction. Brecht, 507 U.S. at 623, 113 S.Ct. at 1714. The Kotteakos standard asks whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Kotteakos, 328 U.S. at 776, 66 S.Ct. at 1253." Booker v. Wainright, 90 F. 3d 440, 441 (11th CA 1996).

new sentencing hearing. Accepted (6 R 1104).

Booker proceeded to the sentencing trial before Judge Robert Cates. After a jury had been selected, the State and Defense presented their respective cases. Eight members of the jury voted for death (7 R 1269).

The court followed that recommendation and sentenced the Defendant to death. Justifying that sentence, it found in aggravation:

1. Booker had previously been convicted of a violent felony. Great weight.

2. At the time of the murder, he was under sentence of imprisonment. Great weight.

3. The murder was committed during the course of a burglary and sexual battery. Great weight.

4. The murder was especially heinous, atrocious, or cruel. Great weight.

(7 R 1305-1308).

In mitigation, the court found:

1. The murder was committed while Booker was under the influence of an extreme mental or emotional disturbance. Great weight.

2. His ability to appreciate the criminality of his conduct or to conform it to the requirements of the law was substantially impaired. Substantial weight.

3. Booker was sexually abused as a child. Substantial weight.

4. He was also physically abused as a child. Substantial weight.

5. He was verbally abused as a child. Moderate weight.

6. His family life was inconsistent. Moderate weight.

7. His education was repeatedly interrupted. Slight weight.

8. He was voluntarily intoxicated and voluntarily used drugs. Moderate weight.

9. He "substantially improved his ability to be a productive citizen, and to produce creative and valuable contributions to American Literature while in prison. Little weight.

10. The relatives of the victim opposed imposition of the death penalty. No weight.

11. Booker was honorably discharged from the Army. Slight weight.

(7 R 1311-16)

This appeal follows.

STATEMENT OF THE FACTS

The facts of the murder, sexual battery, and burglary, as provided by this Court in the original opinion in this case were re-established at the resentencing.

> The victim, an elderly woman, was found dead in her apartment in Gainesville, Florida. [11 R 1616] The cause of death was loss of blood due to several knife wounds in the chest area. Two knives, apparently used in the homicide, were embedded in the body of the victim [11 R 1630-31]. A pathologist located semen and blood in the vaginal area of the victim and concluded that sexual intercourse had occurred prior to death [11 R 1696-97]. The apartment was found to be in a state of disarray; drawers were pulled out and their contents strewn about the apartment [11 R 1631]. Fingerprints of the defendant were positively identified as being consistent with latent fingerprints lifted from the scene of the homicide [11 R 1636]. The defendant had a pair of boots which had a print pattern similar to those seen by an officer at the scene of the homicide [11 R 1655].

Booker v. State, 397 So.2d 910, 912 (Fla. 1981).

Born in Brooklyn, New York, in September 1953, Stephen Booker was 24 years old when he murdered Lorine Harmon (11 T 1712). His father and mother separated before his birth, and his mother and grandmother raised this initially very bright boy in an environment of beatings, sexual, physical, and verbal abuse, and bad role models (11 T 1746-50).[2] Without any stability at home he moved from school to

[2] During his childhood, Booker had almost died in a house fire. He also had been shot (11 T 1713-14).

school, attending eleven different ones in six years (12 T 1718). His scores in math and reading also declined significantly as did his grades (11 T 1719). By age 13 or 14, he was skipping school and drinking alcohol. By the time he was 16, he had a drinking problem (12 T 1760, 1800). He was admitted to a hospital in New York for psychiatric evaluation because he was drinking more, becoming more aggressive, and experiencing blackouts and memory loss (12 T 1752-53). When he was 17, his mother died, and he joined the army in December of that year (12 T 1759).

Although Booker spent three years in the military and was honorably discharged, his civilian problems dogged him, and got worse (12 T 1801). In addition to his drinking addiction, he began using marijuana, heroin, LSD, and sniffing glue (12 T 1760, 1768). His mental problems became so pronounced that he was hospitalized in Okinawa where he was assigned because he had cuts on his belly, chest, and face. Doctors there thought he was schizophrenic (12 T 1762).

He was transferred to Walter Reed Hospital in the states where he continued to received medical and psychiatric treatment.[3] In particular he continued being prescribed Thorazine and Mellaril, anti-psychotic medicines, in "pretty high dosages"

[3] Dr. Barnard, the psychiatrist who examined Booker in 1977 and later, testified for the defense at the resentencing. He believes the Defendant never was schizophrenic (12 T 1796-97).

because the army doctors had diagnosed him as suffering "schizophrenia, paranoid acute type." (12 T 1762-63).

Discharged from the army in 1974, he returned to New York to live with his grandmother. He acted abnormally, and she thought he was using drugs (11 T 1715). Within months he returned to a mental hospital because he had been found in the middle of a street with a knife threatening people. Doctors thought he had a paranoid reaction or was intoxicated (12 T 1765). After leaving that facility, he also left New York and came to Florida where he promptly was convicted of robbery and placed in prison for three years (12 T 1802). While there, his paranoid thinking continued, and it now included hallucinations (12 T 1767). Released from prison in 1977, he came to Gainesville. He apparently stayed briefly in two drug treatment facilities, but was kicked out, wrongly he claimed (12 T 1769, 1803). He became a homeless person who predictably had a hard time finding work (12 T 1773).

By the time of the murder, he was hallucinating, suffering altered states of consciousness, and believing he was possessed by others (12 T 1771, 1802).[4] Aggravating these problems, he also had a diagnosed anti-social personality disorder that made it difficult for him to deal with teachers, discipline, and many of the

[4] During Barnard's interview with Booker in 1977, he claimed that a spirit by the name of Aniel was telling him to jump on the psychiatrist.

demands of modern society (12 T 1774). Accordingly, on the day of the murder he woke up angry, wanting to kill someone without any reason (12 T 1829, 1831).

After being convicted of the first degree murder, sexual battery, and burglary and sentenced to death, Booker was sent to the Florida State Prison. On October 15, 1980, a guard, Marvin Thomas, approached Booker's cell. He knew the Defendant and had had no problems with him (11 T 1587-89). As he walked to the cell, he saw the Defendant had something in his hand that was burning. Without saying anything to the guard, he threw it on him, severely burning his arm, part of his neck, and ear (11 T 1591). Booker was convicted of aggravated battery for doing that and sentenced to fifteen years in prison consecutive to his other punishments (11 T 1586).

Then, about that time, Booker began developing an interest in poetry. It gave him something purposeful to do (14 T 1984), and it soon became evident he had a rare talent for this difficult medium (T 1946). Within a few years, national and international journals were publishing his poetry. Just how good he had become emerged from the sentencing hearing as nationally recognized poets and critics came to Gainesville on Booker's behalf. The editor of the Seneca Review testified that her journal received 5,000 poems yearly but published on 30 to 40 of them. Booker's poetry appeared in several editions of this prestigious literary journal.

The editors of Field Magazine read 30,000 to 50,000 poems yearly and rejected ninety-nine percent of them before further screening reduced the number more (14 T 1956). They considered themselves fortunate to have known Booker (14 T 1956). The New Renaissance had also printed some of his poetry (T 1962). Other prestigious journals such as The Senora Review, the Mid-Delta Review, and the Southern Review had published his works (14 T 1984). Booker's works have appeared in print in England, Canada, Holland, Finland, Australia, Poland, and Japan (T 1881, 1920).

Other than single works, Booker has had several books of poetry published. His first was Waves and Licenses. His most recent one is Swiftly Deeper, published by the Mandrake Press in Poland in 1995 (14 T 1985). In 1991, the very prestigious Wesleyan University Press published Tug. It received from 800 - 1,000 book length manuscripts every year, but published only 4 to 6 of them. Tug was one of them. Gwendolyn Brooks, the first black person to win a Pulitzer Prize, endorsed the work.[5] Hayden Carruth, one of the pre-eminent poetry critics in America today also recommended Booker's volume.

[5] Brooks was also the poet laureate of Illinois (T 1882, 1891).

In fact, Carruth and Booker had been writing since the latter approached him in 1980-81 with some of his poetry (T 1894).[6] Even then his work was interesting, and they began a correspondence that lasts to this day. Carruth had read a lot of poetry, and of Booker's work he said,

> It's typed, original, thoughtful, quite thoughtful, as a matter of fact. . . . People are aware of him. People are interested in him. He is doing work that is on the one hand significantly connected to the work of his colleagues, black writers, and on the other hand, new and different and original. . . In that sense I think he is comparable to a good many poets.

(13 T 1919-1920). "He is a person of consequence, he's a person of great intelligence." (13 T 1922)

Susan Tamminen, the editor of the Wesleyan Press testified that Booker was a "remarkably original writer and very, very skilled in his use of language.. . . He has tremendous insight into character, in his own and others. And he writes like no else. I mean very, very valuable poems." (13 T 1882) Stuart Lavin, a professor of creative writing at Castleton State College in Vermont and editor of the Four Zoas Journal has written letters to Booker on a monthly basis encouraging his rare talent. Of Booker's poetry, he said, "Well, he's realistic, personal. There's some visions, what I would

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[6] Carruth was the editor of the Hudson Review, "a quarterly magazine devoted to serious literature." He had also written 35 books by some of the largest publishers in the nation and won many, many awards. (13 T 1915-1917)

like to call visionary--there's something visionary in his work. . . But he transmutes the language. He actually transforms it. So when you read his work, it evokes something beyond just what the words themselves say." (13 T 1947).

Finally, Stuart Friebert, a retired professor at Oberlin College in Ohio had received a "batch of poems by Stephen Todd Booker" about 1990 and was "immediately taken by their integrity and their voice and character and their ways with words." (14 T 1956) Like other editors, he was impressed with Booker and "feels fortunate to have gotten to know him through a long correspondence. . ." (14 T 1956) But Friebert also knew other poets, namely Moikim Zeqo, an Albanian writer.[7] Friebert wanted to translate Zeqo's work and while the poems had been translated, their sense had not. So, he sent some of the Albanian's poetry to Booker to

> see what he could do with them. And, to my amazement -- I guess I shouldn't be amazed given what else I know about his capacities as a writer, but he sort of pounced on them, and very quickly back in the mail I got some, I thought, really interesting versions. . . . [H]is first attacks at the work were so successful, I immediately sent them to Mr. Zeqo.. . . And he said, Well, this is another miracle of sorts. Let's proceed. And so I kept sending more and more of Mr. Zeqo's very intricate and complex poems to Mr. Booker. And, again, came back very powerful -- I would say very powerful translations that, in my judgment, deserve to be published. That's how good they are.

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[7] At the time of Booker's resentencing, Zeqo had become the minister of culture "in the new Albanian government." (14 T 1957)

(14 T 1958-59).[8]

Others became involved with Booker. Betty Vogh, a lab technician at the University of Florida College of Medicine, read his "post-sentencing statement of remorse" in the Gainesville Sun and "what he said there just sort of grabbed me." Eventually she and her husband began writing him, and after six years they began visiting him (14 T 1982) Their relationship was "of just good friendship with a certain parental flavor to it." (14 T 1983)

Finally, Page Zyromski, a grand niece of Lorine Harmon, spoke of her forgiveness of Booker and the friendship she had developed with him over the 18 or 19 years she had known him (14 T 2006).[9] Harmon had been "like a grandmother to us," and Zyromski had a very close relationship with her (14 T 2006). Understandably, her murder deeply affected her, yet she has also been profoundly affected by her relationship with Booker. "[I]n the religious sense, just grappling with issues of forgiveness have been -- have been very, very meaningful for me. . . . I'd have to say that my life has been very immensely changed by my relationship with [Booker]."

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[8] Booker's most recent publication was in The Lynx Eye, a poetry journal in the Summer 1997 edition (14 T 1999).

[9] She did not know Booker before the murder, and at first her motivation to meet him was religious and spiritual. (14 T 2007).

In the contract with Wesleyan University Press, Booker included a clause that he wanted all the royalties from Tug to go to Zyromski (14 T 2006).

SUMMARY OF THE ARGUMENT

ISSUE I: Booker must serve 100 years in prison for sexual battery, burglary, and aggravated battery convictions after he has served whatever sentence he receives for the murder he was convicted of committing. The jury knew about the facts of those capital and noncapital crimes, but the court refused to admit evidence of the 100 year prison sentence. In doing so, it relied on this Court's opinion in Nixon v. State, 572 So.2d 1336, 1345 (Fla. 1990), which said that Rule 3.390(a), Fla. R. Crim. P., prohibited the jury from hearing about other sentences the defendant may have, the evidence was irrelevant for mitigation, and besides defense counsel had argued the convictions as mitigation and the court instructed the jury that it was "unlimited." None of the reasons withstand scrutiny or application to this case. Rule 3.390(a) applies only to the guilt phase of a trial. The evidence was accurate and has relevance to the defendant's record. Defense counsel made no mention of Booker's other convictions during his closing argument, and the court's mitigation instruction was far more limited than what was given in Nixon. Additionally, the evidence of the punishment Booker faced in the noncapital cases was accurate information and of the type sentencers have traditionally used in determining the appropriate sentence a defendant should serve. Booker also wanted the evidence to rebut or minimize the

weight the jury would give to the uncontested aggravating factors of (1) Prior violent felonies, and (2) Committed during the course of a sexual battery and burglary.

ISSUE II: During voir dire, the State peremptorily challenged Ms. Filer, a black woman who worked at the Gainesville library and who was a "lover of books." Booker objected to that use of peremptory challenges arguing that, using that rationale, the prosecution should have excused at least one other juror, a white male. That it refused to excuse him, and, in fact, he served as the jury foreman, shows that its reason for excusing Ms. Filer was disingenuous.

ISSUE III: Booker requested the court define "mitigation" for the jury, but it refused to do so. Because the Eighth Amendment requires heightened reliability in capital sentencing, the instructions guiding the jury should reflect an extraordinary sensitivity to the possibility of jury misunderstanding over terms that have specific meanings to lawyers and judges. Unless jurors receive specific guidance on the meaning of that term whatever recommendation they render may become suspect.

ISSUE IV: While the court found four aggravating factors to justify a death sentence, it also found the two statutory mental mitigators, and other significant nonstatutory mitigation. Because of the close causal connection between Booker's lifelong severe mental disabilities, bordering on insanity, and the aggravators, death is an unwarranted punishment. This conclusion becomes irresistibly compelling in light

of the re-emergence of Booker's brilliance in the twenty years he has been on death row. Since 1980, his poetry has won national recognition and international acclaim. More significant, however, everyone who has known Stephen Todd Booker has been uplifted and inspired. Not simply academics and poets, but ordinary citizens, people who before 1978 had never heard of him, have been encouraged and strengthened by him. If at all possible, Booker has tried to redeem himself for the horrible wrong he committed.

ISSUE V: The amazing Page Zyromski, the grand-niece of Lorine Harmon who had been able to forgive Booker, wanted to watch his resentencing hearing. While defense counsel had no objection to it, asserting that her testimony would have remained unaffected by what she heard, the State had problems with her presence. Beyond claiming that, however, it never showed how it would have been hurt by her presence in the courtroom, and the court erred in excluding her from a major portion of the trial.

ISSUE VI: Booker has been on death row since 1978. That is a cruel and unusual punishment. Although this Court has disagreed, it is so.

ISSUE I

THE COURT ERRED IN REFUSING TO PROVIDE ACCURATE INFORMATION TO THE JURY THAT BOOKER FACED ONE HUNDRED YEARS IN PRISON FOR OTHER CRIMES HE HAD COMMITTED AND WOULD SERVE THAT TIME CONSECUTIVE TO WHATEVER PUNISHMENT HE RECEIVED FOR THE MURDER, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The jury in this case knew Booker had murdered Lorine Harmon. They also knew he had been convicted of sexually battering her and burglarizing her home. They knew that about two years after arriving on death row he had committed an aggravated battery on a prison guard by throwing a piece of burning material on him, causing permanent scarring. They knew he had served time in prison for robbery and had been out of prison for two months before committing the murder, sexual battery, and burglary that led to him being sentenced to death. They knew he had been on death row since 1977. Finally, they knew he had originally been sentenced to death, that sentence had been reversed, and they now had to decide if he should be imprisoned for the rest of his life without the possibility of parole for 25 years or be sentenced to death.

They did not know he faced 100 years in prison consecutive to whatever punishment the court had imposed for the murder for committing the sexual battery,

burglary, and aggravated battery. They remained ignorant of that crucial fact because the court refused to let them hear about it. That was error, and this Court should reverse the court's subsequent sentence of death and remand for a new sentencing hearing.

In addition to the sentence Booker faced for the murder of Lorine Harmon, the trial court in 1977 imposed consecutive fifty-year and thirty-five-year sentences for the sexual battery and burglary he had committed at the same time as the homicide (1 R 140-41). Two years later, Booker committed an aggravated battery against a corrections officer, and he received a fifteen- year prison term for that offense to be served consecutively to his earlier punishments (7 R 1271, 14 T 2119, 15 T 2274). Thus, he must serve one hundred years in prison after serving whatever punishment he receives for the murder.

At the resentencing hearing, the jury learned about the convictions for the sexual battery, burglary, and aggravated battery (11 T 1586, 1598). Indeed, the State argued, and jury and the court found them as aggravating factors as provided by section 921.141(5)(b), (d), Florida Statutes (1995). The jury, however, never knew about the one-hundred-year consecutive prison sentence Booker faced despite his requests that the court tell them of it (6 R 1067, 18 T 2422). The State opposed the request and filed a memorandum of law justifying its opposition (6 R 988). Notably, it relied

almost exclusively on this Court's opinion in Nixon v. State, 572 So.2d 1336, 1345 (Fla. 1990).

The court, after hearing arguments on the issue, refused Booker's request (7 R 1239). The Defendant renewed it at the penalty phase charge conference, and Judge Cates again refused to tell the jury that Booker faced one hundred years in jail consecutive to the punishment he would receive for the murder of Lorine Harmon (14 T 2118-20).

The problem became more acute because the jury had the sentencing options of death or life in prison without the possibility of parole for twenty-five years, and, by the time of the resentencing in 1997, Booker had spent twenty years on death row. During voir dire several prospective jurors had asked about the possibility of Booker's release and whether he would be given credit for the time he had already served (e.g., 2 T 275, 314, 316, 3 T 395, 432, 4 T 571). In particular, when one member of the venire asked about the credit Booker would receive for the time he had already served, the court responded, "It means life imprisonment with no possibility for parole for the first 25 years, and that's as far as we can go. Okay." (5 T 774-75). Despite this specific guidance, the jurors who were to recommend whether Booker should live or die still had a question. A minute after retiring to consider their sentencing recommendation, they sent the court a note. Ominously, the court predicted, "I'm

sure everybody knows what it is." (15 T 2269). "Will the time already served be considered as gain time in a life sentence without the possibility of parole for 25 years?" (15 T 2269, 2274). Defense counsel renewed his request for a jury instruction on the other sentences Booker faced, which the court "of course, rule[d] as [it had] previously ruled." (15 T 2274). Nevertheless, Judge Cates sympathized with Booker's position. "Well I know how strongly you feel about this, and it is somewhat frustrating to try a case which is obvious to anyone who has first-grade mathematical ability exists, cannot be discussed and the jury is going to be instructed not to consider it but that is the law, and the Court is going to follow the law." (15 T 2275). It, and counsel, then fashioned an instruction that told them, "You must not consider issues not presented to you for your consideration in these proceedings. You must base your advisory recommendation on the evidence presented to you in this proceeding and on the law on which you have been instructed by the court." (15 T 2277)[10]

The court's failure to instruct the jury on the 100 year sentence Booker also had became one of the grounds he raised in his motion for a new sentencing hearing, which the court denied (7 R 1270-74). Significantly, defense counsel attached a newspaper article in which one of the jurors said that information about the 100 years

[10] Booker's lawyer objected to the instruction as inadequate and moved for a mistrial, both of which the court denied (15 T 2275, 2278)

may have influenced other jurors to have voted for life had they known of that additional sentence. The court, as it had done on this issue, denied the motion (7 R 1291).

In Nixon v. State, 572 So.2d 1336, 1345 (Fla. 1990), this Court approved the trial court's ruling excluding evidence about other sentences the Defendant may have had for crimes arising in the same episode as the murder for which the jury was to recommend he live or die.

> Nixon maintains that the fact that he was convicted of three other offenses which carried lengthy maximum penalties was a circumstance on which the jury should have been instructed under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Florida Rule of Criminal Procedure 3.390(a) provides that "[e]xcept in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial." This rule has been construed to mean that the jury need only be instructed as to the possible penalty when it is faced with the choice of recommending either the death penalty or life imprisonment. As to offenses in which the jury plays no role in sentencing, the jury will not be advised of the possible penalties. Coleman v. State, 484 So.2d 624, 628 (Fla. 1st DCA 1986).
>
> As we recently noted in King v. Dugger, 555 So.2d 355, 359 (Fla.1990), "Lockett requires that a sentencer 'not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " The fact that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime. Therefore,

> the trial court did not err in refusing to give the instruction. Even if it had been appropriate for the jury to be instructed on the maximum penalties for the other crimes, the requested instruction merely set forth the maximum sentences for each of the noncapital offenses. The instruction did not inform the jury that it could consider the maximum sentences for the noncapital offenses as a mitigating factor. The jury was aware of the noncapital offenses for which Nixon was convicted, counsel urged those convictions as mitigation, and the jury was instructed that the factors which it could consider in mitigation were unlimited.[11]

Thus, this Court rejected Nixon's argument for three reasons: (1) Rule 3.390(a) prohibits the jury from knowing what sentences a defendant may face for noncapital crimes. (2) Evidence of that punishment is irrelevant to his character, prior record, or circumstances of the crime. (3) Defense counsel argued the other convictions as mitigation, and the court told the jury that mitigation was "unlimited."

Because Judge Cates believed himself bound by Nixon this Court should re-examine what it held there because it prevents the jury from hearing accurate information that is relevant to the ultimate issue of whether death is the appropriate

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[11] Following Nixon, this Court in Walker v. State, 707 So.2d 300, 314 (Fla. 1997), relied on that case in rejecting a similar argument. In a footnote, the court noted that the legislature had "remedied any possible uncertainties harbored by penalty phase juries regarding a defendant's ineligibility for parole when it amend section 921.141" by eliminating the possibility of parole after 25 years. Now the only punishments available are death or life in prison without any possibility of parole." That option was not given to the jury in this case.

sentence. Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed. 2d 133 (1994).[12] Second, and as important, the excluded evidence had relevance in minimizing the weight the jury could have given at least two of the aggravating factors the judge and jury could have used in justifying a death sentence.

A. Rule 3.390(a) Fla. R. Crim. P. poses no barrier to admitting evidence that Booker would serve 100 years consecutive to the sentence imposed for the murder.

Rule 3.390(a) provides:

> (a) **Subject of Instructions.** The presiding judge shall charge the jury only on the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial.

For three reasons, that rule has no relevance to this issue. First, Booker was not on trial for the sexual battery, burglary, and aggravated battery. He had been convicted and sentenced for them almost twenty years earlier. So, the rule has no application

[12] Because Florida has placed its "sentencing authority in two actors rather than one," the jury must be as aware of the relevant law and facts as the judge. See, Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed. 2d 854 (1992).

here as it did in Nixon where the noncapital crimes Nixon wanted the jury to know about were tried at the same time as the murder.[13]

Second, the rule applies to the guilt phase portion of the trial, not the penalty phase. Generally, unless a rule of criminal procedure specifically includes language that makes it applicable to the penalty phase of a capital trial, this Court has refused to apply it to that proceeding. For example, in State v. Hernandez, 645 So.2d 432 (Fla. 1994), it affirmed a trial court's ruling that in a capital case a defendant could waive an advisory jury verdict. It specifically held that Rule 3.260, Fla. R. Crim. P., which concerns waivers of jury trials, applied to the guilt phase portion of a trial, and not the penalty phase part of a capital proceeding.

> First, we concur with the district court's reasoning with regard to Rule 3.260. Rule 3.260 appears under the heading of Part IX of the Florida Rules of Criminal Procedure entitled "The Trial." It does not appear in part XIV, entitled "Sentencing," and , therefore, it is not applicable to sentencing proceedings.

Id. at 434.

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[13] The trial court initially favored Booker's argument, and it was especially impressed by the distinction with Nixon that in that case the jury that was to recommend a life or death sentence was the same one that had found him guilty of the three noncapital offenses. That was, obviously not the case with Booker (18 T 2426-29, 2436).

Likewise, Dilbeck v. State, 643 So.2d 1027, 1031 (Fla. 1994), recognized that Rule 3.220, Fla. R. Crim. P., did not control penalty phase discovery, at least with regards to allowing a state hired mental health expert to examine the defendant for penalty phase proceedings. "We have asked the Criminal Rules Committee of the Florida Bar to submit a proposed permanent rule addressing this issue. See, Burns v. State, 609 So.2d 600 n.8 (Fla. 1992)."

Indeed, this Court limited that portion of Rule 3.390(a) allowing the jury to know of the sentences the defendant faced in a capital trial to the penalty phase portion of such proceedings. Wright v. State, 596 So.2d 456, 457 (Fla. 1992) ("[T]he most logical interpretation of the rule is that the penalty instruction is required only in the penalty phase of a capital trial when the jury must recommend the penalty."). Other decisions from this Court support Booker's contention that Rule 3.390(a) applies only to the guilt phase portion of a trial, capital or non. Burns v. State, 609 So.2d 600, 607 (Fla. 1992); Chaky v. State, 651 So.2d 1169, 1172 (Fla. 1995)(Requiring the jury to have the jury instructions in capital cases.); Wike v. State 648 So.2d 683, 686 (Fla. 1994)(Noting that Rule 3.780 specifically covers the order of closing argument during the penalty phase portion of a capital trial, and Rule 3.250 controls it for the guilt determination part of the trial.); Cf., In Re Amendments to Florida Rules, 609 So. 2d 516, 549 (Fla. 1992)(amending Rule 9.140, Fla. R. App. P.,

to recognize that "the procedures set forth in the rules for criminal appeals were inappropriate for capital cases.") As this Court recognized in Wright, "the most logical interpretation" of rule 3.390(a) is that the prohibition against instructing the jury on the penalties a defendant may face applies only to the guilt portion of a trial.

Third, the current Rule 3.390(a) was adopted in reaction to the prior rule which had specifically required the trial court (when requested) to instruct the jury on the "Maximum and minimum sentences which may be imposed (including probation) for the offenses for which the accused is then on trial." Tascano v. State, 393 So.2d 540 (Fla. 1981). Justice Alderman, dissenting from this Court's approval of a jury instruction implementing that rule noted, "I suggest that no proper purpose is served and that in some cases knowledge of the maximum and minimum penalties may divert the jury from their duty to consider only the question of whether the State has proved the defendant's guilt. Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 599 (Fla. 1981).

B. The evidence of Booker's 100 year consecutive sentence was relevant as a matter of due process of law in determining if he should live or die.

In denying Nixon's claim that he should have been able to tell the jury about his noncapital sentences, this Court said:

> The fact that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime.

Nixon at 1344.

Recent decisions from the United States Supreme Court refute that conclusion. Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed. 2d 133 (1994); California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed. 2d 1171 (1993). In Simmons, the jury had the duty of sentencing Simmons to life imprisonment or death for the beating murder of an elderly woman. Shortly before the trial, he pled guilty to burglary and two counts of "criminal sexual conduct" of two other elderly women. The prosecution argued that the jury should sentence him to death because he posed a risk of future dangerousness. Defense counsel argued to the contrary, especially noting that he was unlikely to become violent if he remained in prison for the rest of his life.

One of counsel's problems, however, was the empirical evidence that most people refused to believe that "life imprisonment" meant that a person with that

sentence would spend the rest of his life behind bars. To the contrary, most thought that defendants punished with life in prison would be paroled within twenty years, and 75% said he would be on the streets after 30 years. More than 75% of those surveyed also considered the amount of time an inmate actually served in prison as "extremely" or "very" important in deciding if a defendant should live or die. Despite this evidence that few people believed life in prison meant that, the trial court refused to define "life imprisonment." It also declined to tell the jury that they were to presume life in prison meant exactly that and they were not to speculate that it meant anything other than that. Consequently, after 90 minutes of deliberation, the jury asked the court "Does the imposition of a life sentence carry with it the possibility of parole?" The court responded that they were "not to consider parole or parole eligibility in reaching your verdict. . . . That is not a proper issue before you."

When the United States Supreme Court reviewed the case, a majority of the court voted to reverse Simmons' death sentence on due process grounds:

> In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration. This grievous misperception was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's parole ineligibility, and by the State's

> repeated suggestion that petitioner would pose a future danger to society if he were not executed.
>
> * * *
>
> The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole. We think it is clear that the State denied petitioner due process.

Id. at 129 L.Ed. 2d 141.

Although future dangerousness as a nonstatutory aggravator does not exist in Florida, Knight v. State, 24 Fla. L. Weekly S135 (Fla. March 11, 1999), the judge and jury considered it in this case when they weighed the aggravators defined in section 921.141(5)(b), and (d).[14] What one has done in the past he may do again. Of particular importance to the prior violent felony aggravator, the drafters of the Model Penal Code, on which Florida's death penalty statute is based, observed that:

> Perhaps the strongest popular demand for capital punishment arises where the defendant has a history of violence. Prior conviction of a felony involving violence to the person suggests two inferences supporting escalation of sentence: first, that the murder reflects the character of the defendant rather than any extraordinary aspect of the

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[14] (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(d)The capital felony was committed while the defendant was engaged, . . .in the commission of . . . any . . . sexual battery . . . burglary.

> situation, and second, that the defendant is likely to prove dangerous to life on some future occasion. Thus, prior conviction of a violent felony is included as a circumstance that may support imposition of the death penalty

Section 201.6, American Law Institute, Model Penal Code, 1980. (Emphasis supplied).

Simmons resonates with Florida's death penalty scheme, and it finds particular application in cases such as this one where those two aggravators apply. Consequently, Booker had a due process right to present to the jury that he had an additional 100 years in prison in order to minimize the weight of the prior violent felony aggravator (18 T 2347). "Like the defendants in Skipper [v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed. 2d 1 (1986)] and Gardner [v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2d 393 (1977)] the petitioner was prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death." Simmons, at 129 L. Ed. 2d 143.

Simmons, moreover, has a wider application than simply allowing a response to a prosecutor's explicit argument of the defendant's record of violence. Read more broadly, the opinion holds that the sentencer in a capital case cannot be precluded, as a matter of law, from considering accurate information relevant to whether a defendant should live or die. Mitigating evidence, therefore relates to more than Booker's character, his prior record, or the circumstances of his crimes. Nixon, cited above at

1345. It mitigates a death sentence if it serves as a "basis for a sentence less than death." Skipper v. South Carolina, 476 U.S. 1, 4-5, 106 S.Ct. 1669, 90 L.Ed. 2d 1 (1986).[15] That Booker faced 100 years in prison following whatever punishment he received for the capital murder was accurate information and was relevant because it rebutted the state's argument in favor of death. Simmons at 129 L. Ed. 2d 143.

This relevance became more obvious during the prosecution's closing argument. There it contended that by releasing Booker from prison in 1977, society had shown some trust in him that he would be a law abiding citizen (15 T 2170-72). That was what the aggravating factor under sentence of imprisonment meant (15 T 2171-72). Section 921.141(5)(a), Florida Statutes (1997). Because Booker violated that trust by committing a murder, sexual battery, and burglary, society would never feel safe with him among its citizens. Death, therefore, was the only sentence that would guarantee their security. See, California v. Ramos, 463 U.S. 992, 1003, fn. 17, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)(It is proper for a sentencing jury to consider

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[15] This is a broader definition of mitigation than used by this Court. In considering allegedly mitigating evidence the court must decide if "the facts alleged in mitigation are supported by the evidence," if those established facts are "capable of mitigating the defendant's punishment, i.e., ... may be considered as extenuating or reducing the degree of moral culpability for the crime committed", and if "they are of sufficient weight to counterbalance the aggravating factors." Hall v. State, 614 So.2d 473 (Fla. 1993)

the defendant's potential for reform and if his probable future behavior weighs against his return to a free society.)

Booker sought to rebut or minimize that argument by saying, yes, Booker should be kept out of society, but that goal will be reached by leaving him in prison for the rest of his life. How will we know he will stay there? In addition to life in prison (for which he may be released in five years), he must serve 100 years in prison. Booker will never be a free man again (18 T 2427-30). This argument became especially compelling in light of the jury's obvious concern that the bureaucracy at the Department of Corrections might trust him enough to again put him back on the Gainesville streets within five years. Death for Booker became the only option the court gave them. Such would not have been true had they known he had another 100 years to serve in prison if they recommended he live.[16]

In response to their legitimate concern about the possibility Booker might be released, the court told the jury "You must not consider issues not presented to you for your consideration in these proceedings. You must base your advisory

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[16] The State in this case argued that evidence of the 100 sentence was irrelevant because it led the jury to speculate about what a "parole board" might at some time in the future do (18 T 2441, 2444). The court in Simmons rejected that concern because the proposed instruction was legally accurate. "Certainly, such an instruction is more accurate than no instruction at all, which leaves the jury to speculate whether 'life imprisonment' means life without parole or something else." Id. At 144.

recommendation on the evidence presented to you in this proceeding and on the law on which you have been instructed by the court." (15 T 2277) The trial court in Simmons gave the jury a similar instruction, which left the Supreme Court unimpressed:

> While jurors are ordinarily presumed to follow the court's instructions,. . .we have recognized that in some circumstance "the risk that the jury will not, or cannot, follow instructs is so great, and the consequences of the failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

Id. at 129 L.Ed. 2d 147.

Additionally, the court noted that the instruction "actually suggested that parole was available but that the jury, for some unstated reason, should be blind to this fact." Id. (Emphasis in opinion.) In this case, the jury was left with the equally tantalizing hint that Booker might be released in five years if they recommended life, but they were to ignore that possibility. That, as the Supreme Court noted in Simmons, was a practical impossibility. Even if the court's additional guidance was effective, "petitioner's due process rights still were not honored. Because petitioner's future dangerousness was at issue, he was entitled to inform the jury of his parole ineligibility." Id. at 129 L. Ed. 2d 147.

This Court must conclude that the lower court denied Booker his right to present his defense as guaranteed by the Due Process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

C. Defense counsel never argued the convictions as mitigation, and the jury instructions were more limited than that read in Nixon.

A significant portion of the State's evidence focussed on the sexual battery and burglary Booker committed at the time he murdered Harmon. The State also presented the prison guard Booker burned to support the aggravated battery conviction. During its closing argument, it also discussed those crimes as they justified finding the aggravating factors of prior violent felony and the murder was committed during the course of the sexual battery and burglary (15 T 2170-75).

In contrast to the State's argument and the Defendant's argument in Nixon, defense counsel in this case made no mention of any of the aggravators present. He specifically never discussed the convictions. Instead, his defense focussed exclusively on the extensive mitigation he had developed, ignoring completely the case the State had presented.[17]

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[17] The court had granted a defense motion precluding the State from arguing that if "Mr. Booker is given a life sentence he would be eligible for parole after twenty five years (5 R 901, 18 T 2436). Booker may have avoided arguing any of the aggravating factors to avoid any allegation that by doing so he had opened the door to

Also unlike Nixon, the instructions told the jury they could consider "any of the following circumstances that would mitigation against the imposition of the death sentence: A. Any other aspect of the defendant's character, record, or background. B. Any other circumstance of the offense." (16 T 2260). That was more much more circumscribed than the guidance given in Nixon "that the factors which it could consider in mitigation were unlimited." Nixon, at 1345.

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argument the court had prohibited.

D. Additional reasons the court should have admitted the evidence of Booker's other sentences.

1. The evidence of Booker's 100 year consecutive sentence was relevant under the Eighth Amendment proscription against cruel and unusual punishments.

Justices Souter and Stevens joined the court's opinion in Simmons, and they added a concurring opinion that the Eighth Amendment "requires provision of 'accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die' and invalidates 'procedural rules that ten[d] to diminish the reliability of the sentencing determination.' " Simmons, cite above, (Souter, concurring. Citations omitted.) Accordingly, by effectively withholding from the jury the life-without-parole alternative, the trial court diminished the reliability of the jury's decision that death, rather than that alternative, was the appropriate penalty in this case."[18]

Similarly, here the jury had an artificial choice to make: death or release from prison within five years. The Eighth Amendment rejects that alternative, and under that provision, the jury should have known about the other 100 years in prison Booker faced. In Beck v. Alabama, 447 U.S. 625, 638, 100 S.Ct. 2382, 2390, 65 L.Ed.2d 392

[18] The Court's opinion explicitly noted that it was based on due process and expressed "no opinion on the question whether" the Eighth Amendment compelled a similar result. Simmons, fn. 4.

(1980), the United States Supreme Court ruled that a state is constitutionally prohibited from withdrawing the option of instructing on lesser-included offenses in a capital case when by doing so it enhances the risk of an unwarranted conviction. Failure to give such instructions leaves the jury with only two options, conviction of the offense charged or acquittal. Id. at 633. Denying the jury the "third option" of convicting on a lesser-included offense inevitably enhances the risk of an unwarranted conviction, particularly when the defendant is obviously guilty of some offense. In the absence of a "third option," a conviction might signal a jury's belief that the defendant had committed some serious crime deserving of punishment, while an acquittal could reflect a hesitancy to impose the ultimate sanction of death. Such possibilities, the Court held, "introduce a level of uncertainty and unreliability into the fact finding process that cannot be tolerated in a capital case." Beck. at 637; Eaddy v. State, 638 So.2d 22 (Fla. 1994); Jones v. State, 484 So.2d 577, 579 (Fla. 1986).

In this case, by keeping accurate information from the jury that Booker faced 100 years in prison regardless of the sentence the jury recommended and the court imposed presented a similar dilemma as that posed in Beck. That is, the jury was faced with the option of recommending death or life without the possibility of parole for 25 years. Yet, with the 25 years almost expired, the jury, as is evident by its question, was very much concerned that this obviously dangerous man would be set

free. So, like the jury in Beck, they voted for the harsher option, wanting safety more than risking his release into their midst.[19] See also, California v. Ramos, cited above, at p. 1003, fn. 17. Yet if they had known he faced an additional 100 years in prison they may very well have voted for life, knowing that he would likely never see a sun set without bars in front of him. The State, thus, succeeded in securing a death sentence by concealing from the jury the true extent of the punishment Booker faced and throwing into doubt the reliability of their recommendation.

2. The evidence of the other punishment Booker faced did nothing more than "level the playing field."

In Dilbeck v. State, 643 So.2d 1027 (Fla. 1994), this Court approved a procedure that allowed a state hired mental health expert to examine the defendant if he intended to present his own expert to testify about his mental condition. It did so to "level the playing field."

> Under these circumstances, we cannot say that the trial court abused its discretion in striving to level the playing field by ordering Dilbeck to submit to a prepenalty phase inter with the State's expert. See Burns. [cited above.] No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved.

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[19] The State's closing argument supported this vote when it noted that Booker had violated society's trust in him when he committed the Harmon murder two months after his release from prison (15 T 2172).

Id. at 1030.

That observation applies to this case. This Court has held that the prosecution can present evidence of the facts underlying the violent felonies which formed the basis for the prior violent felony aggravator because it helps the judge and jury evaluate the defendant's character. "Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge." Elledge v. State, 346 So.2d 998, 1001 (Fla.1977); Stewart v. State, 558 So.2d 416, 419 (Fla. 1990).[20] But the facts of those violent crimes certainly have no relevance to the defendant's prior record, as this Court used that term in Nixon. Only the fact of the conviction would have any pertinency to the sentencing phase of a capital trial. Yet, this Court has obviously ruled to the contrary. Thus, to "level the playing field" and give the jury a complete, accurate picture of the defendant's prior violent history, the additional fact of what sentences the defendant has for those crimes is relevant.

For the reasons presented above, this Court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

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[20] "Propensity to commit violent crimes" is synonymous with future dangerousness.

ISSUE II

THE COURT ERRED IN FINDING THE STATE HAD A RACE NEUTRAL EXPLANATION FOR EXERCISING A PEREMPTORY CHALLENGED ON PROSPECTIVE JUROR PHYLLIS FILER, A VIOLATION OF BOOKER'S FOURTEENTH AMENDMENT RIGHTS.

Among the several prospective jurors questioned during the voir dire in this case were William Pepper and Phillis Filer. Mr. Pepper had spent the first fifteen years of his "active life" working on three newspapers, and had been the executive editor for the Gainesville Sun (9 T 1291, 1301-1302). He had written letters to newspapers "all his life," and had also had written magazine articles. As he said, "I've always written." (9 T 1291). He enjoyed reading history and the Bible, and he subscribed to the Sun, Writer's Digest, National Geographic, and U.S. News and World Report (9 T 1369).

Ms. Filer, a black female (10 T 1395), had worked at the library in Gainesville for the past twenty two years.[21] As the prosecutor said, she was "a person, obviously, who is, I don't know, that you are a lover of books." (9 T 1290). Unlike Pepper she was "not really" a writer (9 T 1291). She read everything from romance, to mysteries,

[21] She had a master's degree in Library science (9 T 1304).

to westerns, to nonfiction, "the whole gamut." She also took the Sun, Black Enterprise, Jet, and Ebony. (9 T 1368-69).

The State peremptorily challenged Ms. Filer, but had no problems with Mr. Pepper. Indeed, he not only served on the jury but apparently was its foreman (15 T 2276). Defense counsel objected to the prosecution's use of its peremptory challenge on the grounds that it was racially motivated (9 T 1381). State v. Neil, 457 So.2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

The State responded, and gave two reasons for the court to use in concluding it had peremptorily excused her for race neutral reasons: 1. He did not want people who would be "unduly influenced by their love of the arts. 2. He believed Ms. Filer, as a librarian, would be unduly influenced by the editors of six journals in English literature and poetry Booker planned to call as witnesses.[22]

Booker countered by noting that Pepper, like Filer, was an avid reader. In addition, he had been a newspaper editor (9 T 1384). The court found the State's explanation race neutral, found no pattern in the use of peremptory challenges, and granted the use of the peremptory challenge on Ms. Filer (9 T 1386). That was error.

[22] He also alleged the journals were nationally recognized and had a high standing in the academic world (9 T 1384).

Curtis v. State, 685 So.2d 1234, 1236-37 (Fla. 1996), provided a summary of the law in this area:

> This Court recently updated Florida law governing racially motivated peremptory challenges in Melbourne v. State, 679 So.2d 759 (Fla. 1996), setting forth the following guidelines:
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> > A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are not met (step 1), the court must ask the proponent of the strike to explain the reason for the strike.
> >
> > At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.
>
> Id. at 764 (footnotes omitted).
>
> We noted that reviewing courts should enforce the above guidelines in a non-rigid manner, giving due weight to the trial court's ruling:
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> > Voir dire proceedings are extraordinarily rich in diversity and no rigid set of rules will work in every case. Accordingly, reviewing courts should

> keep in mind [the following principle] when enforcing the above guidelines[:] .... [T]he trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous.

Id. at 764-65 (footnotes omitted).

The issue here focusses on the third step: the genuineness of the State's asserted race neutral reasons for excluding Ms. Filer.

If the State did not want Ms. Filer because she loved books, Pepper suffered a similar disability as he was as evident a lover of the written word. Like Booker, but apparently not Ms. Filer, he had had his words evaluated and published by others. In truth, Ms. Filer was probably like many on the jury, a lover of books. She liked to read and had an wide-ranging interest in fiction and non-fiction. Nothing on this record showed any legitimate distinction from Mr. Pepper or the rest of the literate community to justify the State challenging her but not Mr. Pepper. Only her race provides the difference between her and Mr. Pepper, so the State's effort to distinguish the two rings hollow.[23]

Likewise, both subscribed to magazines and would probably have been as influenced by the editors of the journals in English literature and poetry as the other. Indeed, we would expect Mr. Pepper to have been more interested in what they had

[23] Ms. Filer subscribed to three black oriented magazines (9 T 1368-69).

to say and sympathetic to Booker than Ms. Filer simply because he had gone through the publishing experience.[24] Thus, the genuineness of the prosecution's explanation lacks credibility since, applying the criteria it used on Ms. Filer, it should also have peremptorily challenged Mr. Pepper.

In Randall v. State 718 So.2d 230 (Fla. 3d DCA 1998), and Overstreet v. State, 712 So.2d 1174 (Fla. 1998), the court held that a reason stated for exercising a peremptory strike is disingenuous when the same reason is applicable to another juror who is not struck. In other words, the genuineness of a reason may hinge on whether counsel applies the objected-to reason evenhandedly. If counsel does not, as in Randall, and Overstreet, there exists a factual basis on the record to support a judge's finding of pretext.

Here, the State's reasons for excluding Ms. Filer applied with equal force to Mr. Pepper, and it lacks the genuineness that this Court requires to survive a Neil challenge. This Court should, therefore, reverse the trial court's sentence of death and remand for new sentencing hearing.[25]

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[24] In addition, as a subscriber to Writer's Digest, Mr. Pepper's interest in writing was demonstrable, while Ms. Filer expressed no interest in writing as a hobby or for publication.

[25] That the court found no pattern of improper use of peremptory challenges is not a factor in evaluating the genuineness of the State's use of those challenges. State v. Slappy, 522 So.2d 18, 23-24 (Fla.1988)(Even though some African-Americans may

sit on jury, reversal is still required if one member of venire is excused for improper racially motivated reasons.)

ISSUE III

THE COURT ERRED IN REFUSING TO GIVE A REQUESTED JURY INSTRUCTION DEFINING MITIGATION, IN VIOLATION OF BOOKER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

During the penalty phase charge conference, Booker's lawyer proposed that the court use the definition of "mitigation" "that comes out of Black's law dictionary."

> Mitigating circumstance are circumstances that do not constitute a justification or excuse for the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability.

(14 T 2116)

The court denied that request. "While I find that this would certainly clarify things in the jury's mind, especially this stilted language, I'm just not going to do it." (14 T 2116) The court's failure to provide some clarifying guidance regarding mitigation created reversible error.

Two cases from the United States Supreme Court control this issue. Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994); Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992).

In Simmons, the court held that a jury charged with the task of deciding if the defendant should live or die must have accurate information in order to make a

reliable determination. In particular, the jury needed to know what "life imprisonment" meant because many believed that defendants receiving that punishment were eventually released from prison. Id. at 129 L.Ed. 2d 139-40.

Justices Souter and Stevens, concurring with the court's opinion, went further and found the Eighth Amendment's heightened reliability requirement in capital cases demanded the court define important legal terms.

> That same need for heightened reliability also mandates recognition of a capital defendant's right to require instructions on the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider, in making the reasoned moral choice between sentencing alternatives. Thus, whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following the refusal of such a request should be vacated as having been "arbitrary or capriciously" and "wantonly and . . . freakishly imposed.

Id. at 129 L.ED. 2d 148.

That observation holds true in this case. "Mitigation" has become a crucial part of death penalty litigation, and its meaning has evolved into a term of art. Certainly, as the trial court recognized, Booker's definition would have clarified things in the jury's mind. With that acknowledgment, the lower court also signaled that there was a "reasonable likelihood" that the jury needed further guidance than provided by the standard jury instructions. As such, it should have defined that term.

Of course, defense counsel argued the evidence he presented mitigated a death sentence, but it remained just that. Argument. And as such it carried less weight than an instruction from the court providing specific, explanatory guidance about the meaning of mitigation. Id. at 129 L.Ed. 2d 148, 151 (Souter concurring, O'Connor concurring.)

In Espinosa, the nation's high court, giving meaning to several pronouncements of this Court, held that neither the jury nor the judge can weigh invalid aggravating circumstances. Id. at 120 L.Ed.2d 859. The court explicitly rejected this court's reasoning in Smalley v. State, 546 So.2d 720, 722 (Fla. 1989), that because the jury does not actually sentence the defendant, they need not receive specific penalty phase instructions. The logic of Espinosa compels the conclusion that the jury must be as fully informed on the law governing the penalty phase considerations as the trial judge. If it is kept ignorant on complete definitions of aggravators, or the full meaning of mitigation, for example, then this Court cannot say the jury's recommendation is reliable.[26]

Cases from this Court also support this argument. The standard in this area of the law is simple: the defendant is entitled to have the jury instructed on the rules of

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[26] This argument does not allege that the standard instructions fails to adequately define the mitigating circumstances. Gamble v. State, 659 So. 2d 242 (Fla. 1995).

law applicable to the case and his theory of defense. Hooper v. State, 476 So.2d 1253 (Fla. 1985). This does not mean the court has to give the jury confusing, contradictory, or misleading guidance. Butler v. State, 493 So.2d 451 (Fla. 1986). Instead, it must give the jury instructions that, when taken as a whole, are clear, comprehensive, and correct. Maynard v. State, 660 So.2d 293(Fla. 2d DCA 1995). Further, this court does not presume the standard instructions accurately reflect the law in any particular case. Yohn v. State, 476 So.2d 123 (Fla. 1985):

> While the Standard Jury Instructions can be of great assistance to the Court and to counsel, it would be impossible to draft one set of instructions which would cover every situation. The standard instructions are a guideline to be modified or amplified depending upon the facts of each case.

Id. at 127.

Here, the court told the jury it would be their duty "to determine whether mitigating circumstances exist which are not outweighed by the aggravating circumstances." (15 T 2259) The court then told the jury what mitigation it could consider. The court, however, never defined mitigating circumstances. That was error, especially when counsel gave the court an instruction that would have supplied that definition.

The standard jury instructions merely provide a list of mitigating factors for the jury to consider. They never define mitigation, a crucial failing since the guidance

also provides that "Among the mitigating circumstances that you may consider . . . " (15 T 2259) (Emphasis supplied.) What the jury may have found mitigated a death sentence in this case was left to their unchanneled discretion, and the standard instructions in that respect were deficient in failing to control it. They needed a definition of mitigation similar to the one Booker supplied, and that the court here failed to define that term was error. In Jones v. State, 652 So.2d 346, 351 (Fla. 1995), the trial court gave a defense requested definition of mitigation. That guidance, when read with the standard instructions on statutory and nonstatutory mitigation, sufficiently informed the jury that it could consider all the mitigation Jones offered. Without similar, expanded guidance here explaining mitigation, this court cannot reach the same conclusion.

This issue, thus, is different from the dozens of cases this court has decided in which the trial court failed to instruct the jury they could consider nonstatutory mitigation. Hitchcock v. Dugger, 481 U.S. 393, 10 S.Ct. 1821, 95 L.Ed.2d 347 (1987); O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989). The error is more basic, and is similar to giving an inadequate definition of reasonable doubt. Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). Not only did the trial court in this case err in failing to define one of the most basic terms in capital sentencing, its error flawed the reliability of the jury's recommendation. See, Sullivan v. Louisiana, 508

U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (Harmless error analysis not applicable to error resulting from trial court giving an inadequate definition of reasonable doubt.) Of course, the court never defined what aggravation was, but in a sense it did when it gave the jury the exclusive list of aggravating factors it could consider.

Such method of definition, by limiting what the jury could consider, has no application when explaining nonstatutory mitigation, a term that has considerably more breath than the aggravating factors. Because the scope of mitigation is potentially so large the jury needed explicit guidance what it was. Otherwise, they might have defined the term much more narrowly than contemplated by the law. See, Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (Sentencer cannot be precluding, as mitigation, "any aspect of a defendant's character or record and any of the circumstances of the offense . . . "); Maxwell v. State, 603 So. 2d 490, 494 (Fla. 1992) ("'Nonstatutory mitigating evidence' is evidence tending to prove the existence of any factor that 'in fairness or in the totality of the defendant's life or character, may be considered as extenuating or reducing the degree of moral culpability for the crime committed' or 'anything in the life of the defendant that might militate against the appropriateness of the death penalty.'")

This court should, therefore, reverse the trial court's judgment and sentence and remand for a new sentencing hearing.

ISSUE IV

A DEATH SENTENCE IS PROPORTIONATELY UNWARRANTED IN THIS CASE.

When Stephen Todd Booker murdered Lorine Harmon in 1977, he was homeless, alcoholic, drug-addicted, and almost insane. He suffered from an extreme emotional disturbance, and his capacity to appreciate the criminality of his conduct was substantially impaired. Although the trial court found four aggravating factors, including that the murder was especially heinous, atrocious, or cruel, when viewed from the totality of the circumstances surrounding the homicide they do not make it one of the most aggravated and least mitigated crimes for which the death penalty is appropriate. Under this Court's unique responsibility to conduct a proportionality review, Booker does not deserve to die.

While proportionality review has several sources, it arises from notions that a death sentence "has long been reserved for only the most aggravated and least mitigated of first-degree murders." State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973).

> Our proportionality review requires us to "consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So.2d 1060, 1064 (Fla.1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). In reaching this decision, we are also mindful that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation." State v.

> Dixon, 283 So.2d 1, 7 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist. Id.; Kramer v. State, 619 So.2d 274, 278 (Fla.1993).

Terry v. State, 668 So. 2d 954, 965 (Fla. 1996).

Thus, proportionality review looks at the quality of the aggravating factors, not the quantity, and compares the case at hand with others that have similar facts. It does this type of analysis to "foster a uniformity in death-penalty law." Urbin v. State, 714 So.2d 411, 415 (Fla. 1998); Williams v. State, 707 So.2d 683, 687 (Fla. 1998). For example, in Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), this court found the defendant's death sentence unwarranted even though five aggravating factors applied because the two statutory mental mitigators and the nonstatutory mitigator of low emotional age also applied. On the other hand, in cases where those two statutory mitigators were absent and the defendant was sober at the time of the murder, death has been proportionally justified. Duncan v. State, 619 So.2d 279, 284 (Fla. 1993). In short, "the Court now has established a category of offenses resulting from serious mental disturbance not amounting to insanity for which the death penalty is impermissible based on the doctrine of proportionality." Johnson v. Singletary, 612 So.2d 575, 581 (Fla. 1993). The question now before the Court is whether Booker falls into that category.

First, the court found four aggravating factors applied in this case. Booker was under sentence of imprisonment for a 1974 robbery, the murder was committed during the course of a sexual battery and burglary, he has a prior violent felony, and the murder was especially heinous, atrocious, or cruel (HAC). As to the first factor, Booker was only technically in prison. Actually he was on parole, which is a significant distinction because the framers of the Model Penal Code, on which Florida's death penalty statute is based, included this aggravator to serve as a deterrent for those who kill while they are in prison.[27] Moreover, we know almost nothing about the facts of the underlying robbery, an important deficit. C.F., Terry, cited above.

Similarly, the "prior" violent felony, the aggravated battery, was such only because Booker won a resentencing, and those hearings, being "de novo," allow both parties to present facts that occurred after the murder. Castro v. State, 644 So.2d 987 (Fla 1994). Finally, the sexual battery and burglary were part of the murder, so whatever mental problems Booker had to mitigate a death sentence generally and the

[27] "Paragraph (a) recognizes the need for a special deterrent to homicide by convicts under sentence of imprisonment. Especially where the prisoner has no immediate prospect of release in any event, the threat of further imprisonment as the penalty for murder may well seem inconsequential. For that reason, the Model Code raises the possibility of capital punishment in such a case." Section 210.6, Model Penal Code.

strength of the HAC aggravator specifically also reduced the significance of the "during the course of a sexual battery and burglary" factor.

As to that last aggravator, this Court has considered the defendant's mental state at the time of the homicide in evaluating its strength. In Mann v. State, 420 So.2d 578, 581 (Fla. 1982), this Court noted that "There is frequently a significant connection between the grossness of a homicide and the perpetrator's mental condition." In Halliwell v. State, 323 So.2d 557, 561 (Fla 1975), the Defendant flew into a violent rage and beat his girlfriend's husband to death with an iron bar. Although beating deaths can be especially heinous, atrocious, Smalley v. State, 546 So.2d 720 (Fla.1989), this one was not because of Halliwell's violent emotions led to the shocking murder. In the very early capital case of Huckaby v. State, 343 So.2d 29, 33-34 (Fla. 1977), Huckaby was sentenced to death for sexually battering his children. This Court agreed that his crimes were especially heinous, atrocious, or cruel, but that aggravator had little significance in light of the two statutory mitigators present.

> Our decision here is based on the causal relationship between the mitigating and aggravating circumstances. The heinous and atrocious manner in which this crime was perpetrated, and the harm to which the members of Huckaby's family were exposed, were the direct consequence of his mental illness, so far as the record reveals.

Id. at 34. Accord, Porter v. State, 544 So.2d 1060 (Fla. 1990); but see, Orme v. State, 677 So.2d 258 (Fla. 1996).

Thus, a defendant's mental state, as reflected in the two statutory mental mitigators and other nonstatutory mitigation, such as his intoxication or drug addiction, can prove so compelling as to require a death sentence be reduced to life in prison.

Such is the case here. Besides the four aggravators, the court found and gave either great weight or substantial weight to the two mitigators defined in section 921.141(6)(b), (f) (7 R 1311-13). That finding, by itself, is very significant and deserves substantial consideration by this Court in its proportionality analysis. Burns v. State, 699 So.2d 646, 650 (Fla. 1997). Indeed, in Duncan v. State, 619 So.2d 279, 284 (Fla. 1993), this Court rejected Duncan's proportionality argument simply because "the mitigating factor of under the influence of alcohol and the two statutory mental mitigators were not established in this case." Here, the court found in addition that Booker "suffered from alcohol and drug abuse," but gave it only a moderate amount of weight because both were voluntary behaviors that he never overcame despite being given the chance to do so (7 R 1315). The court also gave moderate weight to the physical, sexual, and verbal he suffered as a child (7 R 1313-14).

Beyond the mere dominating presence of the mitigation, Booker's near insanity so controlled his actions on November 9, 1977, that the aggravators become a

testament of the madness driving him that day. Booker has had serious mental problems since his teenage years, and has been an alcoholic at least since he was sixteen (12 R 1752-53). Early on, the roots of dementia began to spread in Booker's life. Sexual and physical abuse coupled with verbal demeaning defined significant parts of his early life (11 T 1746-50). This naturally gifted child's intellectual gifts were recognized early on but squelched by the abuse in all forms and the constant moving, and as he grew older the genius became harder to detect (11 T 1719). Booker began self-medicating himself with alcohol when he was 13, and by the time he was 16 he was an alcoholic as indicated by the blackouts and memory loss (12 T 1753, 1756, 1800).

These difficulties reveal more than teenage alcoholism. He had diagnosed psychological problems and, though committed to a hospital in New York, he never received any of the recommended pyschotherapy (12 T 1753).

Within a year of his release, his mother died and, at the age of 17, he joined the army. His mental disfunctioning followed him there. To the alcohol addiction, he added drugs and emotional stress (12 T 1760). While stationed on Okinawa, he developed severe mental problems so that the doctors there treated him with Thorazine and Mellaril -- strong anti-psychotic drugs (12 T 1761). The psychiatric facility on that island, however, proved inadequate, so Booker was sent to the Walter

Reed Hospital in the states. The doctors thought he had Schizophrenia, paranoid acute type, and administered Thorazine in unusually high dosages.[28] He was discharged after two months, but he continued to have mental, emotional, alcohol, and drug problems (12 T 1764).

Honorably discharged from the army in 1974, he returned to New York where within a year he was back in the hospital because he had been found in the middle of a street with a knife, threatening people (12 T 1765). His family confirmed that he had acted "bizarre or weird a few days before that." (12 T 1766)

When he came to Florida and quickly found his way into our prison system, his paranoia came with him. On one occasion, he claimed the water had been tampered with, causing him to become impotent. Another time, he saw the devil on his chest (12 T 1767).

Besides his near insanity, Booker's drug and alcohol problems persisted, and, after being released from prison in the fall 1977, he lived in two drug/alcohol rehabilitation houses. His paranoid thinking, however, apparently never far from the surface, re-emerged and he very quickly was expelled from them (12 T 1773). Now,

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[28] Dr. Barnard, the only mental healthy expert who testified at the hearing, said Booker received a daily dose of 300 milligrams of Thorazine. 100 milligrams is enough to put a person to sleep (12 T 1763-64).

depression and homelessness were added to his other mental problems, and he began using drugs and alcohol "more intensely." (12 T 1773)

Thus, on November 9, 1977, Booker was only one step from being insane. He had severe, acute mental or emotional disturbances and his ability to appreciate the criminality of his conduct was substantially impaired (12 T 1778-79). He killed Lorine Harmon not from some cold, calculated plan, nor with any intent to steal from her.[29] Instead, the voices, the paranoia, the depression, the drugs, the alcohol, and the life of abuse drove him to commit a "horrible, senseless and indefensible first-degree murder," for which death is unwarranted. Johnson v. State, 23 Fla. L. Weekly S563 (Fla. October 28, 1998).

Moreover, if a death sentence is "unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice," what Booker has done since 1980 should weigh heavily in this Court deliberations of whether he should live or die. Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988).

We have, first of all, the re-emergence of the brilliance that was stifled as child. Without any doubt, Booker has a world class intellect. Witness after witness at the

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[29] After killing Harmon, Booker went to a bus station. While there he discovered he had jewelry on him, but did not know how he got it, and threw it away (12 T 1846).

resentencing hearing gave unqualified praise of Booker as a master of the English language (14 T 1946).[30]

Deborah Tall, Editor of Seneca Review, said of Booker, "Well, he's a remarkably original writer and very, very skilled in his use of language. . . .[H]e has tremendous insight into character, into his own and others. And he writes like no one else. I mean, very valuable poems."(13 T 1882) "His work reflects intelligence and insight and were indicative of a first rate poetic intelligence." (13 T 1883-84).

Hayden Carruth, a noted poet critic, said of Booker's work "It's [] original, thoughtful, quite thoughtful, as a matter of fact. . . . People are aware of him. People are interested in him. He is doing work that is on the one hand significantly connected to the work of his colleagues, black writers, and on the other hand, new and different and original. ... In that sense I think he is comparable to a good many poets." (13 T 1919-20) "He's a person of consequence, he's a person of great intelligence and perception. . . . His mind is his own and his phrasing and diction are quite original. He's not imitating anybody." (13 T 1923)

Stuart Lavin, a professor of English and creative writing at Castleton State College in Vermont and an editor of a literary journal, said, "Well, he's realistic, personal. There's some visions, what I would like to call visionary -- there's

[30] See Appendix A for samples of his poetry.

something visionary in his work. . . .He transmutes the language. He actually transforms it. So when you read his work, it evokes something beyond just what the words themselves say." (14 T 1947)

Stuart Friebert, a retired professor who taught at Oberlin College in Ohio, had corresponded with Booker for some time when he sent him the poems of the Albanian poet Moikim Zeqo to translate.[31] (14 T 1958-59). "And I thought, well, I would try some of these poems on Stephen Todd Booker. . . . And. . . he sort of pounced on them, and very quickly back in the mail I got some, I thought very interesting versions. . . . His first attacks at the work were so successful, I immediately sent them to Mr. Zeqo who said, 'Let's proceed.' And so I kept sending more and more of Mr. Zeqo's very intricate and complex poems to Mr. Booker. And, again, came back very powerful -- I would say very powerful translations that, in my judgment, deserve to be published. That's how good they are." (15 T 1958-59). In answer to the prosecution's questions, Friebert said his work was intelligent, creative, and compelling, the product of a first rate mind (15 T 1967).

[31] Apparently, they had already been translated from Albanian to English, but the sense or meaning had gotten "lost in translation." "There are lots of people who can read many languages, but they're not necessarily gifted at being able to understand another writer's work that deeply." (14 T 1958)

Friebert's relationship with Booker, however, illustrates the more significant quality that has emerged in the last 18 years Booker has spent on death row. Without exception, everyone who has known Booker since 1980 has been lifted up and encouraged by the defendant. Stuart Friebert told the court, "I feel fortunate to have gotten to know him through a long correspondence." (14 T 1956)

Hayden Carruth writes to Booker monthly (13 T 1924), and has done so for almost two decades. "I believe he sent me -- he submitted to me some of his work. I was interested in it. We began to correspond and have continued to do so ever since with some (inaudible). (13 T 1918)

Similarly, Stuart Lavin received some of Booker's poems sent in 1991, and that started a correspondence that continues to this day (14 T 1943).

But Booker's influence extends beyond the world of poetry, professors, and academics. Betty Vogh, a teacher and researcher at the University of Florida medical school read Booker's statement of remorse that the Gainesville Sun published at his 1978 sentencing. "What he said there just sort of grabbed me. And I kept thinking about it and thinking about it, ... I just felt like it was sincere." (14 T 1978) She and her husband began writing him, and over the years a deep, personal friendship developed. "The relationship was often more between my husband and Stephen than me. . . . It was a relationship of just good friendship with a certain parental flavor to

it." (14 T 1988). Predictably, "His letters to me are always interesting, and they're sometimes very informative. . . . They're entertaining, because he has such a vast array of word skills and immense vocabulary, and he's so good at being able to choose exactly the right word out of any level of cultural usage of the language and say exactly what he means, and really enjoy that part. . . . [It is] as if we've had an almost twenty-year conversation that just never got boring, and that's pretty special to me." (14 T 1988)

The amazing Page Zyromski, the niece of the Lorine Harmon, said her relationship with Booker was profound. "In the religious sense, just grappling with issues of forgiveness have been -- have been very, very meaningful for me. I think I am -- I think I am a better person for having faced those issues straight on. I think I have been very strongly influenced by that. Then the part about us both being writers has also been a great influence on me, because it wasn't -- it was a two-way street. Whenever I would get discouraged about a whole bunch of rejection slips in a row, which a writer -- a writer has to face as part of the writing life, Stephen would write me a letter . . . and give me encouragement . . . I'd have to say that my life has been very immensely changed by my relationship with him." (14 T 2010).[32]

[32] At the sentencing hearing, the rest of Harmon's immediate family testified that they did not want Booker executed (21 T 2615-31).

Finally, even Booker's lawyers were impressed with him and considered him a friend. James Coleman represented him in his post-conviction proceedings, and said of the defendant: "We were impressed from the very beginning with both his intelligence and with his cooperation. He assisted us in every way that we asked. He gave us information that we knew, at times, was painful for him. He assisted. He was stoical. He was courteous. He was thankful for what we had done." (21 T 2605) From the beginning he was sorry about the murder, and he donated all the royalties from his poetry to Mrs. Harmon's family (21 T 2607). "I certainly think of him as a friend." (21 T 2608)

So, we have a case of profound sorrow. First, there is the undeniable tragedy of Lorine Harmon's death for which there is no defense. There was no justification for it, and Booker makes none. There is, also, the tragedy of Stephen Todd Booker, a man afflicted by demons who now asks this court to recognize the redemption he is trying to work out. The last 20 years of his life have seen the rebirth of a genius the first twenty smothered. Beyond that though, we have seen the growth of a man from one consumed with drugs, alcohol, and mental illness to one who inspires and lifts all those to whom he has written or talked. Poets, strangers, victims, and lawyers have universally benefitted from knowing him.

Perhaps Booker can never redeem himself for the senseless morning in November 1977, but he has demonstrated in the last 20 years on death row that we should let him live out the rest of his life in prison trying. This is not one of the most aggravated murders. It has, instead, some of the most compelling, poignant mitigation this Court has seen. It should reverse his sentence of death and remand for a sentence that he spend the rest of his life in prison without the possibility of ever being freed.

ISSUE V

THE COURT ERRED IN EXCLUDING PAGE ZYROMSKI, LORINE HARMON'S GREAT-NIECE, FROM THE MAJORITY OF THE SENTENCING HEARING.

Ms. Page Zyromski, the grand-niece of Lorine Harmon, asked defense counsel if she could watch Booker's sentencing proceeding. He had no problem with that request, particularly because he had not invoke the rule of sequestration on behalf of his client (12 T 1726). The State, however, objected:

> I believe that you certainly have the right as a victim to be present in the courtroom. There's a difference, though, just as in normal victim impact, you sort of make a selection. If you choose to--or if it is a strategy of the case that you are a witness in the case, then I believe that you're under the normal rules of sequestration.
>
> I believe that the state has great concern in this particular case of the impression that would be given on the jury by a person who is a witness in the case, who has sat in the courtroom for a period of time, and then is going to be called; and I think it's safe to say that she will probably end up begin the defense's last witness for dramatic effect, unless somebody else is late. ... I don't think there's an exception for family members who are going to be witnesses.

(12 T 1728).

The court refused to let Ms. Zyromski sit in the courtroom until she had testified because it was afraid her testimony might be tainted (12 T 1729-30). She

was the last witness to take the stand. The court abused its discretion in excluding her.

As defense counsel and the prosecutor agreed, they were usually on the other side of the issue with the former trying to exclude the victim's family from watching the trial (12 T 1727). Two legal principles clash in this type of issue. Article I, Section 16, of the Florida Constitution provides that

> Victims of crime ... are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

On the other hand the rule of sequestration helps ensure a fair trial by avoiding "the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand." Spencer v. State, 133 So.2d 729, 731 (Fla.1961). A court, therefore, abuses the discretion given it only if allowing the witness to attend the proceedings somehow prejudices the parties' rights to a fair trial. Gore v. State, 599 So.2d 978 (Fla.. 1992). Normally no measurable prejudice arises by the mere presence of the victim's family in the courtroom, even if they sit near the jury where they could see the family members cry and hug each other. Farina v. State, 680 So.2d 392, 395 (Fla. 1996).

Thus, it is difficult to understand what prejudice the State would have suffered with Zyromski sitting in the courtroom. She certainly had the right, as guaranteed by the Florida Constitution, to be present.[33] Defense counsel guaranteed that her testimony would remain untainted by what she saw at trial.

> Her testimony would go exclusively to a relationship that developed between herself and Mr. Stephen Todd Booker while Mr. Booker was in prison. It goes to the nature and extent of that relationship. It will go to acts that Mr. Booker has done in helping and assisting her, but it will in no way go towards literary criteria as far as her opinions, although she may say that he has written on a couple of occasions to her concerning his poetry and his writing.

(12 T 1727).

There was no likelihood that what Ms. Zyromski heard would have tainted her testimony, so the rule of sequestration, apparently invoked only against her, would have served no purpose other than to keep a witness/victim sympathetic to Booker from observing almost the entire trial. If Farina had no right to object to the presence of the family of his victim, even though they may have cried during the trial, the State, in this case, had no grounds to complain about the presence of Ms. Zyromski in the

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[33] Article I, Section 16, speaks only in terms of allowing the victim's family presence at trial "to the extent that these rights do not interfere with the constitutional rights of the accused." Booker has assumed that this clause applies in this case although he notes that the State has no constitutional rights in the sense contemplated by that section.

courtroom. They have not carried their burden of showing prejudice to their case. Martinez v. State, 664 So.2d 1034, 1036 (Fla. 4th DCA 1995)(Burden to show prejudice on the party wanting the victim's family excluded.); Sireci v. State, 587 So.2d 450, 454 (Fla. 1991)(victim's family had right to attend all crucial stages of the criminal proceedings.)

This Court should, therefore, reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE VI

IT IS CRUEL AND UNUSUAL PUNISHMENT FOR STEPHEN TODD BOOKER TO HAVE SPENT THE LAST TWENTY-TWO YEARS OF HIS LIFE ON DEATH ROW.

Booker was sentenced to death in October 1978 (1 R 134-42). He has remained there ever since. That is cruel and unusual punishment, as that phrase has been used in the Eighth Amendment to the United States Constitution. This Court rejected that argument recently in Knight v. State, 24 Fla. L. Weekly S135 (Fla. March 11, 1999). This Court should reconsider its decision in light of the opinion of members of the United States Supreme Court that the issue has merit and should be considered by the full court. Elledge v. Florida, 12 Fla. L. Weekly Fed. S1 (October 13, 1998) (Breyer dissenting from denial of certiorari.); Lackey v. Texas, 514 U.S. 1045 (1995)(Stevens, dissenting.).[34]

To execute Mr. Booker after he has already had to endure more than two decades of incarceration under sentence of death, would be unconstitutionally cruel

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[34] Although he filed the post-conviction motions, this delay must be attributed to the state because it denied him a constitutional hearing initially. See O'Neil v. McAninch, 115 S.Ct. 992, 998 (1995)("the State normally bears responsibility for the error that infected the initial trial," and, thus, must bear responsibility for the delay between the initial trial and retrial); see also State v. Richmond, 886 P.2d 1328, 1333 (Ariz. 1994)(death row inmate not responsible for delay resulting from a post-conviction appeal).

and unusual punishment. The inherent cruelty of the protracted time element in the processes of the death penalty itself has been duly noted by numerous jurist and commentators. In this case, however, where an individual has lived under a sentence of death that has the unusual aspect of having gone on for nearly a generation, the suffering cannot be seen as merely incidental to the appellate process. It is an extended or long-termed administration of an especially cruel form of punishment, which is equivalent to or greater than an actual execution.[35] See Coleman v. Balkcom, 451 U.S. 949, 952 (1981)(Stevens, J., concurring in denial of certiorari); c.f., In re Medley, 134 U.S. 160, 172 (1890). Because of the inordinate delay, death cannot be added to the punishment, so the only permissible punishment under the Eighth Amendment is life imprisonment.

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[35] E.g., Furman, 408 U.S. 238 at 382 (Burger, C.J., dissenting, joined by Blackmun, Powell & Rehnquist, JJ.)("a man awaiting execution must inevitably experience mental anguish"); Furman, 408 U.S. at 288-89 (Brennan, J., concurring) ("[W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution extracts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"); People v. Adamson, 493 P.2d 880 (Cal. 1972)("Penologists and medical experts agree that the [protracted] process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture,"); Suffolk County District Attorney v. Watson, 411 N.E.2d 1274, 1289-95 (Mass. 1980)(Liacos, J., concurring)(describing the psychological pain and torture that the condemned person experiences while awaiting execution); id. At 1287 (Braucher, J., concurring)(arguing that capital punishment is unconstitutional under Massachusetts Constitution in part because "it will be carried out only after agonizing months and years of uncertainty").

Second, the decision in Gregg v. Georgia, 428 U.S. 153 (1976), holding that the Eighth Amendment does not prohibit capital punishment, rested in part on the ground that the death penalty was considered permissible by the Framers. However, execution of a condemned prisoner after inordinate delay attributable to state actors would have been considered cruel and unusual at common law, see Lackey v. Texas, 115 S.Ct. 1421 (1995)(memorandum of Stevens, J., respecting the denial of certiorari, joined by Breyer, J.).

Third, carrying out the execution of a person originally condemned to die over two decades ago would constitute cruel and unusual punishment because such an execution would be a pointless and needless extinction of life which, at best, would only marginally effectuate the constitutionally-legitimate purposes of capital punishment. See Furman, 408 U.S. at 312-13 (White, J., concurring); see also Lackey, 115 S.Ct. At 1422 (opinion of Stevens, J.).[36] The Supreme Court has recognized that the two constitutionally legitimate purposes justifying capital punishment are retribution and deterrence. Gregg, 428 U.S. at 183. Neither purpose

[36] The belief that capital punishment would be unconstitutional, as applied, if it failed to serve the legitimate penological ends it was designed to meet has been reiterated in subsequent opinions. See Gregg, 428 U.S. at 183-87 (joint opinion of Stewart, Powell, & Stevens, JJ.); Coker v. Georgia, 433 U.S. 584, 592 n.4 (1977)(plurality)(capital punishment would be unconstitutional if it did not "measurably serve the legitimate ends of punishment"); McKlesky v. Kemp, 481 U.S. 279, 301 (1987)(quoting Gregg).

would be served by executing Mr. Booker for the capital offense he was convicted of in 1977 now or in the future.

Finally, the State of Florida has forfeited its right to execute the defendant under binding norms of international law. A proscription against "torture or cruel, inhuman, or degrading treatment or punishment," is contained in both the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Since the early 1990s, the United States has been a signatory of both treaties. Under the Supremacy Clause, those two treaties are binding on the states as well as the federal government. See Missouri v. Holland, 252 U.S. 416 (1920).[37] Numerous leading

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[37] The U.S. has filed "reservations" with respect to both treaties, which contend that the U.S. understands the language "torture or cruel, inhuman or degrading punishment or treatment" to mean the same thing as the phrase "cruel and unusual punishment" in the Eighth Amendment. See David P. Stewart, United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations, 42 DePaul L. Rev. 1183 (Summer 1993). No other signatory nation has filed a "reservation" or otherwise objected to that particular language in the treaty. Michael H. Posner & Peter Shapiro, Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights, 42 DePaul L. Rev. 1209, 1216 (Summer 1993). Numerous signatory nations have lodged objections to the U.S. "reservations" in the United Nations. The fact that well over 100 nations are signatories of the International Covenant on Civil and Political Rights, see id. At 1212, means that the language in Article VII of the Covenant has assumed that status of a "peremptory norm" of international law, or jus cognes. See Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715-16 (9th Cir. 1992). Such a fundamental norm of international law is binding on the federal government and the states even in the absence of a treaty. See The Paquete Habana, 175 U.S. 577,

international law tribunals have held that the prohibition against "cruel, inhuman or degrading punishment or treatment" prohibits a state from keeping a condemned person on death row for an inordinate period of time. See, e.g., Pratt & Morgan v. Attorney General of Jamaica, 2 A.C. 1 (British Privy Council 1993)(en banc)(citing numerous decisions of courts around the world); Soering v. United Kingdom, 11 E.H.R.R., 161 Eur.Ct.H.R. (Ser. A)(Eur. Ct. Hum. Rts. 1989). This Court should do likewise.

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700 (1900).

CONCLUSION

Based on the arguments presented here, the Defendant, Stephen Todd Booker, respectfully asks this honorable court to reverse the lower court's sentence of death and remand either for a new sentencing hearing, or with instructions that it impose a sentence of life in prison.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to RICHARD MARTELL, Assistant Attorney General, by delivery to The Capitol, Tallahassee, FL 32399-1050; and a copy has been mailed to appellant on this _____ day of March, 1999.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

_____
DAVID A. DAVIS
Assistant Public Defender
Fla. Bar No. 0271543
Leon County Courthouse, Ste. 401
301 South Monroe Street
Tallahassee, FL 32301
(850) 488-2458
ATTORNEY FOR APPELLANT

IN THE SUPREME COURT OF FLORIDA

STEPHEN TODD BOOKER,

Appellant,

v. Case No. 93,422

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX

Tug

The Pied-Piper of Murderloin Downs

Parenthetically Speaking

Simple Arithmetic

Tug

Not many lifetime guarantees exist.
Yet I might still absolutely become
entranced, primal, a dancing, dizzy riff,
taut then loosened, a syncopated drum.

But if only I can survive the cold,
unawed by the thawed out realities
that shine in from afar, will yesterday's
wishes change into a high-flown castle,
evolving empty but mine to sell or keep . . .

underwritten by bolts of manmade lightning,
numbered at the knees of a steel-gray sky,
defaced, weather-beaten, pitted by time,
ever silent enough to raise the dead,
reborn as shadows going fast asleep.

Shivering now, nearly frozen, am I,
transfixt in front of a dream of myself
atop a white-hot cloud . . . when roused awake,
new as you please, I hear voices screaming
doubts about things not to be said aloud . . .

and then there for just an instant, beating,
never mistaken for shadows or ghosts
daring to sabotage where they are from,
to wit: it is my icy heart come off
upset inside the many sides of me. . . .
Guests, we are, in one riff, one chest, one drum.

STEPHEN TODD BOOKER

THE PIED-PIPER OF MURDERLOIN DOWNS

Residing in the cave next door to me,
Ununderstood, practically de-eyed,
Toothless, insensate, and ready
With an infectious smile, is a killer.
Divvying up his meals at chow time,
Sacrifices are laid out for mice, he says
To save them hunting in our cells at night.
Rats visit him occasionally; and he is
Their Messiah too. Birds (namely,
Sparrows), he kills. Daily;
He bends staples into teensy-weensy hooks,
Baits them with balls of bread and . . .
There is a seldom-observed
Type of gagging or death rattle
That is a horrific opera . . .
A churning puff of dusty brown feathers
Going berserk, dervishly jiggabooing,
Going over the edge of the tier's catwalk,
Gone noiselessly down to meet the first floor . . .
And there is
On one end of a length of thread,[1]
And quivering, that last, precious tweet-tweet
On the catwalk,
Fresh meat for the mice.

Parenthetically Speaking

What if the thing that is important
(aside from the pounding or
painting of saying it into a music
or in a life's work whose merit
lies in how it feels is the scoring
of the precedent for having thought

then thinking and the ability
to think anything and move on it
though maybe it goes without saying
all of your thoughts are your children
whether the progeny of boredom
and you their celebrated parents

letting them each have at hot stovetops
and sip after sip multiplying into
drenchings and then dalliances
with a sadistic babysitter
should after all wash up on a beach
and you pausing bend and pick it up

just to see how much it resembles
a seeded plot in the human mind
like the chrysalis of lead-based paint
you spied back when you were a possum
deep down inside of an empty jar
and you poked your magnified rat puss

as far as it would go until stuck
headfirst into the bloated libraries
of dutifully dying or deadly egos
of parent-cobblers of thoughts so dense
that they had never walked on water)
is and how if only they were not?

— Stephen Todd Booker

Simple Arithmetic

No opposition mounted against it, no
Challengers in the shadows, waiting in the wings.
That's what a so-called charmed life has needed,
An open season to fritter away, hunting
Or cavorting about as snug in its getup
As the ace of spades is in his or in yours;

None of its greater white-hopes dreading an end
In sight to dreams being dreamt by nobody's fool,
By who isn't worshipping assimilation,
And who hasn't bowed, quaking in the doorway
To an appointment with a noose. After living
A dream that has swam through a sea of razors,

I have coined a ditty, today. It reads 'Home.
Don't leave you rebused house without it.' That
And whether you or I slow down long enough
For slits to be chopped into our psyches
Is all a charmed life has not ever wanted:
Us: knowing that *they can* program our minds,

Compelling us to *just say yes* to what-all
Drilled home to who we are or are presently
Thinking of ourselves as. Implanted with aches
Which register as long-suppressed yelps,
Tonight, schlumping into surreality,
Where dream leads the whole universe in touch-downs

By a runner, stolen bases, and blocked shots,
Its acrobatic abandon an entrée
To the main course of its fetish for giving
An audience its tuppence' worth of negro,
There he is, not folding his asbestos nutshell,
Nor laying it under his mattress again;

Not enamored over dated promises,
And not drooling or panting at the prospect
Of being thought of as sensitive or sane.
In the vinyl-covered, cushioned kitchen chair, I,
When my dream reaches its perigee, relax.
Because I, as the last 'darkie' on earth, must

Silently recite my prayers to myself,
Asking forgiveness for my enemies too,
While they then saw off my left leg at the shin
And as a hant kneels to sip from the stump. Awake!
Awake! toes, tongue, my trigger finger! Awake!
Dear Anger..., am I your master or your chump?