IN THE SUPREME COURT OF FLORIDA

STEPHEN TODD BOOKER,

Appellant,

v. CASE NO. SC06-121

STATE OF FLORIDA,

Appellee.

______________________________/

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

ANSWER BRIEF OF THE APPELLEE

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I. PRELIMINARY STATEMENT

Appellant, STEPHEN TODD BOOKER raises two issues in his appeal from the denial of his second amended motion for post-conviction relief. References to the appellant will be to “Booker” or “Appellant”. References to the appellee will be to the “State” or “Appellee”. The four-volume record on appeal in the instant case will be referenced as “PCR” followed by the appropriate volume number and page number. References from Booker’s direct appeal will be referred to as “TR” followed by the appropriate volume and page number. References to Booker’s second penalty phase proceedings will be to “2PP” followed by the appropriate volume and page number. References to Booker’s initial brief will be to “IB” followed by the appropriate page number.

II. **STATEMENT OF THE CASE AND FACTS**

Stephen Todd Booker, born on September 1, 1953, was 24 years old when he murdered ninety-four-year-old Lorine Demoss Harmon. The procedural history and relevant facts surrounding the November 9, 1977, murder are set forth in this Court's opinion on direct appeal from Booker's second penalty phase proceedings:

> ... The victim, an elderly woman, was found dead in her apartment in Gainesville, Florida. The cause of death was loss of blood due to several knife wounds in the chest area. Two knives, apparently used in the homicide, were embedded in the body of the victim. A pathologist located semen and blood in the vaginal area of the victim and concluded that sexual intercourse had occurred prior to death. The apartment was found to be in a state of disarray; drawers were pulled out and their contents strewn about the apartment. Fingerprints of the defendant were positively identified as being consistent with latent fingerprints lifted from the scene of the homicide. The defendant had a pair of boots which had a print pattern similar to those seen by an officer at the scene of the homicide.
>
> Test results indicated that body hairs found on the clothing of the defendant at the time of his arrest were consistent with hairs taken from the body of the victim.
>
> After being given the appropriate warnings, the defendant made a statement, speaking as an alternative personality named "Aniel." The "Aniel" character made a statement that "Steve had done it."

Booker v. State, 773 So.2d 1079 (Fla. 2000).

Booker was charged by indictment with first-degree murder, sexual battery, and burglary. Booker pled not guilty and proceeded

to a jury trial. On June 21, 1978, contrary to his pleas, the jury returned a verdict finding Booker guilty of first-degree murder, sexual battery, and burglary. Booker v. State, 773 So.2d at 1082.

During the sentencing phase of the proceedings the defendant testified. At the conclusion of his testimony, and against the advice of his attorney, the defendant made a statement to the jury saying, "A defendant found guilty of such a crime should receive the death penalty." The jury recommended the death penalty and the trial judge sentenced Booker to death. This Court affirmed Booker's convictions and sentences on direct appeal. Booker v. State, 397 So.2d 912 (Fla. 1981).

On July 20, 1981, Booker filed a petition for writ of certiorari. The United States Supreme Court denied review on October 19, 1981. Booker v. Florida, 454 U.S. 957, 70 L.Ed.2d 261, 102 S.Ct. 493 (1981).

Subsequently, after initiating post-conviction proceedings in both state and federal court, a new penalty phase was ordered.[1]

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[1] Booker received a new penalty phase as a result of a Hitchcock error. During the penalty phase, the prosecutor told the jury that the only mitigating circumstances they could consider were those listed in Florida's death penalty statute. At the conclusion of that penalty phase hearing, the jury, by a majority vote of nine-to-three, recommended that Booker receive the death penalty. Booker v. State, 773 So.2d at 1082.

Booker’s new penalty phase took place before a new jury in March 1998.

During its case-in-chief, the State introduced documentary evidence showing that (1) Booker was convicted of robbery in 1974; (2) Booker was out of prison on "Mandatory Conditional Release" when he murdered Mrs. Harmon; (3) Booker was convicted of first-degree murder, sexual assault, and burglary for the 1977 criminal episode involving the victim; and (4) Booker was convicted of an aggravated battery which occurred in 1980. The State also read into evidence the testimony of two witnesses, Ms. Frank Johnson, and Ms. W.K. Klinepeter. (2PP Vol XI 1600-1611). Both witnesses testified, subject to cross-examination, at Booker’s first trial and both were deceased at the time of Booker’s second penalty phase proceedings. (2PP Vol. I 8).

The State called four witnesses to testify before Booker’s second penalty phase jury. The first, Officer Marvin Thomas Sr., a former guard at Florida State Prison, explained how Booker had burned him with a flammable substance while he was passing by Booker's prison cell. This attack led to Booker’s 1981 conviction for aggravated battery. The other three State witnesses testified about

the facts surrounding the Harmon murder. Booker v. State, 773 So.2d 1079, 1083 (Fla. 2000).[2]

In its case in mitigation, the defense introduced the affidavit of Booker's deceased grandmother, Florence Edmund, a long-time resident of Brooklyn, New York. In her affidavit, Ms. Edmund stated that Booker was born on September 1, 1953, and he grew up without knowing his father. Ms. Edmund recounted how Booker lived, at different times, with either her or his mother, and his behavior, while generally good, took a turn for the worse when he was about twelve years old. According to the affidavit, Booker was shot while in a fight, and during his hospital stay, he roomed with a person who used drugs. Ms. Edmund suspected that Booker began using drugs after his stay in the hospital. Id.

Ms. Edmund explained that Booker's mother died as the result of a stroke just before Booker's seventeenth birthday, and Booker joined the army shortly thereafter. While in the army, Booker had been hospitalized in Walter Reed Army Hospital. After his discharge from

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[2] The three witnesses were Mr. Pete Fancher; Mr. David Smith; and Dr. Chantal Harrison. Mr. Fancher, a former officer with the Gainesville Police Department (G.P.D.), was the first officer to respond to the murder scene. Mr. Smith, also a former officer with G.P.D., was one of the crime scene investigators who responded to the murder scene. Finally, Dr. Harrison, a former associate medical examiner with Alachua County, performed the autopsy of the murder victim. Booker v. State, 773 So.2d 1079, 1083 n.5 (Fla. 2000).

the Army, Booker initially lived with Ms. Edmund, but he then unexpectedly moved to Florida. The last time that Ms. Edmund heard from Booker was through a letter he sent to her from jail in Fort Myers, Florida. Ms. Edmund did not hear that Booker had been convicted of first-degree murder and sentenced to death until October 29, 1983. Booker v. State, 773 So.2d at 1083.

Next, the defense introduced the affidavit of Ms. Patricia R. Singletary, a former employee in the New York City public school system. In her affidavit, Ms. Singletary summarized Booker's erratic educational history: Booker transferred in and out of eleven different schools between kindergarten and the sixth grade. Generally, the educational records described Booker as intelligent, doing particularly well in artistic endeavors, but the records also contained several references to disciplinary problems, including aggression. Absenteeism became an increasing problem as Booker grew older, and he officially left school in February 1970, at the age of sixteen. Id.

The defense also presented the testimony of Dr. George Barnard. Dr. Barnard, a psychiatrist, testified as an expert in both psychiatry and forensic psychiatry and outlined for the jury, in detail, Booker’s personal and psychological history. Dr. Barnard's first contact with Booker came in December 1977, when he evaluated Booker pursuant to court order. At the conclusion of that and

several other subsequent evaluations in early 1978, Dr. Barnard testified for the State during the guilt phase of the trial that Booker was both sane at the time of the murder and competent to stand trial.

Dr. Barnard's next contact with Booker occurred in 1985, when defense counsel asked Dr. Barnard to review Booker's case to determine whether any mitigating circumstances existed. After reviewing Booker's case, Dr. Barnard determined that (1) Booker was under the influence of extreme mental or emotional disturbance at the time of the crime; and (2) at the time of the crime, Booker's ability to understand the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Booker v. State, 773 So.2d at 1084.

In 1997, Booker's counsel again requested that Dr. Barnard evaluat Booker, and Dr. Barnard did so, conducting a seven-and-one-half hou evaluation. In addition to the evaluation, Dr. Barnard reviewed variou materials gathered in Booker's case since the initial trial had occurrec After evaluating Booker and reviewing the materials gathered in Booker' case, Dr. Barnard summarized for the jury various events in Booker' life, including Booker's mental health history. Dr. Barnard testifie that Booker started using alcohol and drugs at approximately age thirtee or fourteen. At the age of sixteen, a family court ordered that Booke undergo a psychiatric examination at Kings County Hospital in New Yor

City. The court ordered that Booker undergo the examination because h
had been threatening his mother and drinking more alcohol. Booker wa
discharged after being in the hospital for slightly over three weeks
with the recommendation that he receive some outpatient psychotherapy o
counseling, which, to Dr. Barnard's knowledge, was never given. Id.

Dr. Barnard further testified regarding three instances of sexual abuse Booker endured as a child, twice by separate babysitters and once by an aunt. In addition, Dr. Barnard explained that while Booker was in the Army, he would regularly become intoxicated and engage in fights. Booker was hospitalized in Okinawa on one occasion for several days after suffering various injuries. Booker experienced blackouts during this time period, and Army personnel thought that he suffered from schizophrenia.[3] Accordingly, Booker was treated with two antipsychotic drugs, Thorazine and Mellaril. Booker was then medically evacuated from Okinawa to Walter Reed Army Medical Center in Washington, D.C., where he was admitted to the psychiatric unit. There, Booker continued to be treated with sizable dosages of Thorazine. Booker remained in Walter Reed for fifty-five days. He continued to serve in the Army for a short time after being discharged from the hospital. He received an honorable discharge from the Army in 1974. Booker v. State, 773 So.2d at 1084.

[3] Dr. Barnard does not agree that Booker was schizophrenic.

Dr. Barnard told the jury that within a year of being discharged from the Army, Booker was taken away in an ambulance after he had been found in the middle of a street wielding a knife and threatening several people. Booker was again admitted to Kings County Hospital in New York City. He was subsequently transferred to another hospital where he was evaluated overnight and released. The diagnosis at the first hospital was a paranoid reaction, while the diagnosis at the second hospital was intoxication. Several days prior to this incident, at least one member of Booker's family communicated to hospital personnel that Booker had engaged in bizarre behavior a few days earlier. Id.

Dr. Barnard further testified that Booker was incarcerated in Florida during the early 1970s. Booker's medical records for that period of incarceration showed that he (1) was seen by a psychiatrist because he thought that the water was tainted, causing a skin rash and possible impotence; and (2) was given an antiseizure medication, Dilantin. Dr. Barnard testified that Booker self-reported that during that period of time he was having hallucinations of the devil sitting or having a fist on his chest. Finally, Dr. Barnard testified that while in Gainesville in 1977, Booker was admitted to Bridge House and "Alcothon House (phonetic)" for treatment of alcohol and drug use problems, with such drugs including marijuana, LSD, heroin, LSC, hashish, and glue. Booker v. State, 773 So.2d at 1084-1085.

Based on all of the above, Dr. Barnard concluded at the close of direct examination by the defense that Booker was suffering from depression, alcohol and drug addiction, an "altered state of consciousness." Dr. Barnard also diagnosed Booker as having an antisocial personality disorder. Consistent with his conclusions at the first trial, Dr. Barnard opined that (1) Booker was under extreme mental or emotional disturbance at the time of the crime; and (2) Booker's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired at the time of the crime. Id.

On cross-examination by the State, Dr. Barnard indicated that at no point in time was Booker insane and Booker did not have a mental disease that prevented him from understanding the difference between right and wrong. Further, Dr. Barnard conceded that much of the information he considered in evaluating Booker was based on Booker's own self-reporting. Dr. Barnard told the jury that many of Booker's statements to him were inconsistent. Booker v. State, 773 So.2d at 1085.

Dr. Barnard told the jury that individuals who suffer from an antisocial personality disorder, such as Booker, can be expected to lie and malinger in order to gain an advantage in a given situation. Dr. Barnard admitted that this fact could call into question the validity of any of the information Booker had provided. Dr. Barnard

also conceded that he had not performed any psychological testing on Booker. Finally, Dr. Barnard testified that, in his various encounters with Booker, he had never seen any manifestation of "Aniel," the alternative personality that allegedly had troubled Booker in the past. Dr. Barnard opined that Booker never suffered from multiple personality disorder. Id.

In addition to Dr. Barnard, the defense presented the testimony of six distinguished scholars who testified about Booker's literary accomplishments while in prison. These witnesses included: (1) Professor Deborah Tall, professor of English at Hobart and William Smith College; (2) Ms. Suzann Tamminen, Editor-In-Chief at Wesleyan University Press; (3) Professor Hayden Carruth, Professor Emeritus at Syracuse University (by video); (4) Professor Stuart Lavin, writer and professor at Castleton State College; (5) Professor Stuart Friebert, poet and professor at Oberlin College; and (6) Professor Williard Spiegleman, professor of English at Southern Methodist University. Booker v. State, 773 So.2d 1079, 1085 (Fla. 2000).

Dr. Deborah Tall testified that she is a Professor of English at Hobart and William Smith Colleges in Geneva, New York. She teaches literature and writing. She is also the editor of Seneca Review, a literary magazine, published twice a year, that publishes poetry and essays. The magazine publishes poetry from Nobel and Pulitzer prize winners as well as poetry from young emerging poets. (2PP Vol. XIII

1875-1876). According to Dr. Tall, there is a rigorous screening process for publication. (2PP Vol. XIII 1876)

Dr. Tall told the jury she never met Booker but saw his work in 1990. She published a poem of his in the Seneca Review in 1991 and accepted another one for publication for the Spring 1998 issue. Through Dr. Tall, trial counsel introduced these poems into evidence. (2PP Vol. XIII 1879).

She told the jury that in her opinion, Booker is a remarkably original writer and very skilled in the use of language. Dr. Tall testified that Booker has tremendous insight into character, his own as well as others. Dr. Tall opined that Booker writes like no one else and authored some "very, very valuable poems". (2PP Vol. XIII 1882).

She also testified that Booker's book "Tug" was endorsed by Gwendolyn Brooks, the first African-American poet to win a Pulitzer prize. She described Ms. Brooks as a very important American poet. (2PP Vol. XIII 1882).[4]

Suzann Tamminen testified she was the Editor in Chief at Wesleyan University Press. (2PP Vol. XIII 1885). The Press publishes

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[4] Hayden Carruth testified at Booker's 1998 penalty phase proceedings that Ms. Brooks is now an old lady and he was not sure if she was still alive. (2PP Vol. XIII 1921). She was. Ms. Brooks died on December 3, 2000, in Chicago, at the age of 83. She was 80 years old at the time of Booker's second penalty phase proceeding.

a range of books mainly academic and scholarly books. They also have a poetry series. Ms. Tamminen knows Booker. None of her contact with Booker was personal. All contact with Booker was through correspondence. Ms. Tamminen told the jury that Booker submitted a manuscript of poetry to the press in 1992. (2PP Vol. XIII 1887).

Based on a review of his manuscript, the Press decided to publish Booker's book. It was published in 1994. The book was called "Tug". Ms. Tamminen testified that three renowned poets endorsed the book; Gwendolyn Brooks, Hayden Carruth, and Brendan Lee Galvin. Trial counsel introduced a copy of Booker’s book into evidence. (2PP Vol. XIII 1890).

According to Ms. Tamminen, Ms. Brooks was the first African-American to win a Pulitzer Prize in poetry which she won in 1949. Ms. Tamminen also noted that Dr. Henry Lewis Gates, Jr. agreed to endorse the book. She told the jury that Dr. Gates was the chair of the African-American Studies department at Harvard University and the W.E.B. Doubois Professor of Humanities at Harvard. (2PP Vol. XIII 1892).

When Booker contracted with Wesleyan University Press he entered into a contract whereby all royalties went to the victim's great-niece. (2PP Vol. XIII 1894). Trial counsel introduced a copy of the contract into evidence. (2PP Vol. XIII 1893-1894).

On cross, Ms. Tamminen testified that a poet is like anyone else except they have talent and skill in the area of writing poems. She believes Booker's poetry reflects someone who is intelligent and able to communicate. She told the jury that Booker's poetry is indicative of someone with a creative mind. (2PP Vol. XIII 1885-1901).

Professor Hayden Carruth testified by video deposition. Professor Carruth told the jury that he is a professor emeritus at Syracuse University. Booker submitted some of his work to Professor Carruth while Professor Carruth was at Harper's Magazine. (2PP Vol. XIII 1918). He has never met Booker. (2PP Vol. XIII 1919). Professor Carruth told the jury that, in his opinion, Booker’s poetry is original and quite thoughtful. (2PP Vol. XIII 1919). He is comparable to a good many poets. (2PP Vol. XIII 1920). He believes Booker has a place in the literary community. (2PP Vol. XIII 1922).

In Professor Carruth’s view, Booker is a person of great intelligence and perception. His work is unique because of Booker's style and use of language. Professor Carruth told the jury that it is a mark of distinction to be published by Wesleyan University Press. (2PP Vol. XIII 1924).

Professor Stuart Lavin testified that he is a Professor at Castleton State College in Vermont. Professor Lavin teaches creative writing, other writing courses, and basic English courses. (2PP Vol.

XIV 1940-1941). He was also the poetry editor at Heron Press in Boston and then later the poetry editor for the Four Zoas Journal of Poetry and Letters. (2PP Vol. XIV 1941).

Professor Lavin told the jury that Booker sent him some poetry while he was the poetry editor at Four Zoas Journal of Poetry and Letters. Professor Lavin believed Booker's work was worthy of publication. In his view, Booker’s poetry is clear, honest, and reflects a lot of skill. (2PP Vol. XIV 1944). Professor Lavin was aware that Booker was published in Seneca Magazine and that Wesleyan University Press published his book called "Tug". Professor Lavin told the jury that it is difficult to get published. (2PP Vol. XIV 1945).

Professor Lavin testified that a poet’s value to society emerges from the way a poet uses ordinary language to express sentiment, feelings and thoughts in a very concentrated way. Professor Lavin opined that such work requires a lot of thought and consideration, a lot of care. (2PP Vol. XIV 1946).

Professor Lavin testified that Booker's writing style is realistic and personal and that there is vision to his work. (2PP Vol. XIV 1947). Professor Lavin opined that Booker has a way with language and his poetry evokes something beyond just the words. (2PP Vol. XIV 1947). Professor Lavin told the jury that, in his view, Booker’s work is intelligent and creative. (2PP Vol. XIV 1948).

Professor Stuart Friebert told the jury he is a professor and poet at Oberlin College. (2PP Vol. XIV 1950). Prior to teaching at Oberlin, Professor Friebert taught at Harvard University. He is fluent in four languages including German, Czech, Romanian, and Italian. He also reads some French. (2PP Vol. XIV 1950-1951). He published some 22 books in his career, including four primary textbooks and published some 30 essays in American and foreign journals. (2PP Vol. XIV 1952-1953).

Professor Friebert testified that when he was the editor of Field Magazine, he received a batch of poems written by Stephen Todd Booker. He was immediately taken by their integrity as well as their voice, character, and way with words. Professor Friebert told the jury he liked these poems very much and began a relationship with Booker. They correspond regularly and Professor Friebert considers himself fortunate to have gotten to know Booker through their long correspondence. (2PP Vol. XIV 1956).

Professor Friebert told the jury he engaged Booker to translate some poems written by arguably the greatest Albanian poet, Moikom Zego. Professor Friebert testified that even though he did not speak Albanian, Booker was able to translate the poems into what Professor Friebert described as “interesting versions”. (2PP Vol. XIV 1958). Professor Friebert testified

that Mr. Zego was very impressed with Booker's work and as a result, Professor Friebert sent more of Zego's poems to Booker. Professor Friebert told the jury that Booker came back with very powerful translations that, in his view, deserved to be published. (2PP Vol. XIV 1959). Professor Friebert viewed Booker's ability to translate Zego's poetry as "one of those miraculous things." (2PP Vol. XIV 1960). Professor Friebert told the jury that he has even used Booker's poetry as a teaching aide in his poetry classes. (2PP Vol. XIV 1963). Finally, Professor Friebert read one of Booker's poems to the jury, a poem he described as his favorite. (2PP Vol. XIV 1965).

Professor Williard Spiegleman testified that he is a Professor of English at Southern Methodist University and is Harvard educated. (2PP Vol. XV 2139). He is not a poet, however he reviews poetry. (2PP Vol. XV 2141). He also teaches, and writes about, poetry. (2PP Vol. XV 2139),

Professor Spiegleman first corresponded with Booker in 1991 or 1992 but has never met him. (2PP Vol. XV 2143, 2145). Professor Spiegleman told the jury that, in his view, Booker is a writer of great talent. (2PP Vol. XV 2150). Professor Spiegleman testified that Booker's work is raw and unfocused but there is an enormous amount of energy and playfulness in his language. (2PP Vol. XV 2150). Professor Spiegelman was well

aware that Booker had works published, including in the distinguished literary quarterly, Kenyon Review. (2PP Vol. XV 2151).

Finally, the defense presented the testimony of Mrs. Betty Vogh, a Gainesville woman who, along with her husband, had befriended Booker during his period of incarceration, as well as the testimony of Mrs. Mary Page McKean Zyromski, a great-niece of the murder victim. Both Mrs. Vogh and Mrs. Zyromski had helped Booker with his literary endeavors over the years. Mrs. Zyromski testified that Booker had assigned to her the royalties generated from sales of one of his published works. Booker v. State, 773 So.2d 1079, 1085 (Fla. 2000).

At the conclusion of the penalty-phase hearing, the jury, by a majority vote of eight to four, recommended that Booker be sentenced to death. After a Spencer hearing, the trial court found four aggravators, specifically: (1) Booker committed the capital felony while he was under sentence of imprisonment (great weight); (2) Booker previously had been convicted of a violent felony (great weight); (3) Booker committed the capital felony while he was engaged in the commission of a sexual battery and burglary (great weight); and (4) the capital felony

committed by Booker was especially heinous, atrocious, or cruel (HAC) (great weight).[5]

The trial court also found two statutory mitigators. The trial court concluded that Booker committed the capital felony while he was under the influence of extreme mental or emotional disturbances, a mitigator to which the trial court afforded great weight. The trial court also found Booker's capacity, at the time of the murder, to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The trial court gave this statutory mitigator substantial weight.

Finally, the court found nine nonstatutory mitigating circumstances and assigned weight to each mitigator: The trial court found: (1) Booker was sexually abused as a child (substantial weight); (2) Booker was physically abused as a child (substantial weight); (3) Booker was verbally abused as a child (moderate weight); (4) Booker's family life was inconsistent (moderate weight); (5) Booker's education was interrupted repeatedly (slight weight); (6) Booker suffered from alcohol and drug abuse (moderate weight); (7) While in prison, Booker substantially improved his ability to be a productive citizen and to produce creative valuable contributions to

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

American Literature (little weight); (8) Booker demonstrated his remorse and attempted to atone for his crime (little weight); and (9) Booker was honorably discharged from the United States Army (slight weight).

After considering these factors, the trial court found the aggravating circumstances substantially outweighed the mitigating circumstances, and sentenced Booker to death. Booker v. State, 773 So.2d 1079, 1085 (Fla. 2000). Booker appealed.

On appeal, Booker raised six issues: Booker claimed the trial court erred: (1) in refusing to instruct the jury regarding the consecutive prison sentences he must serve based on his prior convictions for sexual battery, burglary, and aggravated battery, (2) in determining that the State's reason for exercising a peremptory challenge on venireperson Phyllis Filer, a black woman, was genuine and not a discriminatory pretext, (3) in denying the defense's request to give a special jury instruction defining mitigating circumstances, and (4) in prohibiting Mrs. Mary Page McKean Zyromski, a great-niece of the victim, from being present in the courtroom during the presentation of Booker's case in mitigation until after she had testified on Booker's behalf. Booker also claimed that death is a disproportionate penalty in his case and that to execute him after he has already spent over two decades on death row would

constitute cruel and unusual punishment under the Eighth Amendment to the Constitution of the United States. Booker v. State, 773 So.2d 1079, 1086-1087 (Fla. 2000).

On October 5, 2000, this Court rejected his claims and affirmed his sentence to death. Id. at 1096. After Booker's motion for rehearing was denied, mandate issued on January 22, 2001. Booker's petition for writ of certiorari was denied by the United States Supreme Court on May 14, 2001. Booker v. Florida, 532 U.S. 1033 (2001).

On September 26, 2001, Booker filed an initial motion for postconviction relief. Subsequently, Booker filed two amended motions. In his second amended motion filed on May 14, 2004, Booker raised eight claims.

Booker alleged: (1) trial counsel was ineffective for failing to: challenge two unidentified jurors who would not consider mitigation evidence; present witnesses in mitigation of the Defendant's 1980 aggravated battery conviction; present additional mitigation witnesses; object to the introduction of non-statutory aggravators, various comments by the prosecutor during closing arguments, and an instruction regarding the testimony of defense witness Page Zymromski; object to evidence introduced by the State in violation of the United States Supreme Court's decision in Crawford v. Washington, 124 S.Ct.

1354 (2004), (2) the State knowingly interfered with the Defendant's attorney-client privilege by opening and reading the Defendant's legal mail and using the information gleaned from those communications against the Defendant at trial,(3) Booker was denied due process and equal protections when the trial court refused to instruct the jury regarding the consecutive sentences Booker received for his prior burglary, sexual battery, and aggravated assault convictions (4) Florida's capital sentencing statute is unconstitutional in light of the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), (5) the State violated the dictates of Crawford v. Washington, 124 S.Ct. 1354 (2004), when it introduced two prior judgments of convictions and sentences, the former testimony of unavailable witnesses Johnson and Klinepeter both of whom had been subject to cross-examination at Booker's first trial, and the testimony of David C.P. Smith, (6) his twenty-seven year incarceration on death row constitutes cruel and unusual punishment, (7) Booker is innocent of the death penalty because he has become a published writer, and (8) The State may have improperly assisted in the drafting of the sentencing order. (PCR Vol. I 3-37).

On October 12, 2004, the collateral court held a hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), at which

both the State and the Defendant were permitted to present arguments to determine whether an evidentiary hearing is required on the Defendant's claims. Additionally, both the State and the Defendant were permitted to present argument on purely legal claims raised by the Defendant in his motion for post-conviction relief. (PCR Vol. III).

On December 15, 2004, the collateral court issued its initial Huff order. The collateral court ruled that, with the exception of that part of Claim I which alleged that counsel was ineffective for failing to raise a Crawford violation, Claim I was insufficiently pled. The collateral court granted Booker thirty days in which to amend the claim. (PCR Vol. I 78-84).

The collateral court denied Booker's claim that trial counsel was ineffective for failing to object to evidence introduced by the State in violation of the United States Supreme Court's decision in Crawford v. Washington, 124 S.Ct. 1354 (2004). The court ruled that none of the evidence about which the Defendant complained fell within the dictates of Crawford. Additionally, the court concluded that because Crawford was decided some six years after the Defendant's 1998 penalty phase was concluded, defense counsel cannot be ineffective for failing to anticipate a change in the law. (PCR Vol. I 80).

The collateral court granted Booker an evidentiary hearing on Booker's claim that the State knowingly interfered with the Defendant's attorney-client privilege by opening and reading the Defendant's legal mail and using the information gleaned from those communications against the Defendant at trial. Finally, the collateral court summarily denied Claims III-VIII.[6] (PCR Vol. I 80-84).

On January 16, 2005, counsel for Mr. Booker filed an amendment to Claim I. (PCR Vol. I 87-89, 92-94). In the amendment, Booker abandoned his claim that trial counsel was ineffective for failing to challenge two jurors who would not consider mitigation evidence. Instead, Booker claimed only that trial counsel was ineffective for failing to challenge juror Erica Prince. (PCR Vol. I 87). Booker did not replead his claim that trial counsel was ineffective for failing to object to the introduction of non-statutory aggravators, various comments by the prosecutor during closing arguments, and an instruction regarding the testimony of defense witness Page Zymromski. (PCR Vol. 87-89).

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[6] During the Huff hearing, Booker essentially abandoned Claim VIII of his second amended motion for post-conviction relief when the trial court informed collateral counsel the State played no part in drafting the sentencing order. Booker acknowledged this representation negated any need for a hearing

The State filed a response. (PCR Vol. 95-129). On February 15, 2005, the collateral court held a second Huff hearing. (PCR Vol. IV).

After hearing the arguments of counsel and reviewing the pleadings, the court denied the remaining sub-claims that Booker raised in Claim I. The collateral court ruled that during voir dire, Ms. Prince indicated at least twice she could, and would, follow the law as presented to her by the Court. The court found that, overall, Ms. Prince's response to the venire questions indicated she would be a juror who would follow her oath. The court found that she was, in many respects, an ideal juror, and that it would have found no reason to excuse her for cause under the circumstances.[7] (PCR Vol. I 149).

The Court also denied Booker's claim that trial counsel was ineffective for failing to present witnesses in mitigation of the Defendant's 1981 aggravated battery conviction. (PCR Vol. I 149-150). Finally, the collateral court denied Booker's claim that trial counsel was ineffective for failing to present additional witnesses to educate the jury regarding Mr. Booker's

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on this claim. PCR Vol. III 52-53. Booker does not challenge the trial judge's ruling on this claim in this appeal.

[7] Booker did not raise the denial of this part of Claim I in this appeal.

contribution to American literature and for failing to call experts on Ezra Pound. (PCR Vol. I 148-151).

On September 16, 2005, the collateral court held an evidentiary hearing on Claim II of the Defendant's amended motion for post-conviction relief. Four witnesses were called. Booker waived his presence at the evidentiary hearing and did not testify. (PCR Vol. I 139).

Booker called Mike "Mick" Price to the witness stand. At the time Booker's second penalty phase commenced, Mr. Price was an investigator working with the State Attorney's Office, in some capacity, on the Booker case. At the time of the evidentiary hearing, Mr. Price was retired. (PCR Vol. II 75).

Mr. Price testified that he worked on the Booker case and he was assigned, on the original case, to interview, interrogate, or question Booker. (PCR Vol. II 75). Mr. Price testified, initially, that he did not go to the prison and do a mail cover on Booker. When asked whether he even knew what mail cover is, he replied "only vaguely." (PCR Vol. II 75). Mr. Price told the collateral court that his understanding of mail cover is that all mail that goes in and out of the prison is screened by someone, and that a mail cover allows whoever's doing that to peek at the mail. (PCR Vol. II 76). He denied looking at Booker's mail. (PCR Vol. II 76).

Mr. Price testified that a Mr. Ruise at Florida State Prison inquired whether Mr. Price wanted mail cover on Booker. Price declined. Mr. Price thought that Johnny Kearns (Booker's trial counsel" would "eat us alive if he found out." (PCR Vol. II 77). Mr. Price testified he does not know how mail cover works. (PCR Vol. II 78).

Collateral counsel then presented a memo (Defense Exhibit B) to Mr. Price and asked him about it. The memo noted that Mr. Price had "picked up another collection of the letters obtained under mail cover." Mr. Price testified that the memo indicated he picked up letters obtained under mail cover but that the memo did not look familiar to him at all. Mr. Price agreed the memo said he had picked up letters. (PCR Vol. II 80).

Mr. Price indicated that he would not have read any of the mail but would have delivered it to the State Attorney's Office. Mr. Price told the court he was working with the State Attorney at the time. (PCR Vol. II 81). He testified he might have been taking the mail to the State Attorney's Office. (PCR Vol. II 81).

When asked about the contents about Defense Exhibit E, a memo allegedly written by Mr. Price, Mr. Price noted the memo indicated he reviewed a letter from Booker to Betty Vogh. Mr. Price testified that it is possible that he was reading Booker's

mail as part of his investigation. (PCR Vol. II 84). Mr. Price did not have any recollection of reading the letter. (PCR Vol. II 85).

During cross-examination, Price testified he had no recollection of either Ralph Grabel or Rod Smith asking him to do a mail cover. He also had no recollection of bringing any of Booker's mail to the State Attorney's Office. Mr. Price had no recollection of ever having a conversation with either Mr. Grabel, Senator Smith or anyone else connected with Booker's second penalty phase regarding a mail cover on Booker's mail. (PCR Vol. II 86). Mr. Price testified that, as he recalled, he was never asked by anyone from the State Attorney's Office to do a mail cover on Booker's mail. (PCR Vol. II 86). Of particular import, Mr. Price provided no testimony that any of Booker's mail he allegedly picked up or reviewed was subject to the attorney-client privilege or was marked "legal mail".

Assistant State Attorney Ralph Grabel also testified before the collateral court. Mr. Grabel testified he is an Assistant State Attorney with the Eighth Judicial Circuit. At the time of Booker's second penalty phase, Mr. Grabel had been a felony division chief for almost a decade. (PCR Vol. II 56). Between 1989 and 1996, Mr. Grabel tried eight or nine murder cases, at least three of which were capital cases. (PCR Vol. II 56-57). Mr. Grabel testified he was familiar with the professional rules

of responsibility and the professional rules of conduct regarding the sanctity of attorney-client privilege. (PCR Vol. II 58).

Mr. Grabel told the court he was one of the two prosecutors who represented the State at Booker's second penalty phase. (PCR Vol. II 10). Mr. Grabel testified he worked with State Attorney Rod Smith on the case. (PCR Vol. II 10).

Mr. Grabel testified he did not do a mail cover on Mr. Booker. (PCR Vol. II 11). When asked what he understood mail cover to be, Mr. Grabel testified his basic understanding is that, generally, all mail coming in and out of the prison is checked to ensure there are no weapons or contraband in the mail. Mr. Grabel testified he also understood that anything marked legal mail would not be opened or read. He did not know whether other mail would be read. (PCR Vol. II 12). Mr. Grabel testified he believed a mail cover would be a review of all the mail coming in and out to a particular inmate, at a specific request of a party. (PCR Vol. II 12).

Mr. Grabel was aware that Booker was represented by trial counsel Johnny Kearns. (PCR Vol. II 14). Mr. Grabel testified that, at the time of Booker's second penalty phase, Mick Price was an investigator in the State Attorney's Office. (PCR Vol. II 15).

Mr. Grabel testified that to his knowledge no one in the State Attorney's Office read Mr. Booker's mail. Mr. Grabel told the court that no mail cover was undertaken on his authority or, to the best of his knowledge, under the authority of anyone else in the State Attorney's Office. (PCR Vol. II 18).

Mr. Grabel testified the State Attorney's Office did not receive any mail cover in Booker's case. Mr. Grabel testified that Mr. Price never asked him if he wanted mail cover and that he never ordered mail cover. Mr. Grabel testified that he never spoke with State Attorney Rod Smith about mail cover and never saw any mail from Stephen Todd Booker. (PCR Vol. II 19). Mr. Grabel testified that he had never done mail cover in any case. (PCR Vol. II 36,59).

Mr. Grabel told the collateral court that he did not direct anyone to intercept any of Booker's attorney-client privileged mail, nor did he receive any information, oral or written, in Booker's case that was subject to the attorney-client privilege. (PCR Vol. II 59). Mr. Grabel testified he never possessed or read any attorney-client privileged communications between Booker and his attorney. (PCR Vol. II 59-60).

Senator Rod Smith was called to testify at Booker's evidentiary hearing. At the time of Booker's second penalty phase proceeding, Senator Smith was the elected State Attorney

for the Eighth Judicial Circuit. Senator Smith testified he and Ralph Grabel handled, on behalf of the State, Booker's second penalty phase proceedings. (PCR Vol. II 38).

Senator Smith had no knowledge of any mail cover on Booker's mail. Senator Smith testified he did not use mail cover during the course of Booker's second penalty phase proceedings. (PCR Vol. II 40,43). Senator Smith testified that if a mail cover was done, he would have to authorize it and he did not do so. (PCR Vol. II 45).

Finally, trial counsel, John J. Kearns testified before the collateral court. Mr. Kearns testified he had been an assistant public defender since 1972. Mr. Kearns told the collateral court that he had been the primary death penalty attorney in the public defender's office since 1978 and had tried approximately 20 capital cases. (PCR Vol. II 108). Collateral counsel stipulated that Mr. Kearns was a well-respected and experienced death penalty lawyer in the Gainesville area. (PCR Vol. II 109).

Mr. Kearns testified that Booker was always worried about his mail being opened. Mr. Kearns testified that Booker told him he was concerned that correctional officers would open inmates' mail as a matter of course. (PCR Vol. II 112).

As a result of this concern, a concern shared by other clients as well, and because of the close proximity of Florida

State Prison to Gainesville, it was Mr. Kearns' practice to personally deliver documents to a client or send one of his investigators to deliver documents. Mr. Kearns testified it would be a rare instance where he would mail documents, before trial, to a client at Florida State Prison. When he hand-delivered materials to Booker, a correctional officer would check the materials for contraband or paperclips, in his presence, and then return them to Mr. Kearns. (PCR Vol. II 113).

Mr. Kearns told the collateral court that he examined his file and found only two letters which he had mailed to Booker. One contained a money order that Mr. Kearns sent Booker around Christmas and another informed Booker about a status conference in which the case had been continued. (PCR Vol. II 113).

Mr. Kearns testified he received approximately 50 letters from Booker. In some of those letters, Booker acknowledged the receipt of materials that had been hand delivered by defense investigator Mack Short. (PCR Vol. II 114).

Mr. Kearns testified that none of the approximately 50 letters he received from Booker appeared to have been tampered with. Booker sealed the letters he wrote to Mr. Kearns and either wrote the words legal mail, or placed a series of Xs, across the seal to ensure any signs of tampering would be observed. (PCR Vol. II 116).

Mr. Kearns said that he examined the letters upon receipt and saw no visible signs of tampering nor any signs that the mail had been opened between the time the letters were sealed and the time Mr. Kearns opened them. (PCR Vol. II 116). At no time during the proceedings did Mr. Kearns become concerned the State had improperly obtained any inappropriate information to subvert his strategy during the trial. (PCR Vol. II 117). Mr. Kearns told the collateral court he had no grounds to believe the State intercepted any attorney-client privileged mail and used its contents to the benefit of the State or to the detriment of Mr. Booker. (PCR Vol. I 119).

During cross-examination, Mr. Kearns testified that if he became aware of any mail cover involving attorney-client privileged mail, he would object. (PCR Vol. II 120). He would be very upset if legal mail was being examined. He was not aware that a state attorney investigator had allegedly picked up any mail. He was also not aware that anyone from the State Attorney's office allegedly read a letter from Booker to Betty Vogh. Mr. Kearns testified that if he knew someone from the state read this letter, he would question why it was happening. (PCR Vol. II 121).

Mr. Kearns told the court that Ms. Vogh had befriended Booker while he was in prison and that he called her as a

witness during the second penalty phase. Ms. Vogh is not an attorney nor was she associated with the Public Defender's Office. Mr. Kearns testified that any letter between Booker and Ms. Vogh would not constitute legal mail. (PCR Vol. II 124). At the evidentiary hearing, Mr. Booker presented no evidence that any communication between him and Ms. Vogh was used by the State to his detriment or to benefit the State.

After evidentiary hearing, the collateral court entered an order denying the remainder of Booker's second amended motion for post-conviction relief. The order set forth the collateral court's findings of fact and conclusions of law as follows:

> .. On September 16, 2005, this Court held an evidentiary hearing on Claim II of the Defendant's amended motion for post-conviction relief. In Claim II, the Defendant alleged the State knowingly interfered with his attorney-client privilege by opening and reading Mr. Booker's legal mail and using the information gleaned from those communications against the Defendant at the penalty phase of his capital trial conducted on March 17-26, 1998.
>
> After considering the testimony of the witnesses presented by both parties at the hearing, the documentary evidence introduced by the Defendant, and hearing the arguments of counsel, the Court finds as follows:
>
> (1) At the evidentiary hearing, Assistant State Attorney Ralph Grabel was called to testify. Mr. Grabel, was a member of the prosecution team during the penalty phase of the Defendant's March 1998 capital trial. Mr. Grabel was primarily responsible for preparing the State's case for trial. Mr. Grabel's testimony completely refutes the Defendant's claim his legal mail was tampered with, in any way, by

anyone acting on behalf of the State. Mr. Grabel testified he did not direct that Mr. Booker's legal mail be opened or tampered with in any way, nor did he see, read, or intercept any privileged communications, in any form, between Mr. Booker and his counsel. Mr. Grabel is well known to this Court and enjoys an excellent reputation in the local legal community. The Court found his testimony to be credible.

(2) Senator Rod Smith was also called to testify. At the time of the Defendant's March 1998 trial, Mr. Smith was the State Attorney for the Eighth Judicial Circuit. He was also the lead counsel for the State in the Booker case. Mr. Smith testified he had no knowledge of any of the Defendant's mail being tampered with nor was he privy to any privileged communications, made by any means, between the Defendant and his counsel. Mr. Smith testified any interception of Mr. Booker's mail for use in preparation for Mr. Booker's trial would have had to be authorized by him and he did not do so. Senator Smith has great credibility among members of the bar. This Court found his testimony credible as well.

(3) The Court heard the testimony of Mike "Mick" Price. Mr. Price was an investigator working with the State Attorney's Office, in some capacity, on the Booker case. Mr. Price was not quite as strong a witness as Mr. Grabel or Mr. Smith but Mr. Price is quite a bit older and his memory of some of the details of this case, among the many that he handled, was perhaps not quite as good as it used to be. He does not recall having anything to do with any tampering of Mr. Booker's legal mail, and if any tampering was done, he did not do it. This Court accepts his testimony.

(4) Finally, the Court heard the testimony of trial counsel John J. Kearns. Mr. Kearns testified he found no evidence that legal mail sent to him by Mr. Booker had been tampered with. Likewise, nothing that occurred during the Defendant's March 1998 penalty phase gave Mr. Kearns any reason to believe the State intercepted Mr. Booker's legal mail or used the content of any privileged communications to the detriment of the Defendant or the benefit of the

State. Mr. Kearns went out of his way to keep Mr. Booker from being concerned about mail tampering by hand delivering any communications from Mr. Kearns to Mr. Booker. This Court found Mr. Kearn's testimony to be credible.

(5) The Defendant has failed to present any evidence demonstrating the Defendant's legal mail was tampered with by any agent of the State. The Defendant, likewise, failed to present any evidence that privileged communications, in any form, were impermissibly intercepted, interfered with, or used by any agent of the State. Not only does the evidence not support the Defendant's claim his legal mail was tampered with or that the State knowingly interfered with his attorney-client privilege, there is a great deal of evidence to support it was not.

(PCR Vol. I, 152-156). This appeal follows.

II. SUMMARY OF THE ARGUMENT

Issue I: While Booker alleges the State violated the dictates of Weatherford v. Bursey, 429 U.S. 545 (1977), by initiating and maintaining a "mail cover" on Booker's attorney-client privileged mail, none of the evidence adduced at the evidentiary hearing supports his claim. To the contrary, the evidence adduced at the evidentiary hearing demonstrated that no member of the prosecution team, that prosecuted Booker during his second penalty phase proceedings, received, opened, or read any of Booker's mail. Because Booker failed to demonstrate that any attorney-client privileged communications were actually intercepted by a state agent or that any privileged information was communicated to a member of the prosecution team, the collateral court properly denied his claim.

Issue II: The collateral court properly denied all but Claim II of Booker's second amended motion for post-conviction relief. With the exception of Claim II, all of Booker's claims were either insufficiently pled, procedurally barred, or could be decided as a matter of law from the face of the record.

IV. ARGUMENT

ISSUE ONE

Whether the trial judge erred in ruling there was no evidence the State violated Booker's Sixth Amendment right to counsel

Booker claims the State violated his Sixth Amendment right to counsel by conducting a "mail cover" on Booker's prison mail. Before the collateral court, in his second amended motion for post-conviction relief, Booker alleged the State violated the dictates of Weatherford v. Bursey, 429 U.S. 545 (1977), by "knowingly violat[ing] Mr. Booker's attorney-client privilege" by improperly opening and reading his mail. (PCR Vol. I 17).[8]

In his motion for post-conviction relief, Booker failed to produce, or point to, even a single piece of attorney-client privileged mail that was allegedly compromised by the State. Likewise, Booker failed to allege the substance of any privileged communications the State improperly intercepted nor identify any "strategy" that was allegedly stolen or point to any actual harm to the presentation of his case. Booker failed, as well, to identify any benefit reaped from the alleged interception by the State of Booker's attorney-client privileged communications. Nonetheless, without objection, the collateral

[8] Before the collateral court and again before this Court, Booker makes no attempt to distinguish between the interception of regular mail and attorney-client privileged communications.

court granted Booker an evidentiary hearing on this claim. (PCR Vol. I 17-21, 80).

In Weatherford v. Bursey, 429 U.S. 545 (1977), the United States Supreme Court ruled that the linchpin of a claim similar to the one made by Booker here is first whether conversations with counsel have been overheard and whether these overheard conversations have produced, directly or indirectly, any of the evidence offered at trial.[9] The constitutionality of the conviction does not turn on whether the conversations were overheard or intercepted but whether these overheard conversations have produced, directly or indirectly, any of the evidence offered at trial. The Court noted that unless the government agent who overheard or intercepted attorney-client privileged communications, in turn communicated the substance of those communications and thereby created a realistic possibility of injury to the defendant or benefit to the State, there can be

[9] In Weatherford, the defendant and an undercover agent were arrested for vandalizing a county Selective Service office. The undercover agent met with both the defendant and his counsel at trial planning sessions on two separate occasions in order to maintain his masquerade and avoid suspicion. The agent then testified as a government witness. The district court found that the agent did not communicate anything to either his superiors or the prosecution regarding trial plans. Accordingly, the Court found no Sixth Amendment violation had been proven. Weatherford v. Bursey, 429 U.S. 545 (1977).

no Sixth Amendment violation. Weatherford v. Bursey, 429 U.S. at 552, 556-558.

In accord with the dictates of Weatherford, in order to prevail on this claim, Booker must show that: 1) attorney-client privileged communications were actually intercepted by a state agent; (2) the intercepting agent communicated this privileged information to a member of the prosecution team, and (3) the prosecution used those communications to Booker's detriment or to benefit the State. At the evidentiary hearing held on this claim, Booker failed to produce a single shred of evidence that attorney-client privileged communications were actually intercepted or that the prosecution received or reviewed any information subject to Booker's attorney-client privilege. Accordingly, the collateral court properly denied the claim.

Before this Court, Booker points to the testimony of retired investigator Mick Price to support his claim. Booker claims that Mr. Price's testimony proves that mail cover was done.

Booker argues that Mr. Price's testimony establishes that a collection of letters was picked up and delivered to the State Attorney's Office and that, at least one letter, a letter to mitigation witness Betty Vogh, was intercepted and read. (IB 10). In relying solely on Mr. Price's testimony to prove that

“mail cover” was improperly conducted on his prison mail, Booker overlooks the testimony of Assistant State Attorney Ralph Grabel, Senator Rod Smith, and trial counsel Johnny Kearns, three witnesses who the collateral court specifically found to be credible. (PCR Vol. I 153-155). Even so, none of Mr. Price’s testimony established that Mr. Price read any of Booker’s attorney-client privileged mail or communicated its contents to any member of the prosecution team.

Assistant State Attorney Grabel testified the State Attorney’s Office never received any of Booker’s mail and that he, personally, never saw any mail from Stephen Todd Booker. (PCR Vol. II 18-19). Mr. Grabel told the collateral court he did not direct anyone to intercept any of Booker’s attorney-client privileged mail nor did he receive any information in Booker’s case, oral or written, that was subject to the attorney-client privilege. (PCR Vol. II 59). Mr. Grabel testified he never possessed or read any attorney-client privileged communications between Booker and his attorney. (PCR Vol. II 59-60).

Even Mr. Price testified he had no recollection of either Ralph Grabel or Senator Smith asking him to do a mail cover. He also had no recollection of bringing any of Booker’s mail to the State Attorney’s Office. Mr. Price had no recollection of

having a conversation with either Mr. Grabel, Senator Smith or anyone else connected with Booker's second penalty phase regarding a mail cover on Booker's mail. (PCR Vol. II 86). Mr. Price testified that, as he recalled, he was never asked by anyone from the State Attorney's Office to do a mail cover on Booker's mail. (PCR Vol. II 86).

Senator Rod Smith testified he had no knowledge of any mail cover on Booker's mail and did not use mail cover during the course of Booker's second penalty phase proceedings. (PCR Vol. II 40,45). Senator Smith testified that if a mail cover was done, he would have to authorize it and he did not do so. (PCR Vol. II 45).

Finally, trial counsel testified that he personally delivered documents to Booker during the course of his representation and, as a matter of course, did not use the mail to communicate with Mr. Booker. (PCR Vol. II 113). Trial counsel testified he received approximately 50 letters from Booker and none of those 50 showed any signs of tampering. (PCR Vol. II 116). At no time during Booker's second penalty proceedings did Mr. Kearns have grounds to believe the State intercepted any attorney-client privileged mail and used its contents to the

benefit of the State or to the detriment of Mr. Booker. (PCR Vol. I 119).[10]

In Pietri v. State, 885 So.2d 245 (Fla. 2004), a case on post-conviction review, this Court addressed a claim similar to the one Booker makes here. Pietri alleged the State intentionally intercepted a document containing communications made between Pietri and a confidential defense investigator. In his motion for post-conviction relief, Pietri claimed counsel was ineffective for failing to adequately investigate and litigate the issue of the stolen document.

The document at issue, written on June 11, 1989, contained an in-depth interview between a defense investigator and Pietri. The document reflected Pietri's explanation of everything that happened on the day of the offense (this explanation was apparently false, however, as Pietri professed his innocence until December 1989 when he finally admitted to trial counsel that he shot the victim). Collateral counsel asserted that the entire defense strategy was contained in the intercepted document.

[10] All of the testimony that Booker presented during the second penalty phase proceedings constituted mitigation evidence. Booker did not testify at the second penalty phase. The State presented no evidence in rebuttal to any of the testimony that Booker presented during the second penalty phase.

In rejecting Pietri's claim, this Court noted that the United States Supreme Court held, in Weatherford v. Bursey, that intrusions into the attorney-client relationship do not establish a *per se* Sixth Amendment violation. Rather, in addition to the intrusion, there must be a showing of prejudice in terms of injury to the defendant or benefit to the State before a violation arises. This Court observed, in Pietri, that the state attorney maintained he never read nor had access to the stolen document, and defense counsel did not challenge that assertion. This Court concluded that "[b]ecause the state attorney had no access to the document, Pietri has failed to demonstrate how he was prejudiced by the state attorney prosecuting the case." Pietri 885 So.2d at 272.

Even assuming that Mr. Price actually conducted some *ultra vires* mail cover on some of Booker's prison mail, Booker failed to show that any member of the prosecution team was privy to any communications subject to the attorney-client privilege. The testimony of Ralph Grabel and Senator Rod Smith provides substantial competent evidence in the record to support the collateral court's conclusion that no member of the prosecution team read, reviewed, or received any attorney-client privileged communications between Booker and his counsel. This Court should affirm.

ISSUE TWO

Whether trial judge properly denied several of Booker's post-conviction claims without an evidentiary hearing

Booker claims the trial judge erred in summarily denying several of his claims. To the contrary, the trial judge correctly denied all but Claim II of Booker's second amended motion for post-conviction relief without an evidentiary hearing. With the exception of Claim II, all of Booker's claims were insufficiently pled, procedurally barred, or could be decided as a matter of law from the record.

(a) ***Allegation regarding counsel's failure to present evidence of the factual inapplicability of a prior violent felony aggravator.***

In Claim I of his second amended motion for post-conviction relief, Booker claimed that trial counsel was ineffective for failing to call witnesses who would have established "the factual inapplicability of the 'prior violent felony aggravating factor'". (PCR Vol. I 7-8). This part of Claim I targeted Booker's 1981 conviction for aggravated battery on Correctional Officer Marvin Thomas. In presenting his claim to the collateral court, Booker
did not identify a single witness he believed trial counsel should have called. (PCR Vol. I 7-8).

The collateral court rejected his claim as insufficiently pled. The court ruled that, in accord with this Court's

decision in Nelson v. State, 875 So.2d 579, 582 (Fla. 2004), Booker failed to present a legally sufficient claim of ineffective assistance of counsel. (PCR Vol. I 79-80).

The collateral court ruled that Booker failed to name any of the uncalled witnesses or outline the substance of their testimony. Additionally, the court ruled that Booker did not provide an explanation as to how the omission of this evidence prejudiced the outcome of the case or allege the uncalled witnesses were available to testify. The court granted Booker thirty days in which to amend his claim. (PCR Vol. I 84).

Booker amended Claim I. In his amendment, Booker alleged that trial counsel was ineffective for failing to call other inmates, including Gray Trawick and William White. Booker also claimed that trial counsel was ineffective for failing to call Booker, himself, to explain the circumstances of the conviction. Finally, Booker alleged that trial counsel was ineffective for failing to present the testimony of "long-time death row liaison for the Palm Beach County Public Defender's Office, Susan Cary, and other [unnamed] attorneys who challenged the prison guard riot which took place after the Knight stabbing death of a prison guard." (PCR Vol. I 88).[11]

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[11] Knight, who is awaiting execution on death row, fatally stabbed Department of Corrections (DOC) guard James Burke on the

The collateral court denied Booker's amended claim. The court ruled that the judgment and sentence were introduced into evidence, as was the testimony of the victim. The collateral court ruled that trial counsel cross-examined the victim at trial and that Booker proffered no basis to challenge the validity of the conviction. Additionally, the collateral court ruled that Booker failed to show any prejudice for trial counsel's alleged failure to challenge the 1981 aggravated battery conviction. (PCR Vol. I 149-150).

To establish a claim of ineffective assistance of counsel, two elements must be proven. First, the defendant must show that trial counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Kimbrough v. State, 886 So.2d 965, 978 (Fla. 2004).

In order to meet this first element, a convicted defendant must first identify, with specificity, the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally

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afternoon of October 12, 1980. State v. Knight, 866 So.2d 1195,

competent assistance. Pietri v. State, 885 So.2d 245 (Fla., 2004).

In reviewing counsel's performance, the court must indulge a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance. It is the defendant's burden to overcome this presumption. Mungin v. State, 31 Fla.L.Weekly S215 (Fla. April 6, 2006). In this case, the presumption that trial counsel's conduct fell within the wide range of professional assistance includes, within it, the presumption that under the circumstances, the challenged action might be considered sound trial strategy. Asay v. State, 769 So.2d 974, 984 (Fla. 2000) (ruling the defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy).

If the defendant successfully demonstrates trial counsel's performance was deficient, the defendant must then show this deficient performance prejudiced the defense.[12] In order to demonstrate prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional

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1198 (Fla. 2003).

[12] If a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford v. State, 727 So.2d 216, 219 (Fla. 1998).

Because Booker claims trial counsel was ineffective during the second penalty phase, Booker must show that, but for trial counsel's alleged errors, he probably would have received a life sentence. Gaskin v. State, 822 So.2d 1243 (Fla. 2002). Unless a defendant can show both deficient performance and prejudice, it cannot be said the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Strickland v. Washington, 466 U.S. 668, 687 (1984); Gorby v. State, 819 So.2d 664, 674 (Fla. 2002).

The collateral court correctly denied Booker's amended claim for several reasons. First, though Booker was given an opportunity to amend his claim, Booker still failed to make even a threshold showing of ineffective assistance of counsel. Nelson v. State, 875 So.2d 579 (Fla. 2004).

In Nelson, this Court ruled that in order to set forth a legally sufficient claim that trial counsel was ineffective for failing to call certain witnesses, a defendant is required to allege what testimony defense counsel could have elicited from

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to the other prong. Waterhouse v. State, 792 So.2d 1176, 1182

witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have so testified prejudiced the case. Additionally, this Court ruled that a legally sufficient claim must also allege the uncalled witness would have been available to testify at trial. This Court concluded that if a witness were not available, a defendant would not be able to establish either deficient performance or prejudice from counsel's failure to call, interview, or investigate that witness. Nelson at 583.

This Court also determined that a defendant who fails to plead the availability of a witness should be given an opportunity to cure the defect. This Court observed that "when a defendant fails to allege that a witness would have been available, the defendant should be granted leave to amend the motion within a specified time period. If no amendment is filed within the time allowed, then the denial can be with prejudice." Nelson v. State, 875 So.2d 579, 583-584 (Fla. 2004).

In his amendment to Claim I, Booker identified four witnesses. These witnesses included himself, fellow death row inmates Gary Trawick and William White, and attorney Susan Cary. Booker failed to allege he told trial counsel of Officer Thomas' threats or what his own testimony would have been had trial

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(Fla. 2001).

counsel called him to testify. Likewise, Booker failed to set forth any grounds to support a finding that trial counsel's failure to call Booker to the witness stand prejudiced his case.

Additionally, despite being given an opportunity to comport with the requirements of Nelson, Booker failed to allege that Trawick, White, or Ms. Cary would have been available to testify at the second penalty phase.[13] (PCR Vol. I 88). Accordingly, Booker's claim was insufficiently pled. Id. at 583.

Booker also failed to allege, in more than a conclusory fashion, how these witnesses would have served to mitigate Booker's attack on Correctional Officer Thomas. For instance, Booker does not outline what testimony defense counsel could have elicited from Mr. Trawick and Mr. White. Instead, Booker alleges only that Trawick and White "might" have testified to threats made by Officer Thomas to the extent he was going to get Mr. Booker. (PCR Vol. I 88).

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[13] While Trawick and White were on death row and could have been transported to trial by Department of Corrections Officials, their physical availability does not relieve Booker from alleging, in good faith, they would have actually been available to testify. There are numerous reasons that a witness would not have been available, including a witness who has or would have asserted his or her right to remain silent and Booker made no showing the witnesses would have been willing to testify. Nelson v. State, 875 So.2d 579, 583 n. 3 (Fla. 2004).

Booker made no allegation that White or Trawick actually heard these alleged threats and therefore would have testified the threats were actually made. Additionally, Booker makes no allegation these threats were made at a time that would give rise to a well-founded fear on Mr. Booker's part, at the time he threw burning liquid in Officer Thomas' face, that Correctional Officer Thomas intended to do him imminent bodily harm. (PCR Vol. I 88).

Booker also failed to demonstrate, or even allege, how Ms. Cary's testimony, if presented, likely would have resulted in a life sentence. In his amendment to Claim I, Booker alleged that Ms. Cary was involved in "complaints stemming from the rampage which included the ransacking of cells and the destruction of legal papers and personal belongings of the inmates." (PCR Vol. I 88). Booker also alleged that Ms. Cary could have testified she believed that there may have been litigation stemming from the guards' post-stabbing conduct which the Department of Corrections may have settled. (PCR Vol. I 88).

Booker failed to establish Ms. Cary's testimony was relevant in any way. Booker did not allege that Ms. Cary was present at the time of any alleged threats or the battery on Correctional Officer Thomas, nor did he allege Ms. Cary had any first-hand knowledge of the incident. Similarly, Booker made no

allegation that Ms. Cary had any personal knowledge of the "guard riot" that Booker alluded to in his motion for post-conviction relief. (PCR Vol. I 88).

Booker also failed to present the collateral court with any basis to link Booker's aggravated battery conviction and the alleged "guard riot" or to establish any connection between his attack on Correctional Officer Thomas and any litigation stemming from the riot.[14] For instance, Booker made no allegation his cell was ransacked, his papers or belongings were destroyed, his safety was compromised, or that he was even involved in any litigation stemming from the "guard riot." (PCR Vol. I 88).

Booker's claims that counsel was ineffective for failing to call inmates Trawick and White, and attorney Susan Cary were speculative and conclusory and, as such, legally insufficient to warrant an evidentiary hearing. Accordingly the collateral court properly denied this claim. Parker v. State, 904 So.2d 370, 378 (Fla. 2005) (ruling that a defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and

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[14] Booker also failed to make any threshold showing that Ms. Cary's testimony would even be admissible. Given that Ms. Cary had no first hand knowledge of either the aggravated battery or

then expect to receive an evidentiary hearing. Instead, the defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant). This Court should affirm.

(b) ***Allegation regarding counsel's failure to investigate and present mitigation***

In Claim I of his second amended motion for post-conviction relief, Booker made various allegations of ineffective assistance of counsel. Among these varied claims, Booker alleged that counsel was ineffective for failing to investigate and present available mitigation evidence.

Before the collateral court, Booker alleged that trial counsel was ineffective for failing to call "a variety of available witnesses who would testify to extensive mitigation regarding Mr. Booker's early life, his early interest in literature which competed for his time with the lure of the streets, his service to his country overseas, and his emotional and mental health history, including the problems of substance

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the so called "guard riot", any testimony about what she learned about these events would constitute inadmissible hearsay.

abuse as it effected him before and at the time of the crime." (PCR Vol. I 11).[15]

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[15] Within Claim I of his amended motion for post-conviction relief, Booker made various "shotgun" allegations of ineffective assistance of counsel. Booker alleged that trial counsel was ineffective for failing to object to testimony supporting "non-statutory aggravators," as well as various arguments made by the prosecution during closing argument. Booker also alleged that trial counsel was ineffective for failing to object when the trial court instructed the jury it was not to consider Page Zymromski's testimony that Booker's remorse was genuine. (PCR Vol. I 14-15).

In his motion, Booker failed to point to any record citations in support of his claim and failed to set forth any legal support for his claim that trial counsel was ineffective for failing to object.
The court denied Claim I as insufficiently pled but did so without prejudice. The collateral court granted Booker thirty days in which to amend Claim I. (PCR Vol. I 83-84). Booker never repled his allegations that trial counsel was ineffective for failing to object to any testimony, various prosecutorial arguments, or to the trial court's instruction regarding Ms. Zymromski. (PCR 87-89). Nor did Booker make any complaint that the collateral court judge did not revisit these allegations at the second Huff hearing held on his amended Claim I. Nonetheless, Booker attempts to resurrect these shotgun claims of ineffective assistance of counsel before this Court on appeal. (IB 33, 37).

Booker fails to cite to any record citation where these alleged objectionable non-statutory aggravators, comments, or instructions occurred or to present any argument in support of his claims. Issues raised in an appellate brief that contain no argument are deemed abandoned. Even if these allegations were properly before this Court on appeal, Booker has now abandoned them. Chamberlain v. State, 881 So.2d 1087,1103 (Fla. 2004); Shere v. State, 742 So.2d 215, 217 n. 6 (Fla. 1999) (finding that issues raised in appellate brief which contain no argument are deemed abandoned).

Booker also claimed that trial counsel was ineffective for failing to present "available evidence of the full scope and extent of Mr. Booker's accomplishment as an influential figure on the national and international literary 'scene.'" Booker alleged that "numerous witnesses could have been called to explain to the jury Mr. Booker's accomplishment in this regard, as could exhibits of Mr. Booker's work which could have explained the person in a unique and powerful fashion." (PCR Vol. I 12). Booker faulted counsel for calling "white academics" who were ill-prepared and did not testify as powerfully as to "Mr. Booker's voice as a black prisoner in America..." (PCR Vol. I 12).

Finally, Booker alleged trial counsel was ineffective for failing to elicit testimony from Professor Hayden Carruth, an expert on Ezra Pound. Booker claims trial counsel should have questioned Professor Carruth on the fact that Ezra Pound faced the death penalty for treason, a crime Booker depicts as more onerous than his own. (PCR Vol. I 12-13).

Booker averred that Professor Carruth could explain that Ezra Pound was released, after being hospitalized as insane for 13 years, as a result of the intercession of other poets and because the State did not want to silence this unique and important artist.(PCR Vol. I 12-13). Booker claimed this

evidence, given the fact that Pound was permitted to give the "fascist salute as he sail[ed] back to Italy upon his release" and "William Burroughs playing William Tell with his wife, shoots her in the head and suffers no punishment", would provide the jury with evidence in contrast with the State's efforts to execute "blackman Poet Stephen Booker". (PCR Vol. I 14).[16]

The collateral court denied this claim as insufficiently pled. The collateral court ruled that Booker failed to comply with the dictates of Nelson v. State, 875 So.2d 579, 582 (Fla. 2004), in presenting his claim.

The collateral court ruled that Booker failed to identify the witnesses he alleges trial counsel should have called, provide the substance of their testimony, explain how the omission of this evidence prejudiced the outcome of the case given the extensive mitigation that actually was presented, or allege the uncalled witnesses were available to testify at the time of trial.(PCR Vol. I 79-80) The Court granted Booker thirty days in which to amend his claim. (PCR Vol. I 80).

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[16] Hayden Carruth actually testified during Booker's second penalty phase proceedings but was not questioned on Ezra Pound. However, Dr. Stuart Friebert did testify about Ezra Pound. During his testimony, Dr. Friebert told the jury that Pound was prosecuted as a traitor but freed from prison as a result of the intercession of people who admired his poetry. (2PP Vol. XIV 1971).

Booker amended his claim. In doing so, Booker abandoned his claim that trial counsel was ineffective for failing to call "a variety of available witnesses who would testify to extensive mitigation regarding Mr. Booker's early life...", as Booker failed to amend this part of his claim to comport with the dictates of Nelson. (PCR Vol. I 11, 89). Likewise, Booker apparently abandoned his claim that trial counsel was ineffective for failing to question Professor Carruth on Ezra Pound as Booker made no more mention of Professor Carruth in his amended pleading.

Instead, in his amended claim, Booker alleged that trial counsel was ineffective for failing to call Henry Louis Gates, Cornell West, Rita Dove, Yuseph Koumanyaka, Amiri Baraka, and Stanley Crouch. Booker alleged, without elaboration, that these witnesses would have "educate[d] the jury on his [Booker's] contributions to the rich vein of American and international letters into which his work feeds and from which he has derived his theme." (PCR Vol. I 89).

Booker also alleged that "experts on Pound could have been called to show how and why he [Pound] was freed from a death sentence". (PCR Vol. I 89).[17] Booker identified these witnesses

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[17] In 1945, Mr. Pound was arrested by U.S. forces for treason. He was ultimately declared unfit for trial, mentally

as Donald Hall, Noel Stock, Robert Crelley and "many others". (PCR Vol. I 89). Booker claimed that at an evidentiary hearing he would call these or other experts to establish that trial counsel was ineffective and that counsel's deficient performance prejudiced the outcome of his case.

The collateral court denied this claim. The court ruled that during the penalty phase, trial counsel presented more than ample evidence of the Defendant's literary accomplishments while on death row. The collateral court observed it had placed little weight on this evidence and that any attempt to present additional and cumulative testimony would not have resulted in a life sentence. (PCR Vol. I 150).

Booker claims before this Court the collateral court erred in summarily denying this claim. This Court should affirm.

The collateral court initially ruled that, pursuant to Nelson, Booker's claim was entirely legally insufficient. In accord with this Court's guidance, the collateral court granted Booker thirty days in which to amend his claim. (PCR Vol. I 84).

Despite being given the opportunity to present a legally sufficient claim a second time, Booker failed to do so. Booker

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ill and committed to St. Elizabeth's Hospital in Washington, D.C., until 1958. He returned to Europe and died in 1972.

not only failed to allege that any of the six uncalled literary witnesses would have been available to testify at Booker's second penalty phase proceedings in 1998, he failed to set forth the substance of any of these witnesses' testimony. In neglecting to do so, Booker failed to demonstrate how these witnesses' testimony would have been materially different from that of the six witnesses Booker actually did present. Similarly, Booker made no effort to explain how these different witnesses' testimony, given the ample "literary" mitigation evidence actually presented, probably would have resulted in a life sentence. (PCR Vol. I 88-89).

As to the three "Pound" witnesses, Booker failed to establish any relevance between Ezra Pound's release from a mental hospital some 40 years before Booker's second penalty phase proceedings and the jury's determination of whether to recommend that Booker be sentenced to death. As was the case for the first six witnesses that Booker claims counsel should have called, Booker failed to allege that any of the so-called "Pound witnesses" would have been available to testify at the time of Booker's second penalty phase proceedings.

Likewise, Booker failed to outline the actual substance of their testimony or explain how this omitted testimony probably

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Unlike Mr. Booker, Mr. Pound was never convicted of a capital

would have produced a life sentence, especially in light of Professor Friebert's "Pound" testimony. In accord with this Court's decision in Nelson, the trial court acted properly in summarily denying this claim. Nelson v. State, 875 So.2d 579, 583-584 (Fla. 2004).

Even assuming, *arguendo*, that Booker's claim met the threshold requirements of Nelson, the trial court properly ruled these additional witnesses would be cumulative to the extensive "literary accomplishment" evidence that trial counsel presented during Booker's second penalty phase proceedings. Counsel does not render ineffective assistance of counsel by failing to present cumulative mitigation evidence. Jones v. State, 928 So.2d 1178, 1187 (Fla. 2006); Cole v. State, 841 So.2d 409, 425 (Fla. 2003) (holding that trial counsel did not render ineffective assistance by failing to present cumulative evidence of drug and alcohol abuse and child abuse) (citing Valle v. State, 705 So.2d 1331, 1334-35 (Fla. 1997)).

By failing to allege the substance of each uncalled witnesses' testimony in more than a conclusory fashion and by omitting any comparison of the putative testimony of the uncalled witnesses to the testimony of the six literary scholars who testified before the jury at Booker's trial, Booker failed

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crime and was never arrested nor convicted for rape and murder.

to meet his burden to show this evidence was not cumulative. In accord with this Court's decision in Jones that trial counsel is not ineffective for failing to present cumulative evidence, this Court should affirm the collateral court's order denying this claim. Jones v. State, 928 So.2d at 1187.

(c) ***Allegation regarding the Simmons claim.***

In Claim III of his motion for post-conviction relief, Booker alleged the trial court erred in refusing to instruct the jury on how long Booker would be in jail if given a life sentence. (PCR Vol. I 22-23). The collateral court denied his claim ruling that:

> The Defendant's claim he was denied due process and equal protection when the trial court refused to instruct the jury regarding the consecutive sentences Booker received for his prior burglary, sexual battery, and aggravated assault convictions is denied. This claim has already been raised and rejected on direct appeal. Booker v. State, 773 So.2d 1079, 1087-1088 (Fla. 2000) (ruling that the Defendant's sentences for his prior burglary, sexual battery, and aggravated assault convictions were not relevant mitigation on the issue of whether he would actually remain in prison for the length of those sentences).

(PCR Vol. I 81).

Booker alleges before this Court that the collateral court erred in refusing to grant him an evidentiary hearing on this claim. To the contrary, the collateral court properly denied Booker's claim.

This claim is procedurally barred. On appeal from his second penalty phase, Booker alleged the trial court erred by refusing to inform the jury regarding the consecutive sentences Booker received for his prior burglary, sexual battery, and aggravated assault convictions.

This Court rejected Booker's claim on the merits. Booker v. State, 773 So.2d 1079, 1087-1088 (Fla. 2000). Claims that were raised and rejected on direct appeal are procedurally barred in post-conviction proceedings. Hannon v. State, 31 Fla.L.Weekly S539 (Fla. August 31, 2006) (ruling that Hannon's attack on the sufficiency of the evidence in support the HAC aggravator was procedurally barred because it was raised and rejected on direct appeal).

Additionally, this Court has rejected, on the merits, the same claim Booker makes here. Gorby v. State, 630 So.2d 544, 548 (Fla. 1993)(rejecting Gorby's claim that the jury must be instructed on the penalties for noncapital crimes for which the defendant has been convicted). This Court should affirm the collateral court's order summarily denying this claim.

(d) ***Allegation regarding the Crawford claim***

In Claim V of his second amended motion for post-conviction relief, Booker alleged the trial court erred when it:

(1) Introduced records demonstrating that Booker had been previously convicted of robbery and aggravated battery.

(2) Permitted the State to read to the jury the testimony of Mrs. Frank Johnson and Mrs. W.K. Klinepeter, who testified, subject to cross-examination at Booker's first trial.[18]

(3) Permitted the "summation testimony" of David C.P. Smith, and,

(4) Allowed Marvin Thomas' testimony that "involved" hearsay.

(PCR Vol. 1 29-30).[19]

The collateral court denied this claim. The Court ruled that:

> The Defendant claims the State violated the dictates of Crawford v. Washington, 124 S.Ct. 1354 (2004), when it introduced two prior judgments of convictions and sentences, the former testimony of unavailable witnesses Johnson and Klinepeter both of whom had been subject to cross-examination at Booker's first trial, and the testimony of David C.P. Smith. The Defendant has failed to demonstrate the evidence was admitted in violation of the dictates of Crawford. Accordingly, his claim is denied.

(PCR Vol. I 81-82).

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[18] Booker makes no claim of error in this appeal regarding the admission of Mrs. Johnson and Klinepeter's testimony. (IB 41)

[19] Booker makes no claim of error regarding Mr. Thomas' testimony in this appeal. (IB 41).

Booker devotes less than one page of his brief in presenting this issue to this Court. In making this token argument, Booker fails to point to any authority to support a finding that any of the testimony admitted at the second penalty phase falls within the ambit of Crawford. Additionally, as was the case in his second amended motion for post-conviction relief, Booker fails to point any evidence he would have presented at an evidentiary hearing in support of this purely legal claim. The collateral court correctly denied this claim.[20]

(e) ***Allegation regarding the cruel and unusual claim***

In Claim VI of his second amended motion for post-conviction relief, Booker alleged that executing him after twenty-seven years on death row constitutes cruel and unusual punishment. (PCR Vol. I 22-23). The collateral court denied this claim, ruling that:

> The Defendant's claim his twenty-seven-year incarceration on death row constitutes cruel and unusual punishment is denied. On direct appeal, the Defendant alleged that to execute him after he has already spent over two decades on death row would constitute cruel and unusual punishment under the Eighth Amendment to the Constitution of the United States. The Florida Supreme Court found this claim to be without merit. As this claim was raised and rejected on direct appeal, this claim is procedurally

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[20] In any event, because this Court has found that Crawford is not retroactive to cases on collateral review, Booker is not entitled to relief on this claim. Chandler v. Crosby, 916 So.2d 728 (Fla. 2005).

> barred. Even if this were not the case, the Defendant's claim is without merit. An extended stay on death row does not constitute cruel and unusual punishment. Foster v. State, 810 So.2d 910, 916 (Fla.)*cert denied*, 537 U.S. 990 (2002).

(PCR Vol. I 82).

Booker alleges he was entitled to an evidentiary hearing on his claim that executing him after nearly thirty years on death row constitutes cruel and unusual punishment and the collateral court judge erred in summarily denying his claim. Booker is not entitled to the relief he seeks.

This claim is procedurally barred. On appeal from his second penalty phase, Booker alleged that executing him after he has already spent over two decades on death row would constitute cruel and unusual punishment. This Court rejected this claim. Booker v. State, 773 So.2d 1079, 1096 (Fla. 2000). Claims that were raised and rejected on direct appeal are procedurally barred in post-conviction proceedings. Hannon v. State, 31 Fla.L.Weekly S539 (Fla. August 31, 2006) (ruling that Hannon's attack on the sufficiency of the evidence in support the HAC aggravator was procedurally barred because it was raised and rejected on direct appeal).

Additionally, this Court has repeatedly rejected, on the merits, the same claim Booker makes here. Elledge v. State, 911 So.2d 57 (Fla. 2005); Lucas v. State, 841 So.2d 380, 389 (Fla.

2003) (holding twenty-five years on death row does not constitute cruel and unusual punishment; death sentence reversed in four previous appeals); Foster v. State, 810 So.2d 910, 916 (Fla. 2002) (rejecting Foster's claim the trial court erred when it summarily denied his claim that the twenty-three years he has spent on death row constitutes cruel and unusual punishment); Rose v. State, 787 So.2d 786, 805 (Fla. 2001) (holding cruel and unusual punishment claim of inmate under death sentence since 1977 was without merit; when death sentence reversed once on direct appeal and a second time in postconviction); Knight v. State, 746 So.2d 423, 437 (Fla. 1998) (holding more than two decades on death row does not constitute cruel and unusual punishment). This Court should affirm the collateral court's order summarily denying this claim.

(f) ***Allegation regarding newly discovered evidence***

In Claim VII of his second amended motion for post-conviction relief, Booker claimed that newly discovered evidence establishes that he is innocent of the death penalty. Booker alleged that, since his 1998 penalty phase proceeding, his reputation as an important American writer has matured. Booker claimed, that as such, the State should be "estopped at this

late date from depriving the public of his unique and important voice....” (PCR Vol. I 33-34).[21]

The collateral court summarily denied this claim. The court ruled that:

> ...The Defendant's claim he is innocent of the death penalty because he has become a published writer is denied. In sentencing the Defendant to death, the Court considered mitigation evidence that while the Defendant was in prison he substantially improved his ability to be a productive citizen and to produce creative valuable contributions to American Literature, but gave it little weight. Such evidence does not establish the Defendant is innocent of the death penalty. Allen v. State, 854 So.2d 1255, 1258 n. 5 (Fla. 2003) (holding that innocence of death penalty claim lacks merit because defendant did not allege that all the aggravating circumstances supporting his death sentence were invalid, and because this Court had already conducted a proportionality review on direct appeal).

(PCR Vol. I 82-83).

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[21] Booker claimed that the American public’s interest in the perpetuation and protection of Mr. Booker’s work would implicate First Amendment protections of a free press and rights to expression protected by the First Amendment and its corresponding provision in the Florida Constitution. (PCR Vol. I 33-34).

Booker also alleged, without elaboration, that he will present evidence and witnesses that the state should be estopped from carrying out the death penalty. (PCR Vol. I 34). Apart from its lack of support in the law, such a conclusory claim does not entitle Booker to an evidentiary hearing. Walls v. State, 926 So.2d 1156, 1169 (Fla. 2006) (mere conclusory allegations are not sufficient to entitle the defendant to an evidentiary hearing).

Booker did not present to the collateral court, nor does he present before this Court, an actual claim of "innocent of the death penalty." Instead Booker presents a clemency argument in the guise of a substantive claim. (IB 43-44).

In order to prevail on a claim of being innocent of, or ineligible for, the death sentence received, a defendant must demonstrate constitutional error invalidating all of the aggravating circumstances upon which the sentence was based. Hannon v. State, 31 Fla.L.Weekly S539 (Fla. August 31, 2006); Elledge v. State, 911 So.2d 57, 78 (Fla. 2005) (finding innocent of the death penalty claim without merit); Allen v. State, 854 So.2d 1255, 1257 n.3, 1258 n.5 (Fla. 2003) (rejecting innocence of death penalty claim because petitioner did not allege that all of the aggravating circumstances supporting his death sentence were invalid); Vining v. State, 827 So.2d 201, 216 (Fla. 2002)(same). Booker provides no support for the notion that any, let alone all, of the aggravators found by the trial court, are constitutionally invalid. Indeed, Booker made no allegation this is the case. Rather than attacking the validity of each of the four aggravators found to exist beyond a reasonable doubt, Booker offers an argument that his literary accomplishments render him ineligible for the death penalty. (IB 43-44). Such an argument has no support in Florida law. The

collateral court judge properly denied this claim and this Court should affirm.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of Booker's second amended motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Harry P. Brody, Esq., Brody and Hazen P.A., P.O. Box 16515, Tallahassee, Florida 32317 this 23d day of October 2006.

____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

____
MEREDITH CHARBULA
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