IN THE SUPREME COURT OF FLORIDA

STEPHEN TODD BOOKER,

Appellant,

CASE NO. 93,422

v.

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On November 9, 1977, Booker broke into an apartment in Gainesville, Florida. When the ninety-four-year-old victim returned home from playing cards with friends, Booker raped her and stabbed her to death. When found, a smaller knife was embedded in the victim's chest, while a larger knife was going through her throat. (T XI 1677).[1] The victim suffered fourteen stab wounds, including defensive wounds, bruising, and five broken ribs. (T XI 1681-90). She was alive when she was sexually assaulted (T IX 1698) and conscious when she was stabbed. (T IX 1703).

Booker was convicted of first-degree murder, sexual battery, and burglary. The jury recommended that he be sentenced to death, which the trial court did, finding three aggravators (prior felony, felony murder/sexual battery and burglary, and heinous, atrocious, or cruel (HAC)) and no mitigators. This Court affirmed Booker's convictions and sentence on appeal. Booker v. State, 397 So.2d 910 (Fla.), cert. denied, 454 U.S. 957 (1981). Later, this Court affirmed the denial of postconviction relief to Booker and denied

[1] "T XI 1677" refers to page 1677 of volume XI of the transcript. There are twenty-four volumes of transcript, numbered I through [XXIV] (the sixteenth through twenty-fourth volumes do not have a volume number), pages 1 through 2854. There are also nine volumes of record, numbered I through IX, pages 1 through 1416. References to the record will be "R," followed by volume and page numbers.

his petitions for writ of habeas corpus. Booker v. Dugger, 520 So.2d 246 (Fla. 1988); Booker v. State, 503 So.2d 888 (Fla. 1987); Booker v. State, 441 So.2d 148 (Fla. 1983); Booker v. State, 413 So.2d 756 (Fla. 1982).

In 1991 the Eleventh Circuit Court of Appeals affirmed the district court's order directing that Booker be resentenced because of Hitchcock v. Dugger, 481 U.S. 393 (1987). Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991). After the United States Supreme Court denied the state's petition for certiorari review, 502 U.S. 900 (1991), the state moved the district court to vacate its judgment. The district court refused, and the eleventh circuit affirmed. Booker v. Singletary, 90 F.3d 440 (11th Cir. 1996).

Booker's resentencing took place before a jury in March 1998. The jury recommended that he be sentenced to death by a vote of eight to four. (R VII 1269). After a Spencer[2] hearing on May 5, 1998 (T [XXI] 2597-2678), the court sentenced Booker to death on June 25, 1998, finding that the four aggravators (under sentence of imprisonment, prior violent felony, felony murder/sexual battery and burglary, and HAC) outweighed the statutory and nonstatutory mitigators. (T [XXII] 2679-2706; R VII 1305-18).

[2] Spencer v. State, 615 So.2d 688 (Fla. 1993).

SUMMARY OF ARGUMENT

ISSUE I:

The court did not err in refusing to instruct the jury on the sentences Booker received for his burglary, sexual battery, and aggravated assault convictions.

ISSUE II:

The court correctly found that the state exercised a peremptory challenge to remove a black prospective juror for a race-neutral reason.

ISSUE III:

The court did not err in refusing to give a jury instruction requested by the defense.

ISSUE IV:

Booker's death sentence is proportionate and should be affirmed.

ISSUE V:

The court did not err in refusing to allow a defense witness to attend the proceedings prior to her testimony.

ISSUE VI:

The length of time Booker has been on death row does not constitute cruel and unusual punishment.

ARGUMENT

ISSUE I

WHETHER THE COURT CORRECTLY REFUSED TO TELL THE JURY WHAT SENTENCES BOOKER HAD RECEIVED FOR HIS NONCAPITAL CONVICTIONS.

Booker argues that the trial court erred by not informing the jury of the sentences he received for his 1978 burglary and sexual battery convictions and his 1980 aggravated assault conviction. There is no merit to this claim.

Because this murder occurred prior to the statutory change in 1994, the possible penalties for Booker's conviction of first-degree murder were death or life imprisonment with no possibility of parole for twenty-five years. Due to the length of time between the original sentencing and the resentencing, Booker filed a motion in limine to prevent the state from arguing that, if sentenced to life imprisonment, Booker would be eligible for parole twenty-five years after his conviction. (R V 901). The court reserved ruling on that motion (T [XVIII] 2450) and, later, granted it. (R VI 1064).

Booker also filed a pre-hearing motion asking the court to take notice of the sentences imposed for his noncapital offenses and to inform the jury that in 1978 Judge Crews sentenced him "to 55 years for the offense of rape and 30 years for the offense of

burglary, both of these sentences to run consecutive to each other and consecutive to whatever sentence is imposed for first degree murder." (R V 828). The state filed a memorandum in opposition to that motion (R VI 988), and the court heard the motion on June 19, 1997. After hearing argument from the parties (T [XVIII] 2423-49), the court reserved ruling on the motion. (T [XVII] 2450; R VII 1175). Just prior to the resentencing proceedings, the court denied Booker's motion to inform the jury of the noncapital sentences. (R VII 1239).

At the charge conference Booker again argued that the jury should be informed of his noncapital offenses and proffered unredacted copies of his judgments and sentences for those offenses. (T XIV 2118-19). The court denied the proffer. (T XIV 2120). Booker then proffered part of his proposed closing argument stating that he had been sentenced for the noncapital convictions without saying what those sentences were. (T XIV 2121-22). The court denied the request to make the proffered argument. (T XIV 2122).

Booker then brought up the concern voiced at voir dire by two prospective jurors, one of whom served as an alternate, as to credit for time served. (T XIV 2122-23). The parties and the court discussed Booker's concern (T XIV 2123-27), and defense

counsel stated: “I am terrified of the credit for time served issue. You can’t tell me that no one of those twelve people that are sitting there ain’t going to be thinking about it.” (T XIV 2127). No resolution of this issue appears in the record of the charge conference.

Shortly after the jury retired to deliberate, it sent the following question to the court: “Will time already served be considered as gain time in a life sentence without possibility of parole for 25 years?” (T XV 2269). The parties considered various instructions (T XV 2270-72), and the court stated the instruction that would be given. (T XV 2272). Defense counsel then asked again that the jury be informed of Booker’s noncapital sentences (T XV 2274), which the court denied. (T XV 2275). Counsel then moved for a mistrial, claiming it was “obvious that the jury is at least entertaining an issue that they should not be entertaining.” (T XV 2275). The court denied that motion, stating: “The Court believes and has no choice but to believe that the Court’s instruction will cure the problem.” (T XV 2275). Thereafter, the court gave the jury the following instruction: “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." (T XV 2277). Defense counsel then renewed the motion for mistrial, which the court denied. (T XV 2278).

Contrary to Booker's contention, this claim is controlled by Nixon v. State, 572 So.2d 1336 (Fla. 1990), cert. denied, 502 U.S. 854 (1991), and its progeny. The jury convicted Nixon of first-degree murder, kidnapping, robbery, and arson. During the penalty phase, he sought an instruction on the possible sentences for the noncapital convictions. His trial court refused to give such an instruction, and this Court affirmed that ruling, stating:

> 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.

Id. at 1345 (emphasis supplied). This issue has arisen numerous times in original sentencings, and this Court has consistently applied and followed Nixon. E.g., Walker v. State, 707 So.2d 300 (Fla. 1997); Franqui v. State, 699 So.2d 1312 (Fla. 1997), cert. denied, 118 S.Ct. 1337 (1998); Marquard v. State, 641 So.2d 54 (Fla. 1994), cert. denied, 513 U.S. 1132 (1995). The precise claim raised by Booker was also raised and rejected in Campbell v. State, 679 So.2d 720, 725 (Fla. 1996):

> At the time of resentencing, Campbell had already been sentenced to consecutive life terms for other related crimes and now claims that the court erred in preventing him from pointing this out to prospective jurors and in declining to instruct the jury on this. This issue has already been decided adversely to Campbell. *See, e.g., Nixon v. State*, 572 So.2d 1336 (Fla.1990), *cert. denied*, 502 U.S. 854, 112 S.Ct. 164, 116 L.Ed.2d 128 (1991). We find no error.

As in Campbell, no error occurred in the instant case, and Booker's death sentence should be affirmed.

Booker relies on several United States Supreme Court cases, but none of those cases support his argument. In Simmons v. South Carolina, 512 U.S. 154, 156 (1994), the Court held that "where the defendant's future dangerousness is an issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." Future dangerousness is not an aggravator in this state, and there was no effort to impose the death penalty based on future dangerousness.[3] Also, unlike for Simmons, parole is a possibility for Booker.

In California v. Ramos, 463 U.S. 992 (1983), the Court held that a state statute requiring that a jury be instructed on the governor's pardon power did not mislead the jury. "There is no corresponding statutory imperative in Florida that a capital jury be told that the governor may commute any sentence." King v. Dugger, 555 So.2d 355, 359 (Fla. 1990). Ramos, therefore, does not apply to this case.

[3] As Booker acknowledges, the propensity to commit crimes is a valid consideration when examining the facts to determine if the prior violent felony aggravator has been established. (Initial brief at 41). However, Booker provides no authority for his extraordinary assumption that "'Propensity to commit violent crimes' is synonymous with future dangerousness." (Initial brief at 41 n20).

Finally, in Beck v. Alabama, 447 U.S. 625 (1980), the Court held that, in a capital case, a state may not withdraw the option of instructing on lesser-included offenses when doing so would leave a jury with the all-or-nothing choice of convicting of first-degree murder or acquitting. That holding is not relevant to Booker's jury, which was considering his penalty, not his guilt, and which only had two choices for its recommendation, i.e., death or life imprisonment.

Even assuming arguendo that Booker's noncapital sentences could be construed as mitigating, the court did not err in not instructing on those sentences. A court need not instruct the jury on individual nonstatutory mitigators because the "catch-all" instruction, which Booker's jury received, is sufficient. Zakrezewski v. State, 717 So.2d 488 (Fla. 1998), cert. denied, 119 S.Ct. 911 (1999).

Moreover, the court's response to the jury's question, i.e., that the jurors should rely on the evidence and instructions, was proper. See Whitfield v. State, 706 So.2d 1 (Fla. 1997), cert. denied, 119 S.Ct 103 (1998); Waterhouse v. State, 596 So.2d 1008 (Fla.), cert. denied, 506 U.S. 957 (1992).

Booker has demonstrated no error regarding this claim, and it should be denied.

ISSUE II

WHETHER THE COURT ERRED REGARDING ONE OF THE STATE'S PEREMPTORY CHALLENGES.

Booker argues that the court erred in holding that the state had a race-neutral reason for exercising a peremptory challenge on Phyllis Filer, a black prospective juror. There is no merit to this claim.

During voir dire, the state exercised peremptory challenges on three women -- Collette Smith, Rae Leggett, and Phyllis Filer -- at the same time. (T IX 1381). Defense counsel challenged excusing Filer based on State v. Neil, 457 So.2d 481 (Fla. 1984). (T IX 1381). At the court's invitation the prosecutor responded: "Your Honor, you'll find a pattern here that I'm looking for, and that is that I do not wish to have people that I believe will be unduly influenced by their love of the arts or their feeling for the arts, their literature." (T IX 1382). The prosecutor then said that he struck Leggett "when she finally said I love to read everything, I love the arts." (T IX 1382). He struck Smith because the last thing she said was that she liked traveling and the arts. (T IX 1382). He struck Filer, a librarian, because he thought "on the unique facts of this case a librarian is going to be unduly -- may subject herself to being unduly influenced by the fact we have a person who is going to bring in, I think he's bringing in six

defense witnesses who are either publishers of or editors of major academic or professional journals in the field of English literature and poetry." (T IX 1382-83).

Defense counsel countered that being an avid reader was not a race-neutral reason and mentioned that William Pepper, a white male, was also an avid reader and an editor. (T IX 1384). The prosecutor responded that there were reasons the state wanted to keep Pepper on the jury, while the defense might not want him, "such as his military service and history." (T IX 1384-85). The judge found the state's reason for striking Filer to be race neutral, stated that he did not "find that there's any pattern here of using the peremptory challenge against Ms. Filer as establishing any kind of pattern of excusing only jurors of her particular ethnic background," and allowed the state to strike Filer. (T IX 1386).

This Court set out guidelines to be used when a race-based objection is made to a peremptory challenge in Melbourne v. State, 679 So.2d 759, 764 (Fla. 1996):

> 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) show 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 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.

(Footnotes omitted.) Appellate courts were cautioned to keep in mind two principles when enforcing the guidelines: 1) "peremptories are presumed to be exercised in a nondiscriminatory manner;" and 2) "the 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).

Relying on Randall v. State, 718 So.2d 230 (Fla. 3d DCA 1998), and Overstreet v. State, 712 So.2d 1174 (Fla. 3d DCA 1998), Booker argues that the state's reason for striking Filer was an impermissible pretext because there was no difference between her and Pepper. The record, however, belies this contention.

During voir dire questioning, Filer acknowledged that she was a librarian and loved books. (T IX 1290). Filer had been a

librarian for twenty-two years and had a master's degree in library science and a bachelor's degree in sociology. (T IX 1304-05). She stated that she reads a "whole wide range of" literature (T IX 1368), essentially, "everything." (T IX 1369).

Pepper was once an editor of the Gainesville Sun (T IX 1291) and, for the first fifteen years of his professional life worked for three newspapers in Texas, Louisiana, and Florida. (T IX 1302-03). Thereafter, he was a retail executive for fifteen years and ran an executive search firm for another fifteen years before retiring. (T IX 1303). Pepper spent twenty years in the Naval Reserve (T IX 1349-50) and enjoyed reading history and the Bible. (T IX 1369).

From their responses it is obvious that Filer and Pepper are more dissimilar than similar. As the state pointed out, Filer shares more similarities with Smith and Leggett than Pepper. Smith worked as a French cooking instructor for sixteen years (T IX 1294) and, among other things, liked traveling and the arts. (T IX 1375). Leggett had been a Vista volunteer and was currently a professional nanny (T IX 1300) and had worked in a recreational program designed to keep teenagers out of court. (T IX 1301). Leggett also stated that she loved to read and liked the arts. (T IX 1372). She compared herself to Filer and stated that the

library was one of her favorite places so she read “a little bit of everything.” (T IX 1372-73). The state also later used a peremptory challenge to excuse another female prospective juror, Leslie Lucas. (T X 1489). Lucas had a bachelor’s degree in English (T X 1424) and stated that her hobbies were traveling and reading. ((T X 1477).

When their responses during voir dire are compared, it is apparent that Filer was more similar to Smith, Leggett, and Lucas, other women excused by the state, than to Pepper. The facts of this case support the presumption that the peremptory challenge of Filer was exercised in a nondiscriminatory manner. Booker, therefore, has failed to carry his burden of demonstrating purposeful racial discrimination. The circuit court’s finding the challenge to Filer not to have been based on a pretext is not clearly erroneous and should be affirmed. See Hudson v. State, 708 So.2d 256 (Fla. 1998); Nelson v. State, 688 So.2d 971 (Fla. 4th DCA 1997).

ISSUE III

WHETHER THE COURT ERRED IN REFUSING TO GIVE A REQUESTED JURY INSTRUCTION ON MITIGATION.

In this issue Booker argues that the court erred in not giving one of his requested jury instructions. There is, however, no merit to this claim.

During the charge conference, Booker, attributing it to Black's Law Dictionary, asked the court to give the jury the following instruction:

> "Mitigating circumstances 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."

(T XIV 2116). The court denied Booker's request. (T XIV 2116; R VII 1254). Now, Booker complains that "[t]he standard jury instructions merely provide a list of mitigating factors for the jury to consider. They never define mitigation, a crucial failing." (Initial brief at 52).

This Court has rejected this issue numerous times, finding that the standard jury instructions are valid and sufficient. E.g., Elledge v. State, 706 So.2d 1340 (Fla. 1997), cert. denied, 119 S.Ct. 366 (1998); Monlyn v. State, 705 So.2d 1 (Fla. 1997), cert. denied, 118 S.Ct. 2378 (1998); Shellito v. State, 701 So.2d

837 (Fla. 1997), cert. denied, 118 S.Ct. 1537 (1998); Gamble v. State, 659 So.2d 242 (Fla. 1995), cert. denied, 516 U.S. 1122 (1996); see also Gore v. State, 706 So.2d 1328 (Fla 1997) (it is not necessary to give specific instructions on nonstatutory mitigators), cert. denied, 119 S.Ct. 212 (1998); Finney v. State, 660 So.2d 674 (Fla. 1995) (same), cert. denied, 516 U.S. 1096 (1996). Booker has presented nothing that calls into doubt this Court's prior rulings, and this claim should be denied.

ISSUE IV

WHETHER BOOKER'S DEATH SENTENCE IS PROPORTIONATE.

Booker argues that his death sentence is disproportionate. There is no merit to this claim, however, and Booker's death sentence should be affirmed.

The circuit court found that four aggravators had been established: 1) under sentence of imprisonment; 2) prior violent felony; 3) felony murder/sexual battery and burglary; and 4) heinous, atrocious, or cruel (HAC). The court made the following findings on the first aggravator:

> 1. The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation at

the time that the capital felony was committed.

The State introduced testimony and documentary evidence in the resentencing hearing showing that Defendant was convicted of the crime of robbery in 1974 and in 1977 was issued a certificate of "mandatory conditional release." The certificate was received in evidence as State's Exhibit No. 61.

Defendant was sentenced to a term of five years in Florida State Prison in Lee County in 1974 for the crime of robbery and on September 1, 1977 he was issued his certificate of mandatory conditional release. He was subject to the terms of mandatory conditional release until March 26, 1979. The Defendant committed the crime of first degree murder against the victim Lorine Harmon on November 9, 1977 while still under the terms of the mandatory conditional release.

The Florida Supreme Court has determined that mandatory conditional release constitutes a sentence of imprisonment as set forth in Florida Statute 921.141(5)(a). Haliburton v. State, 561 So.2d 248, 252 (Fla. 1990). The Florida Supreme Court has also determined that ex post facto application of sentencing refinements to aggravating factors are permissible. Trotter v. State, 690 So.2d 1234 (Fla. 1996).

The State has proved that Defendant was under a sentence of imprisonment at the time he committed the murder of Lorine Harmon beyond a reasonable doubt.

The Court gives great weight to this aggravating factor.

(R VII 1307). Booker implies that this aggravator is not worth much because he was on parole when he killed the victim, not in prison, and that this aggravator was meant to deter prisoners from killing their fellow inmates. (Initial brief at 57). This Court, however, has long held that being on parole establishes this aggravator. E.g., Hildwin v. State, 23 Fla.L.Weekly S447 (Fla. Sept. 10, 1998); Williams v. State, 437 So.2d 133 (Fla. 1983), cert. denied, 466 U.S. 909 (1984); Aldridge v. State, 351 So.2d 942 (Fla. 1977), cert. denied, 439 U.S. 882 (1978). The record supports the circuit court's finding under sentence of imprisonment in aggravation, and that finding should be affirmed.

The court made the following findings in support of the prior violent felony aggravator:

> 2. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> The State introduced evidence that STEPHEN TODD BOOKER was convicted of the crime of robbery in 1974 in Lee County, Florida. The State introduced the judgment and sentence of Mr. Booker for the crime of robbery as Exhibit No. 60. Robbery is a crime involving the threat or use of violence to the person, and therefore constitutes proof beyond a reasonable doubt of the existence of aggravating factor No. 2.
>
> In addition, the Defendant committed the crime of aggravated battery against a

> correctional officer in Florida State Prison in 1980 as evidenced by certified copies of the judgment and sentence entered as State's Exhibit No. 62. Even though this crime was committed after the murder Lorine Harmon, it was committed before the second penalty phase proceeding in this cause. The Florida Supreme Court has decided that aggravating factors that did not exist at the time of the crime but which were committed prior to the penalty phase proceeding may be considered as aggravating factors in the penalty phase proceeding. Castro v. State, 644 So.2d 987 (Fla. 1994) and Craig v. State 510 So.2d 857 (Fla. 1987).
>
> The State has proved this aggravating factor, based on the offense of robbery committed in 1974, and based on the offense of aggravated battery committed in 1980, beyond and to the exclusion of a reasonable doubt.
>
> The Court gives great weight to this aggravating factor.

(R VII 1307-08). Booker denigrates this aggravator because the aggravated assault conviction occurred after the murder. (Initial brief at 57). He acknowledges, however, that a resentencing allows both sides to present facts that occurred after the murder. As this Court recently stated, "under *Elledge v. State*, 346 So.2d 998 (Fla.1977), and its progeny, previous violent felony convictions suffice for purposes of the prior violent felony aggravator so long as the convictions predate the sentencing, even when the crime underlying the conviction occurred after the crime for which the

defendant is being sentenced." Knight v. State, 721 So.2d 287, 297 (Fla. 1998). Booker's 1980 conviction qualifies for this aggravator. Moreover Booker overlooks his 1974 robbery conviction in this issue. "Robbery is per se a crime of violence for purposes of the statutory aggravating circumstance of previous conviction of a crime involving the use or threat of violence." Johnson v. State, 465 So.2d 499, 506 (Fla.1985). The record supports this aggravator, and its finding should be affirmed.

Regarding the third aggravator, the court found:

> 3. The capital felony was committed while the Defendant was engaged in the commission of sexual battery and burglary.
>
> Defendant was convicted of the crime of sexual battery of Lorine Harmon at the guilt phase of his trial in 1978 and the judgment and sentence finding him guilty of the crime of sexual battery was entered in evidence by the State as Exhibit No. 63.
>
> Defendant committed the murder of Lorine Harmon while he was present in her apartment in 1977. He was convicted of the crime of burglary at the original guilt phase of this proceeding in 1978 and the judgment and sentence convicting him of the crime of burglary was entered in evidence by the State as Exhibit No. 63.
>
> The State has proved beyond a reasonable doubt that the Defendant, STEPHEN TODD BOOKER, committed the premeditated first degree murder of Lorine Harmon while he was engaged in the commission of sexual battery and burglary.

> The Court gives great weight to this aggravating circumstance.

(R VII 1308). Booker's only complaint about this aggravator is that "whatever mental problems [he] had . . . reduced the significance of" this aggravator. (Initial brief at 58). The record supports finding this aggravator, however, and, because it is supported by competent substantial evidence, the circuit court's giving great weight to this aggravator should not be disturbed.

The court made the following findings regarding HAC:

> 4. The capital felony was especially heinous, atrocious, or cruel.
>
> In support of its position that the capital murder of Lorine Harmon was committed in a heinous, atrocious and cruel manner, the State introduced the testimony of Dr. Chantell Harrison, Professor of Pathology at the University of Texas. Dr. Harrison is a licensed medical doctor who was on the faculty of the University of Florida Medical School in 1977 when the murder of Lorine Harmon occurred.
>
> Dr Harrison is the pathologist who performed the autopsy of Lorine Harmon. She testified from her notes taken at the time of the original autopsy of Lorine Harmon, and based on her experience as a medical examiner and doctor since that time. The sequence of events leading to the death of Lorine Harmon is known only by the Defendant, but because of the testimony of Dr. Harrison, certain things are known generally about Lorine Harmon's death.

It is quite certain that Lorine Harmon was raped before she was murdered. Dr. Harrison testified that she took swabs of the vaginal area and some tissue samples to determine whether rape had occurred. Her examination detected the presence of spermatozoa in the vagina of Lorine Harmon which indicates that Lorine Harmon was raped.

Dr. Harrison also testified as follows regarding the extensive trauma to the vaginal area: “The external part of the vagina was bloody. There was clearly some hemorrhage there. And then in the vagina on all the soft tissue around all the way out to where the cervix of the uterus is, there was soft tissue hemorrhage there.”

Dr. Harrison stated the Mrs. Harmon was alive during the sexual assault because of the hemorrhage in the tissue around her vagina, and because there would not have been hemorrhage in the tissue if she had been dead.

During and after the rape was completed, the Defendant began to physically attack Mrs. Harmon. The doctor observed ecchymosis around her nose and eyes. This was in addition to the bloody ecchymosis around her vaginal entrance. This ecchymosis was caused by a blow to the face which undoubtedly was intended to subdue the struggling Mrs. Harmon. Ecchymosis would not be present unless Lorine Harmon were alive.

Dr. Harrison also noted defensive wounds, which she described as wounds 13 and 14, to the inside of Mrs. Harmon’s arm, and to her thumb. These wounds indicate that Mrs. Harmon was conscious, and aware of the attack. She held her arms up to protect her body from this stabbing by the Defendant, and suffered cuts on the inside of her arm and on the inside of her thumb.

Other wounds observed by Dr. Harrison included broken ribs indicating that the stabbing was extremely forceful and caused pain to Mrs. Harmon in addition to ultimately ending her life.

Dr. Harrison testified that two knives were used in the attack upon Lorine Harmon. The first knife used was what is commonly called a “paring knife.” It cannot be doubted that this was the first knife used to attack Lorine Harmon, and indeed it was the knife that caused her death. This shorter knife, or paring knife, penetrated the chest of Lorine Harmon, and “nicked” her aorta, causing her to bleed to death. Dr. Harrison indicated that Mrs. Harmon’s death caused by extensive bleeding would have taken some few minutes, and not a matter of mere seconds.

However, the short knife was not the only knife used in the attack upon Lorine Harmon. The Defendant apparently broke off the attack on Mrs. Harmon, sensing that he was not achieving the desired result, her death, and returned to the kitchen to obtain a large knife. It can be assumed that Lorine Harmon was still conscious at this point, because the Defendant would not have been motivated to further stab her body.

The Defendant retrieved a larger knife from the kitchen and attempted to slice Lorine Harmon’s throat with this knife. It cannot be assumed with certainty that Lorine Harmon was conscious at the time that this stabbing occurred, but she was still alive.

The forceful rape, the blow to the face, the broken ribs from the forceful stabbing, and the defensive wounds indicate that Mrs. Harmon was conscious and aware of the force of the attack upon her, and attempted to defend herself from the attack.

> The Court finds that the physical brutality of the rape and stabbing was especially torturous to the victim.
>
> The State has proved beyond a reasonable doubt that the premeditated murder of Lorine Harmon was heinous, atrocious and cruel.
>
> The Court gives great weight to the aggravating circumstance that the murder committed by STEPHEN TODD BOOKER was committed in a heinous, atrocious and cruel manner.

(R VII 1309-11). The record supports finding this aggravator, and it should be affirmed. Cf. Lott v. State, 695 So.2d 1239 (Fla.), cert. denied, 118 S.Ct. 452 (1997); Orme v. State, 677 So.2d 258 (Fla. 1996), cert. denied, 117 S.Ct. 742 (1998); Johnson v. State, 660 So.2d 637 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996).[4]

The circuit court found that Booker established all of his proposed mitigators. The court gave "great weight" to the extreme mental or emotional disturbance mitigator (R VII 1312) and "substantial weight" to the impaired capacity mitigator. (R VII 1313). The court gave "substantial weight" to the nonstatutory mitigators of sexual and physical abuse (R VII 1313) and "moderate weight" to Booker's suffering verbal abuse as a child, the

[4] HAC is frequently found and affirmed in stabbing deaths. E.g., Guzman v. State, 721 So.2d 1155 (Fla. 1998); Brown v. State, 721 So.2d 274 (Fla. 1998); Mahn v. State, 714 So.2d 391 (Fla. 1998); Whitfield v. State, 706 So.2d 1 (Fla. 1997), cert. denied, 119 S.Ct. 103 (1998).

inconsistency of his family life, and his voluntary alcohol and drug abuse. (R VII 1314-15). Finally, the court gave "little weight" and "slight weight" to the disruption of Booker's education, his ability to be a productive citizen, his remorse, and his having been honorably discharged from the armed services. (R VII 1314-17).

Booker claims that his mental problems, "near insanity," alcohol and drug use, and his mastery of the English language (initial brief at 60-68) preclude his being sentenced to death. Trial courts, however, have broad discretion in determining whether mitigators apply, and their decisions regarding mitigators will not be reversed absent a palpable abuse of discretion. E.g., Banks v. State, 700 So.2d 363 (Fla. 1997), cert. denied, 118 S.Ct. 1314 (1998). Moreover, "the weight to be given a mitigator is left to the trial judge's discretion." Mann v. State, 603 So.2d 1141, 1144 (Fla. 1992); Cave v. State, 727 So.2d 227 (Fla. 1998); Alston v. State, 723 So.2d 148 (Fla. 1998). Booker's judge did not abuse his discretion regarding the mitigators, and his findings should be affirmed. Cf. Zakrezewski v. State, 717 So.2d 488, 497 (Fla. 1998) (affirmed trial court's giving from "substantial" to "slight" weight to two statutory and fourteen nonstatutory mitigators), cert. denied, 119 S.Ct. 911 (1999); Elledge v. State, 706 So.2d

1340, 1347 (Fla. 1997) (trial court did not abuse its discretion in assigning mitigation "little weight"), cert. denied, 119 S.Ct. 366 (1998); Consalvo v. State, 697 So.2d 805, 819 (Fla. 1996) (within trial court's discretion to give mitigation "very little weight"), cert. denied, 118 S.Ct. 1681 (1998)'; see also Henyard v. State, 689 So.2d 239, 244 (Fla. 1996) (death sentence affirmed where trial court gave mitigators "some weight," "little weight," and "very little weight"), cert. denied, 118 S.Ct. 130 (1997).

Additionally, this Court has stated that is not its job to reweigh the evidence of aggravators, but, rather to review the record to determine if the trial court applied the right rule of law and if competent substantial evidence supports the aggravators. Willacy v. State, 696 So.2d 693, 695-96 (Fla.), cert. denied, 118 S.Ct. 419 (1997). This Court "is not a fact-finding body when it sits to hear appeals in death cases" and is "constrained by the four corners of the" circuit court's findings. Hamilton v. State, 678 So.2d 1228,1232 (Fla. 1996); Occhicone v. State, 570 So.2d 902, 905 (Fla. 1990) ("When there is a legal basis to support finding an aggravating factor, we will not substitute our judgment for that of the trial court"). When the aggravators and mitigators have been "established, assigning their weight relative to one another is a question entirely within the discretion of the finder of fact."

Johnson v. State, 660 So.2d 637, 647 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996). The circuit court, Booker's finder of fact, applied the correct rules of law, and competent substantial evidence supports its findings. Booker has failed to demonstrate an abuse of discretion in the court's evaluation and weighing of the aggravators and mitigators, and the court's finding death to be the appropriate penalty should be affirmed.

Besides being appropriate, Booker's death sentence is also proportionate. In Sliney v. State, 699 So.2d 662 (Fla. 1997), cert. denied, 118 S.Ct. 1079 (1998), this Court affirmed Sliney's death sentence for beating and stabbing the victim to death where there were only two aggravators (felony murder/robbery and avoid arrest), the statutory mitigators of age and no prior history and numerous nonstatutory mitigators. Horace Pope beat, kicked, and stabbed a woman in her home, and this Court affirmed his death sentence on two aggravators (prior felony and pecuniary gain), both statutory mental mitigators, and several nonstatutory mitigators. Pope v. State, 679 So.2d 710 (Fla. 1996), cert. denied, 117 S.Ct. 975 (1997). This Court found the death sentence proportionate in Orme v. State, 677 So.2d 258 (Fla. 1996), cert. denied, 117 S.Ct. 742 (1997), where the trial court weighed three aggravators (felony murder/sexual battery, HAC, and pecuniary gain) against the two

statutory mental mitigators. Emmanuel Johnson's death sentence for stabbing an elderly woman to death in her home was found to be proportionate based on three aggravators (prior violent felony, HAC, and pecuniary gain) and a multitude of nonstatutory mitigators. Johnson v. State, 660 So.2d 637 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996). In Rhodes v. State, 638 So.2d 920, 927 (Fla.), cert. denied, 513 U.S. 1046 (1994), this Court found the death sentence proportionate based on three aggravators (felony murder/attempted sexual battery, prior conviction, and under sentence of imprisonment) in spite of "substantial mental mitigation."

When placed beside comparable cases, it is obvious that Booker's death sentence is proportionate. That sentence, therefore, should be affirmed.

ISSUE V

WHETHER THE COURT PROPERLY EXCLUDED A DEFENSE WITNESS FROM THE SENTENCING PROCEEDINGS.

Booker claims that the circuit court erred by excluding one of his witnesses from the sentencing proceeding. There is no merit to this issue.

After Booker had been on death row for several years, Page Zyromski, a great-niece of the victim, wrote to Booker and

befriended him. (T XIV 2005 et seq.). During opening statement, defense counsel said that Zyromski would be the last defense witness called and described the relationship that had developed between her and Booker.[5] (T X 1544-46). After the state rested its case on March 24, 1998 (T XI 1711), the defense presented the affidavits of Booker's grandmother and of a teacher which were read to the jury. (T XI 1712-19). When the proceedings resumed the next day, defense counsel announced that Zyromski had asked him if she could remain in the courtroom and observe the proceedings before her testimony. (T XII 1726-27). The prosecutor objected, contending that instead of being controlled by the victim's exception, Zyromski was subject to the normal rules of sequestration. (T XII 1727-29). The court disagreed with the defense argument that Zyromski's being present would not prejudice the state and sustained the state's objection (T XII 1730), but allowed Zyromski to remain in the courtroom after she testified. (T XV 2135-36).

As Booker points out, article I, section 16 of the state constitution provides that victims of crimes, and/or their families, are entitled to attend criminal proceedings. E.g.,

[5] As it turned out, Zyromski was the next-to-last defense witness. Willard Spiegleman, who was to have testified earlier (T X 1539-40), was the last witness because of difficulties with his travel schedule from Texas. (T XIII 1910).

Farina v. State, 680 So.2d 392 (Fla. 1996). This right is not absolute, however, and exists only to the extent that it does "not interfere with the constitutional rights of the accused." Art. I, §16, Fla. Const. Thus, allowing a victim/witness to be present during opening statements has been found to be error. Martinez v. State, 664 So.2d 1034 (Fla. 4th DCA 1995).

Although the constitutional provision speaks only vis-a-vis the rights of victims and those on trial, the rule of sequestration is available to both parties in a trial. Therefore, "when requested by either side, the trial judge will exclude all prospective witnesses from the courtroom during the trial." Spencer v. State, 133 So.2d 729, 731 (Fla. 1961). The exclusion of witnesses is within the discretion of the judge, and the judge's decision will not be disturbed unless an abuse of discretion is demonstrated. Id.; Gore v. State, 599 So.2d 978 (Fla.), cert. denied, 506 U.S. 1003 (1992).

Booker has failed to show that the circuit judge abused his discretion. As the prosecutor pointed out, having Zyromski in the courtroom while all the other defense witnesses testified would have been dramatic and might have prejudiced the state. (T XII 1728). Zyromski, however, was available throughout these proceedings and could have testified at the beginning of Booker's

case and then observed the rest of the proceedings. Sireci v. State, 587 So.2d 450, 454 (Fla. 1991) (proper to allow victim's wife and son to remain in courtroom after their testimony), cert. denied, 503 U.S. 946 (1992). Instead, Booker chose to have her testify at the end of his case, even though scheduling was difficult due to the other witnesses' travel. (E.g., T XI 1719; T XIII 1910).

No abuse of discretion has been demonstrated, and this issue should be denied.

ISSUE VI

WHETHER THE TIME BOOKER HAS BEEN ON DEATH ROW CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Booker argues that his having been on death row since October 1978 constitutes cruel and unusual punishment. There is no merit to this claim.

As Booker acknowledges, this Court rejected this exact issue in Knight v. State, 721 So.2d 287 (Fla. 1998).[6] The Court addressed this issue as follows:

> Knight claims that to execute him after he has already endured more than two decades on death

[6] The state asks this Court to take judicial notice of Knight's argument on this claim in Knight v. State, no. 87,783, which is attached to this brief as appendix A for the Court's convenience.

> row is unconstitutionally cruel and unusual punishment. He also argues that Florida has forfeited its right to execute Knight under binding norms of international law. Although Knight makes an interesting argument, we find it lacks merit. As the State points out, no federal or state courts have accepted Knight's argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay. *See, e.g., White v. Johnson,* 79 F.3d 432 (5th Cir. 1996); *State v. Smith*, 280 Mont. 158, 931 P.2d 1272 (Mont. 1996). We also note that the Arizona Supreme Court recently rejected this precise claim. *See State v. Schackart*, 190 Ariz. 238, 947 P.2d 315, 336 (Ariz.1997) (finding "no evidence that Arizona has set up a scheme prolonging incarceration in order to torture inmates prior to their execution"), *cert. denied*, --- U.S. ---, 119 S.Ct. 149, --- L.Ed.2d --- (1998). . . . We similarly reject Knight's claim under international law.

Id. at 300; Elledge v. State, 706 So.2d 1340, 1342 n4, 1347 n10 (Fla. 1997) (finding no merit to Elledge's claim that death should not be a possible sentence based on unconstitutional delay), cert. denied, 119 S.Ct. 366 (1998).

Booker's only addition to Knight's argument is to cite Justice Bryer's dissent from the denial of Elledge's petition for certiorari. (Initial brief at 73). A dissent by a solitary jurist presents no basis for revisiting this issue. As this Court has stated previously: "Once the legislature has resolved to create a death penalty that has survived constitutional challenge, it is not

the place of this or any other court to permit counsel to question the political, sociological, or economic wisdom of the enactment." Johnson v. State, 660 So.2d 637, 646 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996). This claim has no merit and should be denied.

CONCLUSION

For the foregoing reasons the State of Florida asks this Court to affirm Booker's death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Dave Davis, Assistant Public Defender, Office of the Public Defender, Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida 32301, this _____ day of June 1999.

Barbara J. Yates
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APPENDIX "A"

96-13065

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,783

THOMAS KNIGHT, n/k/a
ASKARI ABDULLAH MUHAMMAD

Appellant,

-vs.-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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factors the jury found in making its recommendation and, thus, cannot rationally distinguish between those cases where death is imposed and those where it is not." *Combs*, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring); *cf. Parker v. Dugger*, 498 U.S. 308, 321 (1991) (emphasizing importance of adequate appellate review to individualized sentencing). The failure to require specific jury findings therefore impermissibly undermines the reliability of the sentencing process and the adequacy of appellate review.

XVII.

BECAUSE OF THE THE INORDINATE LENGTH OF TIME THAT THE DEFENDANT HAS SPENT ON DEATH ROW, ADDING HIS EXECUTION TO THAT PUNISHMENT WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 17, THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV, AND BINDING NORMS OF INTERNATIONAL LAW.

Mr. Muhammad has been on death row for 22 years. At least 14 years of the delay in carrying out his execution is attributable to the state, which denied him a constitutional capital sentencing hearing in early 1975. After his convictions and death sentences were affirmed on automatic, mandatory direct appeal, Mr. Muhammad initiated the post-conviction appeals in state and federal courts that led to his death sentences being vacated. Although he initiated these post-conviction appeals, this period of delay must be attributed to the state, because it was the state who denied him a constitutional sentencing hearing in the first place. *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 1329, 1333 (Ariz. 1994) (death row inmate not responsible for delay resulting

from a successful post-conviction appeal).

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

First, the inherent cruelty involved in the prolonged process of carrying out a death sentence has been recognized by numerous jurists and commentators.[30] Where, as here, the inherent cruelty of living under a sentence of death is prolonged for more than two decades, at least 14 years of which is attributable to the state's initial failure to give the defendant the constitutional sentencing hearing to which he was entitled, such suffering cannot be considered incidental to the processing of the appeals. It is unnecessary and thus unconstitutional. Such long-term suffering becomes a separate form of punishment, which is equivalent to or greater than an actual execution. *See Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari); *cf. In re Medley*, 134 U.S. 160, 172 (1890). As a result of the inordinate delay, death cannot be added to the punishment; the only permissible punishment under the Eighth Amendment is life imprisonment.

Second, the decision in *Gregg v. Georgia*, 428 U.S. 153 (1976), holding that the Eighth

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[30]*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. Anderson*, 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").

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, e.g.*, IV Blackstone's Commentaries on the Laws of England 404 (5th ed. 1773), and cannot be justified by reference to the practice of 1789, when 14-year delays seldom, if ever occurred, *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.).[31] 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 would be served by executing Mr. Muhammad for the capital offense which he was convicted of in 1975--at this point or at any point 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

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[31]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"); *McKleskey v. Kemp*, 481 U.S. 279, 301 (1987) (quoting *Gregg*).

the Convention Against Torture and Other Cruel, Inhuman or Degrading Treament 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).[32] Numerous leading 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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[32]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 punishments" 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 the status of a "peremptory norm" of international law, or *jus cogens*. *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. 677, 700 (1900).