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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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ARGUMENT

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 major issue presented by this case focusses on the continuing viability of Nixon v. State, 572 So.2d 1345 (Fla. 1990). The State takes the obvious approach, maintaining that Nixon remains good law. It relies on opinions from this Court that have summarily cited that case without any further examination of its underlying rationale. (Answer Brief at pages 8-9). Booker, of course, recognized this Court's adherence to Nixon in his Initial Brief on page 24, footnote 11, but argued that this Court should recede from it, and he provided four reasons why it should do so. First, the Nixon rationale is flawed. Second, the case specific reasons this Court approved are missing in this case. Third, recent decisions from the United States Supreme Court strongly indicate that sentencing juries must have evidence of other punishment the defendant faces to guarantee the required, enhanced reliability of a death sentence. Finally, if the State can use the defendant's prior record to justify a death sentence, and it can present the jury the facts of his earlier,

violent crimes, fairness and a commitment to a "level playing field" dictate that the jury should hear all the facts surrounding the Defendant's criminal record. An absolutely integral, fundamental "fact" of those crimes is the punishment he received. The State never says much about those arguments.

On page 9 of its brief, the State says "Future dangerousness is not an aggravator in this state, and there was no effort to impose the death penalty based on future dangerousness." (Footnote omitted, but discussed below.) In Knight v. State, 24 Fla. L. Weekly S135 (Fla. March 11, 1999), this Court said it was not a nonstatutory aggravator. It has never said that future dangerousness is not found in the statutory aggravating factors. Future dangerousness, as an explicit aggravator, of course, finds no mention in Florida's death penalty scheme, as, for example, it does in Texas' statute, See, Estelle v. Smith, 451 U.S. 454 (1981). Booker acknowledged as much on page 31 of the Initial Brief. But, as also argued on that and the next page, considerations of Booker's future dangerousness, or his propensity to commit crimes, inherently finds expression in two aggravating factors found in section 921.141(5), Florida Statutes (Supp. 1998): prior conviction of a violent felony, and committing a murder during the course of a sexual battery and burglary. Florida adopted a modified form of the death penalty scheme created by the drafters of the American Law Institute. They included the prior conviction of a violent felony as a capital sentence aggravator because a person's history of violent crime strongly indicates "the defendant is likely to prove dangerous to life on some future occasion." Section

201.6, American Law Institute, Model Penal Code, 1980. Future dangerousness has always been a legitimate sentencing consideration, and Florida includes it as a factor in determining whether a defendant should live or die.

In footnote three on page 10 of its brief, the State says "However, Booker provides no authority for his extraordinary assumption that "'Propensity to commit violent crimes' is synonymous with future dangerousness." (Initial Brief at 41 n.20).[1] Well, besides being intuitively obvious, decisions from courts of this State have also made that extraordinary assumption. In Law v. State, 639 So.2d 1102, 1103-1104 (Fla. 5th DCA 1994), the court said,

> The actions of the defendant on the evening of this offense in light of his past record establish clearly that his violent propensities are escalating and a guideline sentence would not safeguard society from his future dangerousness. See, White v. State, 548 So.2d 765 (Fla.1st DCA 1989); Cochran v. State, 534 S.2d [sic] 1165 (Fla. 2nd DCA 1988); and, DeGroat v. State, 489 So.2d 1163 (Fla. 5th DCA 1986).

The First District Court of Appeals' decision in Tallahassee Furniture Company v. Harrison, 583 So.2d 744, 757-58 (Fla. 1st DCA 1991), a civil case, provides an explicit connection between a person's criminal propensities and his future conduct:

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[1] Booker made that observation in reference to what this Court had noted in Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977): "Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge."

> Appellant also maintains that the element of foreseeability is not present in this case and that, at most, Tallahassee Furniture's employment of Turner merely provided the occasion for Harrison to give Turner the television set and for Turner to use the television as a pretext to contact Harrison. Again, we disagree. As stated by this court in Paterson v. Deeb, 472 So.2d 1210, 1218 (Fla. 1st DCA 1985), rev. denied, 484 So.2d 8 (Fla.1986):
>
>> In determining foreseeability, it is not necessary to "be able to foresee the exact nature and extent of the injuries or the precise manner in which the injuries occur"; it is only necessary that "the tortfeasor be able to foresee that some injury will likely result in some manner as a consequence of his negligent acts." Crislip v. Holland, 401 So.2d 1115, 1117 (Fla. 4th DCA 1981). (emphasis in original).
>
> It would seem almost unnecessary in these times to require proof of the correlation between a person's history of unlawful and violent behavior, drug abuse, and mental illness, and that person's propensity for future dangerousness. Nevertheless, appellee established such a correlation through extensive testimony of police officers, psychologists, and an expert in criminology, Professor White. While it is true, as explained by Professor White, that the science of future behavior has not developed to the point of permitting one to predict the time or exact nature of future acts, the best indicator of potentially-dangerous future conduct is the history of a person's past conduct.

(Emphasis supplied.)

Hence, a defendant's violent propensities closely correlates with his future dangerousness, and is virtually synonymous with it. If the prosecution can justify a death sentence based solely on those tendencies, State v. Dixon, 283 So.2d 1, 9 (Fla. 1972),

the jury should also know what punishment society has imposed to protect itself from his future dangerousness.

The State, on pages 9-10 of its brief, factually distinguishes Simmons v. South Carolina, 512 U.S. 154 (1994); California v. Ramos, 463 U.S. 992 (1983); and Beck v. Alabama, 447 U.S. 625 (1980), from the facts of Booker's situation. But, in doing only that, it has missed the reason Booker relied on those decisions. The evidence of the Defendant's 100 years additional punishment was uncontested by anyone, including the State. Everyone, except the jury, knew what additional prison time he faced, and that ignorance undermined the reliability of its recommendation. As Justice Souter observed in his concurring opinion in Simmons, "[The Eighth Amendment] requires provision of 'accurate sentencing information [as] an indispensable prerequisite to a reasonable determination of whether a defendant shall live or die' and invalidates 'procedural rules that [ten]d to diminish the reliability of the sentencing determination.'" The point of Simmons, and the other cases Booker cited in his Initial Brief, is that jury speculation, anathema in any legal setting, is especially loathed in capital sentencing. Instead, the jury should have complete, accurate sentencing information in order to make an informed, reliable recommendation of whether the defendant should live or die. If the trial judge can satisfy that fundamental requirement of death penalty sentencing by answering a question about the time Booker must remain in prison it must do so. Simmons, cited above, at 129 L.Ed. 2d 144.

Moreover, what time a defendant has to serve in prison is a consideration that trial judges use when sentencing defendants in capital or noncapital cases. Frequently notations in sentencing documents order a sentence be served "concurrent to other sentences being served," or "consecutive to the sentence being served in case number 99-xxx." Guilt, innocence, and even the crime charged often have a practical irrelevance to the sentence imposed. The bottom line, fundamental concern defendants, victims, and society have focusses on how much time the Defendant will serve. Why? Because they want to know 1. If he has been punished adequately for what he had done (revenge), and 2. How long they will be protected from his or her depredations (deterrence). Are they valid concerns? Yes, of course. Should the jury be given accurate information that helps them reach a just recommendation? The question answers itself. Should the jury, which in this unusual type of proceeding is a co-sentencer with the judge, be as well informed about the facts of the case as he or she is? If reliability, no, heightened reliability, is the defining feature of capital sentencing, Woodson v. North Carolina, 428 U.S. 280, 305 (opinion of Stewart, Powell, and Stevens, JJ)(1976), there is no reasoned justification for keeping from the sentencer in this case information courts for hundreds of years have have used in determining the just sentence a person convicted of some crime should receive.

On page 10 of its brief, the State says, "Also, unlike for Simmons, parole is a possibility for Booker." There was no evidence of that, and the State in its brief, as the

jury in its deliberations had to do, must speculate to reach that conclusion. They also had to guess about the other punishment Booker faced for the other serious crimes they knew he had been convicted of committing. But they were never told if the punishment for those offenses would be served concurrently, consecutively, or if in fact any had been imposed. Based on the information this jury had, they may have believed Booker would be released within two or three years of their recommendation.

On pages 10-11 of its brief, the State contends no error occurred because "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)." That, of course, ignores the issue Booker presented. The court erred in refusing to admit evidence that Booker faced an additional 100 years in prison following whatever sentence the court imposed in this case. This issue has nothing, directly, to do with the court denying some requested jury instruction on mitigation. Had the court admitted evidence the Defendant faced an additional very lengthy prison term, but refused to instruct that was mitigation, this Court would be facing something closer to the State's point. But it did not, and this issue is likewise unconcerned with that speculative problem.

Finally, on page 11, the State contends that the court's "response to the jury's question, i.e., that the jurors would 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)."

First, in response, the State has ignored what the United States Supreme Court concluded in Simmons v. South Carolina, 512 U.S. 154 (1994):

> While jurors are ordinarily presumed to follow the court's instructions,. . . .we have recognized that in some circumstances "the risk that the jury will not, or cannot, follow instructions 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."

129 L.Ed. 2d at 147.

In this case, unlike the facts in Whitfield, and Waterhouse, the jury faced the very real possibility that if they recommended life for Booker, he would be on their streets in two or three years. The consequence of that possibility was so significant to them personally that we cannot presume the jury followed the court's guidance in this case.

Moreover, in those two cases, the jury questions about parole possibilities focussed exclusively on the capital murder the defendants had committed. The jury instructions on the penalties for those murders was accurate. The defendants were sentenced either to life in prison without the possibility of parole, or with the possibility after twenty-five years. Neither case dealt with the situation here where the trial court refused to give the jury any guidance on the punishment Booker had to face in addition to whatever sentence he received for the capital murder.

Finally, giving the jury an instruction that Booker faced an additional 100 years in prison, besides being accurate, was better than what the court told them. "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.'" Simmons, cited above, at 129 L.Ed. 2d 144.

While Booker has attacked the continuing validity of Nixon, this Court can grant him relief by distinguishing that case, in the following ways:

1. The jury was faced with the real possibility that Booker would be on the streets in two or three years. It had no similar concerns in Nixon.

2. The sentences Booker faced were known, having been imposed years earlier, contrary to the facts in Nixon, where the trial court and jury could only speculate about the punishment Nixon would have received for the other, contemporaneously committed crimes he had committed at the time of the murder.

3. Trial counsel never argued, at the court's invitation, that Booker faced punishment for other serious crimes.

4. Section 921.141 has been modified so that the possibility of parole after serving 25 years in prison no longer exists.

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

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.

> Red herring . . . so called from the traditional practice of dragging a red herring across a trail to destroy the scent: a diversion intended to distract attention from the real issue. Webster's Third New International Dictionary

As stated in the Initial Brief, this issue focusses on the genuineness of the State's reason for excusing Mrs. Filer, a black prospective juror. The prosecutor peremptorily excused her because (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 so swayed by the editors of six journals in English literature and poetry Booker planned to call as witnesses (9 T 1382-83). The genuineness can be tested by examining other members of the venire. If one has the same "disabilities" as those articulated by the prosecution justifying excusing the challenged juror, yet he or she remains on the jury, then the appellate court can confidently conclude the particular peremptory challenge has not been used in a race neutral manner. Randall v. State 718 So.2d 230 (Fla. 3d DCA 1998); Overstreet v. State, 712 So.2d 1174 (Fla. 3d DCA 1998). The State has ignored that focus in favor of an easier, but irrelevant, analysis

The key sentence in the State's argument on this issue appears on page 15 of its brief: "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." Even if we assume that is true, so what? The law, as this Court has stated, and the lower appellate courts have applied, requires the reviewing judges to examine the genuineness of the State's exercise of one of its peremptory challenges on Ms. Filer. Thus, that she may have given responses similar to other members of the venire whom the State also peremptory challenged misses the point: she gave similar answers as Mr. Pepper who sat as a juror.

In Foster v. State, 24 Fla. L. Weekly D1039 (Fla. 4th DCA April 28, 1999), the State peremptorily challenged two black members of the venire for the admittedly race neutral reason that they had family members who had been arrested. The genuineness of that reason, however, was refuted when it accepted a non-black whom the police had also arrested.[2]

> The State's attorney said that he struck Ms. Sands because she indicated her brother had been arrested. He also questioned the credibility of her contention that her brother was arrested for traffic tickets. The prosecutor explained that Ms. Montgomery was struck because her brother had been arrested numerous times, including once for robbery.

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[2] The State had also accepted two non-black members of the venire who had either been arrested themselves, or had relatives who the police had taken into custody. At the prodding of the court, the prosecution peremptorily excused them.

> Notwithstanding, the record reflects that the State accepted Ms. Cardenas, a non-black juror, although it was revealed during voir dire that she failed to disclose on the questionnaire that her brother had been arrested.
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> * * *
>
> In light of this record, we find that the trial court clearly erred in finding that the State's reason for peremptorily striking the only two black jurors was genuine. The State's challenge to these two jurors was equally applicable to non-black jurors who were not challenged. . . . Because there were no other race-neutral reasons proffered to justify the strike, any suggestion of genuineness in the State's decision to strike these two black jurors was completely refuted.

Accord: <u>Brown v. State</u>, 24 Fla. L. Weekly D 1363 (Fla. 4th DCA June 9, 1999); <u>Daniel v. State</u>, 697 So.2d 959 (Fla 2d DCA 1997)(Where Ortiz's response was shared by another juror who was not challenged by the prosecutor, the trial court erred in failing to reject the state's explanation as pretextual.); <u>Stroud v. State</u>, 656 So.2d 195 (Fla. 2d DCA 1995)(strike based on briefness of juror answer was insufficient where other juror responses on the same issue were also brief); <u>Richardson v. State</u>, 575 So.2d 294 (Fla. 4th DCA 1991)(strike based on challenged juror's response which was similar to opinion of unchallenged juror was improper).

The State cites two cases at the end of its argument, <u>Hudson v. State</u>, 708 So.2d 256 (Fla. 1998), and <u>Nelson v. State</u>, 688 So.2d 971 (Fla. 4th DCA 1997). They have no significance in resolving this issue. <u>Hudson</u> is a routine application of the law on this

issue that amounted to dicta because Hudson "accepted the jury without renewing his challenge." Id. at 262. That is, he failed to preserve the Neil[3] issue for appellate review. Similarly, in Nelson, defense counsel failed to adequately raise his objection for the lower court to decide. Those cases have no pertinence here because Booker's lawyer clearly raised the issue he now argues to this Court, and he renewed that objection at the close of the jury selection (10 T 1494).

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

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[3] State v. Neil, 457 So.2d 481 (Fla. 1984).

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 Booker's closing argument, the Defendant focused on only the mitigation present in his case. He never challenged the presence, sufficiency, or weight of any of the aggravating factors. As such, what was "truly mitigating" was his only defense. On that crucial issue, the court erred in refusing to define that central, crucial term. Indeed, the court itself believed the instruction "would certainly clarify things in the jury's mind, especially this stilted language, [but] I'm just not going to do it." (14 T 2116).

Even though this Court may have rejected this issue in other capital cases, those decisions should have no controlling precedence here. That is, the re-emergence of Booker's genius in the years since sentenced to death significantly mitigates a death sentence. Of more importance, the jury may well have been uncertain factors that in 1977 may have mitigated a death sentence, but whose continuing viability they may have questioned. Defining mitigation would have eliminated some of the unnecessary confusion about that term, in light of the long passage of time and the demonstrated redemption Booker has shown.

Thus, because of the unusual nature of this case, this Court can only conclude with the trial court that Booker's proposed instruction defining mitigation would "certainly

clarify things." It must reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE IV

A DEATH SENTENCE IS PROPORTIONATELY UNWARRANTED IN THIS CASE.

Booker has two points to make in reply to the State's argument on this issue: 1. The State says very little about Booker's proportionality argument. 2. What it does say is easily distinguished.

1. The State says very little about Booker's proportionality argument.

Fundamentally, the State never addressed the proportionality argument Booker presented in his Initial Brief: "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." (Initial Brief at p. 60)Accordingly, the trial judge found both statutory mental mitigators and gave them either great or substantial weight. He also found related nonstatutory mitigators of child sexual, physical, and verbal abuse, and gave them substantial weight. It gave moderate weight to his alcohol and drug use (7 R 1311-16). The State, instead, spends most of its effort arguing issues Booker never contested. He conceded, for example, at trial and on

appeal, that the State had proved, and the Court had correctly found four aggravating factors.(Appellee's Brief at pp. 18-25).[4]

Booker never asked this Court to reweigh any of the aggravators or mitigators found by the court (Appellee's Brief at pp. 25-27). Instead, his argument focussed on this Court's unique duty to ensure death is the proportionally correct sentence. This obligation requires more than counting aggravators and mitigators found in a particular case, or determining whether sufficient evidence supports finding them. This Court examines the quality of those factors and compares the facts of this case with those involving defendants similarly situated. Urbin v. State, 714 So.2d 411, 415 (Fla. 1998).

The State on page 25 of its brief ignores that analysis by reciting the bland, deceptive truism that "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."[5] (Cites omitted.) Well, OK, but so what? Booker has

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[4] Booker does, however, contest the State's argument that the trial court could have used his 1974 robbery conviction as a prior conviction for a violent felony. (Appellee's Brief at p. 20). The lower court did not use that conviction, and the State never objected that omission (22 R 2705). It cannot now raise the objection to this Court. Cannady v. State, 620 So.2d 165(Fla. 1993).

[5] It is deceptive because in State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), this Court said: If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, Supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

never complained the court failed to find some mitigation, so he is mystified about the relevance of that sentence to the State's argument. Again, this issue focuses on this Court's duty to conduct proportionality review, and applying the special rules this Court has developed to fairly carry out that obligation. It has nothing to do with the correctness of the lower court's findings about the presence or absence of aggravating and mitigating factors, or the weight they should be given.

If it did, the State would certainly have argued Booker had not preserved that issue for appeal. He never objected to any failing of the trial court on those grounds at the charge conference or after the court had read the instructions to the jury. That it has remained silent on that failing indicates that it knows, as well as Booker, that the points it has propped up and knocked down have nothing to do with the proportionality argument presented by this issue. Thus, the first 10 pages have virtually nothing to do with the claim he has raised here. Only after it has wandered down the wrong path does it finally return to the trail Booker followed. In its last two paragraphs on this issue, the State more closely addresses the point he raised. Even there, however, the several cases it cites are readily distinguishable.

2. The State's proportionality argument refuted.

Booker has life long, well documented mental illnesses, which significantly distinguishes his situation from the short term, voluntary, cocaine induced anger Michael Orme had. Orme v. State, 677 So.2d 258 (Fla. 1996). Unlike what happened here, the trial court in that case also found both statutory mental mitigators but gave them only "some" weight, and it rejected his claim of an unstable childhood as mitigating. Id. at 261. The quality of Booker's mitigation here also obviously differs from that in Sliney v. State, 699 So.2d 662 (Fla. 1997), in which none of the statutory mental mitigators were found, a point this Court particularly noted in its proportionality analysis. Sliney, at 672. Similarly, in Johnson v. State, 660 So.2d 637 (Fla. 1995), the court found three aggravators (including financial gain), none of the statutory mental mitigators, but a lot of nonstatutory nonmental mitigation.

Pope v. State, 679 So.2d 710 (Fla. 1996), has a superficial similarity to this case only in that the trial court found both of the statutory mental mitigators. Pope, unlike Booker, however, made his proportionality argument in the context of the murder being a lover's quarrel that had gotten out of control. "Pope argues that his death sentence should be reduced to life in prison to comport with the line of cases dealing with murders arising from lovers' quarrels or domestic disputes." The majority rejected that contention, finding the homicide a "premeditated murder for pecuniary gain, not a heat of passion killing resulting from a lovers' quarrel." Justices Kogan and Anstead, dissenting, concluded that

death was disproportionate, largely due to the single disability of the defendant's chronic alcoholism.

While Booker certainly had alcohol (and drug) addictions, his more serious near insanity drove his actions on November 7, 1977. Pope's alcoholism could not mitigate his greed. Here the evidence of Booker's final mental collapse pervades the record on appeal and explains the senseless attack on a 94-year-old stranger. Booker has also displayed a genuine, long term remorse for what he has done.

In Rhodes v. State, 638 So.2d 920 (Fla. 1994), the trial court found only one of the statutory mental mitigators-the defendant's capacity to appreciate the criminality of his conduct substantially impaired, and it explicitly refused to consider that he was under the influence of an extreme mental or emotional disturbance, or that he was under extreme duress due to alcohol consumption and his family history. This Court found death proportionately warranted in light of the three aggravating factors present.

Significantly, here, unlike Pope, Orme, and Johnson, money never drove Booker to murder. Indeed, although he took some jewelry from Loraine Harmon, he threw it away once he discovered he had it (12 T 1846), and the trial court never found that he had killed her for pecuniary gain (7 R 1305-1308). Unlike those cases, and Rhodes, madness drove Booker, and the extensive statutory and nonstatutory mental mitigation the court found testifies to that.

Contrary to those cases, Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), has significant, compelling similarities. In that case, the defendant tried to rob a bank using a hostage he had kidnapped. The plan collapsed during the kidnapping, and a police officer was killed. The court, in sentencing Fitzpatrick to death, found five aggravating factors. Significantly, it also found the two statutory mental mitigators. Supporting those latter findings was testimony of witnesses and family members who testified of the defendant's bizarre behavior on the day of the crimes and his life long mental quirkiness. The unanimous opinion of the mental health experts who had examined him justified the trial court's finding of both mitigators. Gunsby v. State, 574 So.2d 1085 (Fla. 1991). Although the five aggravators made the case one of the most aggravated, the extensive, unrebutted mitigation did not make it one of the least mitigated murders. There, like here, the mitigation, far more than the aggravation, defined the Defendant and his crimes. State v. Dixon, 283 So.2d 1, 8 (Fla. 1973); Almeida v. State, 24 Fla. L. Weekly S 336 (Fla. July 8, 1999).

In Almeida, this Court clearly articulated the two prong analysis involved in its proportionality review:

> "Our law reserves the death penalty only for the most aggravated and least mitigated murders". Kramer v. State, 619 So.2d 274, 278 (Fla. 1993). Thus, our inquiry when conducting proportionality review is two pronged: We compare the case under review to others to determine if the crime falls within the category of both (1)the most aggravated, and (2) the least mitigated.

24 Fla. L. Weekly at S339. (Emphasis in opinion.)

While several aggravators applied in this case, Booker has argued they have a poor quality. Arguably, though, the State has met the first prong of the required two prong analysis. It has utterly failed, though, in showing that this is not one of the least mitigated. Besides the two statutory mental mitigators, the court found that he had suffered physical, sexual, and verbal abuse as a child. Predictably, he self medicated himself with drugs and alcohol as a teenager and adult. By the time he was 16, he was an alcoholic, and when he left the army he had a drug habit as well. Those addictions only emphasized the deep seated psychological problems that had emerged in his childhood, followed him into the army, back into the civilian world, and into prison. The seriousness of the recognized, but never treated, madness finds support from the extremely high levels of psychotropic drugs given him during his stay in military hospitals (12 T 1763-64). Significantly, like Fitzpatrick, there is no evidence refuting or weakening any of the mental mitigation the court found. The compelling quality of Booker's mitigation not only becomes overwhelming, it infects and reduces the significance of the aggravation the court found, particularly the heinous, atrocious, or cruel aggravator. (Initial Brief at pp. 58-59) It also prevented the court from finding he had committed the murder in a cold, calculated, and premeditated manner. See, Fitzpatrick, at 812. ("In contrast, the aggravating circumstances of heinous, atrocious, and cruel, and cold, calculated and premeditated are

conspicuously absent."); Larkins v. State, 24 Fla. L. Weekly S379, 381 (Fla. July 8, 1999).

Moreover, when Booker's mitigation is compared with that presented in other cases in which this Court has reduced death sentences to life in prison on proportionality grounds, it must reduce his death sentence to life in prison. Urbin v. State, 714 So.2d 411 (Fla. 1998)(substantial mitigation including impaired capacity, deprived childhood, and youth.); Curtis v. State, 685 So.2d 1234 (Fla. 1996)(substantial mitigation including remorse and youth); Knowles v. State, 632 So.2d 62 (Fla. 1993) (substantial mitigation including brain damage and impaired capacity.)

What Booker said on page 62 of his brief remains true:

> Thus, on November 9, 1977, Booker was 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 Loraine Harmon not from some cold, calculated plan, nor with any intent to steal from her. 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).

That remains true. In light of the quality of the aggravators and mitigators, this is one of the least aggravated and most mitigated cases presented to this Court. It should reverse the trial court's sentence of death and remand with instructions that it impose a sentence of life in prison.

ISSUE V

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

On page 30 of its brief, the State says, "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)." That is speculative as a matter of fact, and incorrect as a matter of law. 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) .

The State also says on the same page that Zyromski was available throughout the proceedings, and she could have testified at the beginning of Booker's case and then observed the rest of the trial. That he wanted her to testify at the close of his case was a strategic decision that, as the State also notes, created some scheduling problems. Counsel wanted her to testify last because she gave very powerful reasons for Booker to live. That decision has no pertinence to the constitutional question of whether Zyromski had the right as a victim to sit in the courtroom during Booker's sentencing trial.

Also, on page 30 of its brief, the State argues that a rule of procedure--the rule of sequestration--somehow trumps the constitutional right of victims to be present "at all

crucial stages of criminal proceedings." The only restriction on that right arises when his or her presence interferes with "the constitutional rights of the accused."Article I, Section 16 (emphasis supplied). If the victim could attend a sentencing even if by doing so it would interfere with the defendant's non-constitutional rights, it is difficult to believe he or she must be excluded because it might similarly interfere with a court made rule the State is invoking.

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.

On Page 32 of its brief, the State says "Booker's only addition to Knight's argument is to cite Justice Breyer'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." That is absolutely true, and is a principle as fundamental as the constitution itself. But Justice Stevens has also joined Justice Breyer, so that bedrock truth crumbles. Lackey v. Texas, 514 U.S. 1045 (1997) (Stevens, dissenting from denial of certiorari). It is replaced by the equally true principle that when a train is pulling out of the station we need to get on before it runs over us. In this instance, the momentum has started, Ceja v. Stewart, 134 F. 3d 1368 (9th Cir 1998) and this Court needs to address this issue.

CONCLUSION

Based on the arguments presented here, Stephen Todd Booker respectfully requests this Court reverse the trial court's sentence of death and remand for either a new sentencing hearing or the imposition of a life sentence without the possibility of parole for 25 years.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to BARBARA YATES, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL 32399-1050; and a copy has been mailed to appellant on this date, October 6, 2000.

Respectfully submitted,

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