SUPREME COURT OF FLORIDA

ROBERT LACY PARKER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

CASE NO. 63,700

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

CASE **PAGE**

TABLE OF AUTHORITIES
(Continued)

CASE **PAGE**

TABLE OF AUTHORITIES
(Continued)

CASE **PAGE**

TABLE OF AUTHORITIES
(Continued)

CASE **PAGE**

OTHER AUTHORITIES

STATEMENT OF THE CASE AND THE FACTS

Mr. Parker characterizes this proceeding as a new "direct appeal" of the sentence of death properly imposed by the trial court and originally upheld by this Court in Parker v. State, 458 So.2d 750 (Fla.1984). As a new appeal, all facts and all inferences from the facts must be taken in favor of the judgment and sentence on appeal. Shapiro v. State, 390 So.2d 344 (Fla.1980). Mr. Parker's brief does not follow established decisional law on that point, so his statement is not accepted beyond the bare chronology of this case.

(a) Procedural History

Robert Lacy "Tinker" Parker was indicted on three counts of first degree murder for his participation in the deaths of Richard Padgett, Nancy Sheppard and Jody Dalton. (R 3). Mr. Parker was convicted of only third degree murder in the Dalton case but was found guilty as charged in the Padgett and Sheppard murders. (R 409-411).

The Appellant argued successfully for a life sentence before the advisory jury. (R 434-455). The trial judge, as actual sentencer, overrode the advisory jury's life recommendation in the Sheppard case and sentenced Parker to death. (R 476-508).

Parker appealed his conviction and death sentence without success. Parker v. State, 458 So.2d 750 (Fla.1984). The Court disallowed two of the statutory aggravating factors found by the trial court (i.e., that the murder was committed in the course of a robbery and that the murder has heinous, atrocious or cruel) but the Court agreed that the following aggravating factors applied:

(1) Parker had a prior conviction for a violent felony (stemming from his shooting of Billy Long).

(2) Parker committed the murder to avoid lawful arrest.

(3) Parker committed the murder for pecuniary gain.

(4) The murder was cold, calculated and premeditated.

Since these four aggravating factors were not offset by any specific findings in mitigation (R 505) and since this Court's independent Tedder review of the record revealed no reasonable basis for the jury's recommendation, Parker v. State, id at 754, Parker's death sentence was affirmed and certiorari was denied. Parker v. Florida, 470 U.S. 1088 (1985).

Parker sought collateral relief pursuant to Fla.R.Crim.P. 3.850, without success. Parker v. State, 491 So.2d 532 (Fla.1986).

Parker filed a petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254. Relief was granted on the theory that this Court's application of Tedder v. State, 322 So.2d 908 (Fla.1975) was capricious, broad and arbitrary. The state appealed this finding and the Eleventh Circuit reversed. Parker v. Dugger, 876 F.2d 1470 (11th Cir.1989).[1]

Certiorari review was granted by the United States Supreme Court. In a 5-4 decision, the Supreme Court remanded this case for "appropriate proceedings" to consider Parker's sentence but without expressing any opinion as to the need for resentencing. Parker v. Dugger, ___ U.S. ___, 111 S.Ct. 731, 740 (1991). The majority opinion was based upon this Court's failure to explain

[1] A cross-appeal by Mr. Parker prompted the "Parker v. Dugger" styling of the case.

whether, in the course of any Tedder analysis, nonstatutory mitigating evidence was considered. The majority speculated (over a strong dissent) that this Court's silence was evidence of "review error." Id., Other issues raised by Mr. Parker were dismissed on the grounds that certiorari had been improvidently granted.

This proceeding ensued.

(b) Facts

We will begin by reviewing the facts as found by the sentencer (Judge Olliff) at the time of trial:

Parker was a drug dealer (R 479). Tommy Groover sold drugs for Parker and owed money (to Parker) for drugs sold to various users, including Richard Padgett. (R 479).

On the day before the murders, Parker threatened to kill Groover (by throwing a rope over a tree limb and threatening to hang him) if Groover did not pay. (R 47). Parker threatened Groover (for a second time) the next day. (R 479).

Groover, accompanied by William Long, went out to collect Parker's money. (R 479). They located Richard Padgett and his girlfriend, Nancy Sheppard, in a nightclub. (R 479).

Groover and Long took Padgett and Sheppard to Parker's home, where Robert Parker and his ex-wife, Elaine, were waiting. (R 479). Padgett told Parker he had no money and Parker took Padgett outside. (R 479). A shot was fired, after which Padgett and Parker (who had a gun) returned. (R 479). Nancy Sheppard was frightened and offered her jewelry as payment, but Parker refused the offer. (R 479).

Parker (still armed) left with Groover, Padgett and Elaine while Long drove Sheppard home. (R 480).

When Padgett was unable to collect some money to pay his debt, he was taken to a junk yard owned by the Parker family where he was beaten up by Groover. (R 480). The Parkers (Robert and Elaine) and Groover then took Padgett to a deserted area, where Groover shot him. (R 480). Parker and Groover then dumped Padgett's body in a ditch. (R 480).

The trio returned to the junk yard where Parker and Groover attempted to melt down the murder weapon (R 480). The trio cleaned themselves and went to a bar, (R 480), where they met Ms. Jody Dalton. The foursome left the bar and proceeded to a secluded area where the "melted" pistol was thrown away. (R 480). The foursome went to Parker's home, where Dalton remained while the Parkers and Groover went to visit one Joan Bennett. (R 480).

When the Parkers, Groover and Bennett returned to the Parker home they discovered that Ms. Dalton had used some of Parker's drugs. (R 481). Ms. Dalton was taken to a secluded area and murdered by Groover. (R 481). Parker and Groover sank Dalton's body in a lake after weighing it down with concrete blocks. (R 481).

Other murders were considered and finally Parker and Groover decided that Ms. Sheppard should be killed since she was a potential witness. (R 481).

The Parkers and Groover went to William Long's home to get directions to Sheppard's home. (R 481). Long did not know a

murder was in the works and thus took the Parkers and Groover to Ms. Sheppard. (R 482).

Elaine Parker tricked Ms. Sheppard into leaving with the group to "find Padgett." (R 482). The group drove part way to the scene of the Padgett murder. Parker asked Long "if he knew what was going to happen next," (R 482), and then gleefully said "Well, you will in a few minutes." (R 482).

When the group reached the scene, Parker, who had previously been convicted of shooting Long, (R 482), threatened to kill Long unless Long killed Sheppard. (R 482). Nancy was then led to a ditch, where she saw Padgett's body and fell to her knees. (R 483).

Elaine Parker handed Long a pistol. Long shot Sheppard while Robert Parker screamed at him to shoot her again. (R 483). To finish the job, Robert Parker slit Nancy Sheppard's throat. (R 483).

Mr. Parker's brief makes certain representations of fact which bear clarification or outright rejection.

At page (5) Parker's brief alleges that Parker asked for a washcloth "to care for Padgett, who was bleeding" in an apparent effort to humanize this defendant. The washcloth testimony came from witness Carl Barton. (R 1451, et. seq.). Barton was a state witness, but Barton was a friend of the Parker's who lived in a mobile home in their junk yard. (R 1468). Parker's parents live across the street and Spencer Hance lives next door. (R 1468).

Barton said that Parker was "trying to look like he was trying to help the Padgett boy." (R 1460). Before the foursome left, Groover obtained a gun from one of the Parkers. (R 1463). While Padgett was scared, Parker was "normal." (R 1462).

The next morning, Parker came by Barton's home and "asked" him "You didn't see anything last night, did you?" (R 1467). Barton "played the fool" (R 1467) and agreed with Parker.

Spencer Hance, Barton's neighbor testified that Mr. Parker roused him out of bed and asked Hance to get rid of a gun for him. (R 1481). When Hance refused, Parker asked to use an acetylene torch, but Hance said none of them were working. (R 1482). Parker and Groover went to the garage and hooked up an arc-welder to the gun. (R 1482). While Parker and Groover worked on the gun, Hance conversed with Elaine Parker, who said that they had just killed someone. (R 1485).

Parker and Groover cooled down the melted gun in Hance's sink and washed off a knife as well. (R 1487). Tommy Groover and Tinker Parker then checked each other for bloodstains. (R 1487). Blood was found on Parker's shoes, so they decided to burn the shoes. (R 1488).

In a later conversation with Parker, Parker told Hance "we wasted two of them." (R 1491).

There was no evidence of "domination" by Groover or that Parker was either "scared" or merely a bystander.

Also at page (5), Parker's brief alleged that Parker shouted "What are you doing you crazy m____f____?", when Groover shot Ms. Dalton. (R 1559). The implication at page (5) is that Parker did not expect Dalton to be killed.

In actuality, the witness (Joan Bennett) testified that she met the Parkers, Groover and Long at the Sugar Shack. (R 1506). Mr. Parker was upset about people owing him money and not paying him. (R 1506). The Appellant said he was going "to kill the m____f___." (R 1506).

Later that night she went to Elaine Parker's trailer, where she saw Jody Dalton with a bag of guauludes. (R 1512). Tinker Parker screamed at Dalton for using his drugs. (R 1512). They all drove to the lake. Elaine Parker drove, while Mr. Parker rode up front. (R 1513). Bennett, Dalton and Groover rode in back. (R 1513).

When they reached the murder scene Groover, Parker and Dalton exited the car while Elaine Parker and Ms. Bennett sat inside. (R 1517). Parker stood by the car while Groover dragged the nude Ms. Dalton to the lake. (R 1518). Groover shot Dalton in the head a number of times. (R 1519). Parker ran up to Groover, grabbed him and said "You m.f., you are making too much noise." (R 1519). Parker and Groover then tied blocks to Dalton's body and sank it in the lake. (R 1520-21). Mr. Parker made them wait to make certain the body did not float. (R 1523).

The partial "quotation" in Parker's brief, "What are you doing . . .," at page (5), was defense attorney Link's characterization of the comment, not the comment itself. Ms. Bennett, for the second time, told Mr. Link and the jury that Parker was upset over the noise being made, not Dalton's fate. (R 1559).

On page (6), Parker describes the Sheppard murder as a simple execution by William Long. The truth, as noted in Judge Olliff's order, is that Long killed Sheppard after Parker threatened to kill Long. (R 1257). Parker had shot Long once before. (R 1257). Elaine Parker also told Long to kill Sheppard or he would die. (R 1260).

When Long shot Ms. Sheppard, Parker yelled "shoot her again" and "she is still breathing." (R 1260). Parker took a knife and cut Ms. Sheppard's throat. (R 1261). Parker retained the knife and later washed it off in a ditch. (R 1264).

The "state witness testimony" that Groover forced Long to kill Ms. Sheppard and that Groover cut her throat was nothing more than Spencer Hance's recitation, on cross, of comments allegedly made by Groover and Parker at a barbecue the next day. (R 1494). Although he was a state witness, Hance lived on the Parker's land and was a "good friend" of the family. (R 1479-80). Hance was scared on the night Parker and Groover came to his home and had received death threats of unknown origin prior to trial. (R 1501).

At page (7) of his brief, Parker alleges "Throughout his long trial, no one ever said that Robert Parker killed anyone."

In point of fact, Long said that Parker slit Sheppard's throat (as noted above), and Parker told Spencer Hance he had, with his companion, "wasted two of them." (R 1491).

Clyde Johnson testified that Parker threatened to "kick Groover's ass" if Groover did not get Parker's money. (R 1131).

Mike Green testified that he gave Parker a .22 pistol as payment for drugs, and Parker pointed the gun at other people present while asking for payment. (R 1165). Green testified to Parker's threat to hang Groover (R 1177) and stated that Groover was scared. (R 1178).

Parker invited Green to go "collecting" with him the next day and Parker had a pistol. (R 1181). When Parker met Groover that day he again demanded money from Groover even though Groover had a shotgun. (R 1182). Groover told Parker he was setting out to collect Parker's money. (R 1182).

Billy Long, who was with Groover, testified that Groover was scared Parker would kill him. (R 1244).

Parker testified on his own behalf. Parker at first denied threatening to hang Groover (R 1821) but later admitted that he did. (R 1906). Parker said he needed to threaten debtors to help his drug business, (R 1898), then later denied it. (R 1907). Parker admitted that he once broke his own mother's arm while intoxicated. (R 1930).

During the penalty phase, Parker presented the following mitigating evidence and testimony:

(1) Hattie Mae Parker

Parker's mother testified that Parker was the "baby" of the family and had three older siblings. (R 2319). Ms. Parker testified that the Appellant had a normal childhood, (R 2321), that the family was close, (R 2321) and, if anything, Mr. Parker was spoiled. (R 2321).

Parker's father drank but was never mean to the kids. (R 2322).

She testified that her spoiled son started using drugs at 15 or 16, quit school, got a girl (Elaine) pregnant and then lived in a house Elaine's parents paid for, and stayed home while his wife worked. (R 2325-2331). Once, while in a fight with his brother, Parker knocked his mother down and broke her arm. (R 2332).

Hattie tried to help Parker by alleging that he said he was innocent, (R 2333), and that Groover threatened her. (R 2338).

(2) Nellie Filbert

Parker's grandmother also attested to his normal childhood, (R 2342), and said Parker was good to his own family. (R 2344).

(3) Nellie Ballard

A former neighbor said Parker was a nice kid. (R 2346).

(4) Gail Palmer

Parker's cousin described him as a normal child. (R 2350). She also said Parker once helped her when her child was ill. (R 2353).

(5) Wilma Urgman

Parker's sister, (R 2355), testified that Parker used dope and was sent to a juvenile shelter after he quit school. (R 2357-58).

(6) Eva Sapp

An evangelist alleged Parker found God in time for trial. (R 2363).

(7) Marion Wainwright

Mr. Wainwright introduced evidence of the advisory sentences meted out in the Groover (codefendant's) case. (R 2378-79). Defense counsel specifically asked the Court to consider the Groover sentences and introduced the advisory and actual sentences into evidence as defense exhibits. (R 2378, exhibits 5 and 6 for the defense).[2]

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[2] The defense asked the Court to consider Groover's sentences, thus belying the claim that the trial judge violated "Gardner" or otherwise erred in reviewing Groover's sentence when considering Parker's sentence.

SUMMARY OF ARGUMENT

The United States Supreme Court remanded this case because it could not tell whether this Court's "Tedder" analysis violated Lockett v. Ohio, 438 U.S. 586 (1978). We submit that by the time this case was decided (in 1984) this Court was aware of, and applying, the six year old Lockett decision. No inference of noncompliance should flow from a "silent" opinion.

This Court can satisfy the remand by any "appropriate" proceeding. The Court can advise the Supreme Court that Lockett evidence was considered (whether it was discussed or not) or the Court can grant Parker a new appeal.

If Parker's appeal is reconsidered, there is no question that the override in this case is well supported by the evidence and therefore under a Tedder analysis, no reasonable jury could conclude life was the appropriate sentence.

ARGUMENT: POINT I

THE TRIAL COURT DID NOT ERR IN SENTENCING THE APPELLANT TO DEATH DESPITE THE SUGGESTION OF THE ADVISORY JURY

(A) SCOPE OF REVIEW

In an effort to limit the scope of review, Parker suggests that the only issue before this Court is de novo review of his sentence of death. The Appellant's desire to limit the scope of this appeal stems in large measure from his inability to rebut or deny the fact that this case is before the Court due to the United States Supreme Court's decision to obtain clarification of a "silent" decision applying state law to proffered evidence.

The majority opinion in Parker v. Dugger, 498 U.S. ___, 112 L.Ed.2d 812, 111 S.Ct. 731 (1991) combined a speculative and almost "unprecedented" reconstruction of a silent record (see White, J., dissenting at 740-1) with two significant errors to create a remand on an issue (the quality of appellate review) not squarely argued by the parties.

The then-extant majority found that this Court's "failure" to discuss nonstatutory mitigating evidence in the written opinion meant that this Court failed to review nonstatutory mitigating evidence as required by Lockett v. Ohio, 438 U.S. 586 (1978). Parker, supra, at 112 L.Ed.2d at 826-827. To support this assumption, the Supreme Court discussed putative nonstatutory mitigating evidence that the trial judge "must have considered," and concluded that this Court's silence "meant" failure to consider that same evidence. Parker, supra, 112 L.Ed.2d at 827.

The error committed in the majority opinion is painfully obvious. As this Court held in the contemporaneous case of Jackson v. State, 452 So.2d 533 (Fla.1984), the mere silence of an opinion regarding any particular issue presented to this Court does not mean that the issue was not considered.[3] Furthermore, this Court reviews the entire record in every capital case. State v. Dixon, 283 So.2d 1 (Fla.1973); Brown v. Wainwright, 392 So.2d 1327 (Fla.1981). Finally, Lockett was published in 1978 and was clearly known to this Court by 1984. It is "incredible" [Spaziano v. Dugger, 557 So.2d 1372 (Fla.1990)] to assume that a court that was familiar with Lockett would ignore its obligation to review nonstatutory mitigating evidence. Accord: Card v. Dugger, 512 So.2d 829 (Fla.1987); Harich v. State, 542 So.2d 90 (Fla.1989) (no Lockett error presumed from silent order). Spaziano v. State, 433 So.2d 508 (Fla.1983); Francis v. State, 473 So.2d 672 (Fla.1985).

Even if one might suspect pure Lockett error, the United States Supreme Court's assumption also presumes this Court's noncompliance with § 921.141, Fla. Stat., (plenary review) and §§ 59.041 and 924.33, Fla. Stat., (harmless error review). Again, there is no authority for such an incredible assumption. It is simply illogical to assume that this Court, in this one

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[3] Oddly, in Eddings v. Oklahoma, 455 U.S. 104 (1982), the Supreme Court held that a mere "silent opinion" would not establish Lockett error. Accord: Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985); Johnson v. Wainwright, 806 F.2d 1479 (11th Cir.1986).

case out of the hundreds of capital cases reviewed since 1972, suddenly ignored the law and rushed to judgment.

The Supreme Court also looked to its interpretation of "Florida practice" in remanding the case. In doing so, the United States Supreme Court observed that this Court "usually" remands override cases for resentencing when an aggravating factor is stricken on appeal. This observation, if intended as a federal finding of state "law," is not necessarily accurate.[4] More to the point, however, is the fact that state court compliance with state "custom" or "usual practice" does not raise a federal constitutional question. Wainwright v. Goode, 464 U.S. 78 (1983); Harris v. Pulley, 465 U.S. 37, 41 (1984). Even if the Supreme Court felt that this Court misapplied an actual state sentencing law, it would have no power to "correct" the decision. Gryger v. Burke, 334 U.S. 728 (1948); Lewis v. Jeffers, ___ U.S. ___, 111 L.Ed.2d 606 (1990). Estelle v. McGuire, ___ U.S. ___ (1991), Case No. 90-1074. The United States Supreme Court held that it will not compel the drafting of an expository opinion on a state court's application of state law, see La Vallee v. Della Rose, 410 U.S. 690 (1973); Sims v. Georgia, 385 U.S. 38 (1967), and will not substitute its judgment even if it disagrees with this Court's application of Tedder v. State, 322 So.2d 908

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[4] A decision to remand any capital case is dependent upon this Court's ability to ascertain harmless error following disallowance of an aggravating factor. See Pentecost v. State, 545 So.2d 861 (Fla.1989); Zeigler v. State, 580 So.2d 127 (Fla.1991). Torres-Arboledo v. State, 524 So.2d 403 (Fla.1988); Thompson v. State, 553 So.2d 153 (Fla.1989).

(Fla.1975). Spaziano v. Florida, 468 U.S. 447 (1984). Estelle v. McGuire, supra.

Just as the United States Supreme Court cannot assume that this Court failed to abide by state law, it is also evident that the United States Supreme Court has not ignored prior decisions in setting the scope of this remand.[5]

A new plenary appeal is not required unless this Court concludes that in 1984 the Court failed to adhere to the tenets of Lockett, supra, and established Florida law.

The United States Supreme Court did not find that the death sentence at bar was inappropriate. The court also declined to suggest or direct any particular result following any "appropriate proceeding." Parker, supra, at 112 L.Ed.2d at 827. The United States Supreme Court was not concerned with the nature of the sentence imposed, but rather, questioned whether the procedures employed comport with constitutional mandates. See Clemons v. Mississippi, 494 U.S. ___, L.Ed.2d 725, 110 S.Ct. 1441 (1990).

Therefore, a new plenary appeal is not warranted if this Court advises the United States Supreme Court that an independent appellate review pursuant to Lockett was considered in this Court's review at the time of Parker's 1984 appeal. Moreover, the entire record was reviewed pursuant to Brown v. Wainwright, supra, in sustaining the override. A determination that Parker's

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[5] In Santos v. State, ___ So.2d ___, (Fla.1991), 16 F.L.W. S634, this court acknowledged the scope of remand in Parker, supra, ("...remanded for new consideration that more fully weighed the available mitigating evidence...").

death sentence is appropriate based on a review of the record before the Court will satisfy the full scope of the United States Supreme Court's mandate.

(B) THE TRIAL COURT DID NOT ERR IN IMPOSING A SENTENCE OF DEATH

The facts have not changed since Parker's original sentence of death was reviewed and the override upheld pursuant to Tedder v. State, 322 So.2d 908 (Fla.1975) and § 921.141, Fla. Stat.[6]

Parker suggests that the jury's recommendation is virtually binding under Tedder, id. Parker's position is undermined by several factors; to wit:

(1) Tedder v. State, 322 So.2d 908 (Fla.1975) is a declaration of judicial policy relating to the standard of review, not law per se. While great weight must be given to the voice of the community, that voice must be rational pursuant to the Tedder standard.

(2) Pursuant to § 921.141(3), Fla. Stat., the trial judge may impose any appropriate sentence "notwithstanding" the jury's suggestion. No sentence can ever be imposed without the trial court, the sentencer, sentencing with written findings.

(3) Neither the United States Constitution nor Florida's death penalty statute require jury sentencing. Spaziano v. Florida, 468 U.S. 447 (1984); Hildwin v. Florida, 490 U.S. ___, 104 L.Ed.2d 728 (1989). In fact, the United States Constitution does not obligate advisory juries to announce their findings in aggravation or mitigation. Hildwin, id.

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[6] The Supreme Court cited to this Court's decision in Campbell v. State, 571 So.2d 415 (Fla.1990), signifying its concern that the scope of review in 1984 was not fully articulated. Parker, supra, 112 L.Ed.2d at 824.

It can hardly be suggested that jury recommendations are "vital." They do not rise to the dignity of a statutory aggravating factor (when the suggestion is "death") and no explanation is required for either a death or life recommendation. Hildwin, id.[7]

The jury's advisory opinion in this case, as this Court has already determined, was clearly one with which no reasonable person could agree (under Tedder) and is clearly contrary to the evidence (under the statute). The trial court did, however, review the aggravating and mitigating factors applicable and concluded that death was appropriate per a Tedder analysis.

When this Court reviews the sufficiency of the record in ascertaining the appropriateness of the sentence of death, it does not engage in second-guessing the sentence imposed. Hudson v. State, 538 So.2d 829 (Fla.1989); Brown v. Wainwright, 392 So.2d 1327 (Fla.1981). The Court does, however, conduct a harmless error analysis when necessary and in particular when an aggravating factor relied upon by the sentencer is disallowed. Sireci v. State, 399 So.2d 964 (Fla.1981). Pettit v. State, Case No. 75,565, ___ F.L.W. ___, (decided January 9, 1992).

(1) Aggravating Factors

The sentencer relied upon six statutory aggravating factors in sentencing Parker to death. Four of these factors are undisputed and warrant little discussion. The four factors are:

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[7] It is also untrue that juries are superior sentencers. Historically, juries have been arbitrary and capricious, Furman v. Georgia, 408 U.S. 238 (1972) and even in the post-Furman era states using juries as sentencers have had problems which have not affected Florida. See Maynard v. Cartwright, 486 U.S. 356 (1988), Smalley v. State, 546 So.2d 740 (Fla.1989).

(1) Parker had a prior conviction for aggravated battery stemming from an earlier shooting of Billy Long.

(2) The Sheppard murder was committed to avoid lawful arrest.

(3) The Sheppard murder was also committed for pecuniary gain (to help Parker's drug business).

(4) The Sheppard murder was cold, calculated and premeditated and without pretense of legal or moral justification.

Two other statutory aggravating factors were applied by the trial court but disallowed in Parker's first appeal. Parker, supra, 458 So.2d at 754. Since reconsideration of these factors will not result in the imposition of a harsher sentence, and since Parker has requested a "new" direct appeal, these aggravating factors are once again subject to review.

The trial judge applied §§ 921.141 (5)(d), Fla. Stat., (murder during a specific felony) as an aggravating factor but erred in applying "robbery" as the specific felony. Thus, the judge reached the correct result for the wrong reason. Savage v. State, 156 So.2d 566 (Fla.1st DCA 1963). This Court can, on appeal, recognize the correct aggravating factor and consider it as part of any analysis of "harmless error." Echols v. State, 484 So.2d 568 (Fla.1984).

While Parker did not kill Ms. Sheppard during a robbery, he did kill her during a kidnapping - another listed § 921.141 (5)(d), Fla. Stat., felony.

By statute (§ 787.01, Fla. Stat.), a kidnapping can be committed by force, by threat or by trick. Robinson v. State, 462 So.2d 471 (Fla.1st DCA 1984); see McCarter v. State, 463 So.2d 546 (Fla.5th DCA 1985). A kidnapping by trick involves

both the use of deceit to lure the victim into abduction and the subsequent asportation of the victim to a place where (she) is cut off from human contact or possible rescue. Robinson, supra.

Judge Olliff did not consider kidnapping under this third definition but clearly could have done so. Echols, supra. The conspirators devised a story to lure Ms. Sheppard into their car. Then, Sheppard was taken to a remote location and murdered. The Echols decision states:

> "We cannot determine whether the trial judge overlooked this fourth aggravating factor or was uncertain as to whether crimes committed concurrently with the capital crime could be used in aggravation. However, we note its presence in accordance with our responsibility to review the entire record in death penalty cases and the well established appellate rule that all evidence and matters appearing in the record should be considered which support the trial court's decision."
>
> Echols, supra, at 576.[8]

The trial judge also considered this murder especially heinous, atrocious and cruel.[9] He was correct in doing so, for the murder of Nancy Sheppard was shockingly wicked and evil, it was unnecessarily torturous to the victim and it was done in a manner that was purely sadistic.

If Parker wanted to execute a potential witness, he could have taken Ms. Sheppard anywhere and shot her. Parker, however, elected to subject Ms. Sheppard to as much anguish as possible. To the sadistic amusement of Parker and his cohorts, Ms. Sheppard

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[8] Kidnapping can be considered even though it was not charged. Ruffin v. State, 397 So.2d 277 (Fla.1981).

[9] Hereafter, abbreviated as "H-A-C."

was taken to Padgett's dead body in the middle of the night. She was shot as she cried in pathetic anguish and then her throat was slit by Parker.

This murder compares with Melendez v. State, 498 So.2d 1258 (Fla.1986), where the H-A-C factor was upheld when the robbery victim, a barber, was shot and then had his throat cut. This murder also compares with Gaskins v. State, 16 F.L.W. S669 (Fla.1991), in which an H-A-C finding was upheld in the presence of evidence that the victim saw her husband killed prior to her own execution. See also Steinhorst v. State, 412 So.2d 332 (Fla.1982); Routly v. State, 440 So.2d 1257 (Fla.1983); Harvard v. State, 414 So.2d 1032 (Fla.1982).

The record evidence exists to support these findings by the sentencer and must be acknowledged as part of the process of appellate review. Shapiro v. State, 390 So.2d 344 (Fla.1980); Spinkellink v. State, 313 So.2d 666 (Fla.1975). Therefore, it is submitted that the statutory aggravating circumstances found by the sentencer but disallowed on direct appeal, be reinstated as valid statutory aggravating factors.

(2) Mitigating Factors

The trial judge, as actual sentencer, found no mitigating factors sufficient to outweigh any of the aggravating factors at bar. The United States Supreme Court, after concluding that the trial judge considered all of Parker's nonstatutory mitigating evidence, specifically found no error by the trial judge. Parker v. Dugger, supra, 112 L.Ed.2d at 822.

Unless this Court singled out Parker's case as the "only post-Lockett case" in which the entire record was not reviewed, the issue of how much weight Parker's "mitigating evidence" carries is essentially moot. The evidence is incapable of justifying the jury's recommendation.

Parker's entire brief is based upon the assumption that the mere presence of mitigating evidence compels affirmance of a life recommendation. This clearly is not the law. Zeigler v. State, 580 So.2d 127 (Fla.1991). Notwithstanding the nonbinding suggestion of the jury, the judge must pass sentence on the basis of evidentiary weight. § 921.141, Fla. Stat.; Zeigler, supra.

Parker lists purported "mitigating" factors and then offers jury argument regarding the weight to be afforded each. The trial judge's decision regarding the mitigating evidence's weight enjoys record support. As such, it must be affirmed just like any other discretionary decision. Pope v. State, 441 So.2d 1073 (Fla.1983).

With these factors in mind, Parker's mitigating evidence is wanting.

(A) "Domination by Groover"

It is virtually beyond dispute that Parker was the leader of a small-time drug business and that he dominated Tommy Groover. At all times relevant to this case, Groover was collecting money for Parker (R 1244) out of fear that Parker would kill or injure him. (R 1131, 1141, 1177, 1179). Groover was scared of Parker. (R 1244, 1178). Even when Groover was armed, he was obedient to Parker. (R 1182, 1241). The record is devoid of any instances

where Groover hit Parker, screamed threats at Parker, gave Parker orders or even stood up to Parker's physical and verbal assaults. At best, Parker's attempt to slough off these murders on his employees are disingenuous. There was no credible evidence upon which the jury's recommendation could have rested.

(B) Parker was Intoxicated

Parker argues that he was mentally incompetent due to drug or alcohol induced intoxication. To support this theory, Parker cites his own testimony (R 1834-1881) and that of Denise Long (R 1619) (Parker was either high or hung over); Lewis Brady (at R 1632) (Parker was sober and serious but he had had a couple of beers); Joan Bennett (at R 1640-1) (everyone took acid and was high); Spencer Hance (R 1497) (Parker was high, Groover wasn't) and Billy Long (R 1401-2) (Parker and Groover seemed high).

Although Parker may have consumed some intoxicants that weekend, none of the witnesses provided consistent accounts of Parker's or Groover's mental state and no one gave an accurate or reliable count of what, if anything, Parker consumed. This indefinite opinion testimony suffers additionally when compared to the known facts:

(1) Parker was not delusional nor was he killing at random. Parker had a clearly defined motive and a clearly defined goal. Nancy Sheppard (in particular) was murdered because she was a potential state witness. Thus, Parker evinced awareness of the illegality of his conduct and the need to assist his legal defense.

(2) Parker planned Sheppard's abduction and knew in advance she would be killed. (See R 1254-56).

(3) Parker cut Ms. Sheppard's throat. (R 1260-1).

(4) Parker had the presence of mind to wash off his knife in a ditch. (R 1264).

Other conduct by Parker in relation to the Padgett and Dalton murders belied any claim of incompetence. Spencer Hance testified that Parker was not staggering or in any way incapacitated, that he asked for an arc welder and was able to use it, that he destroyed one of the murder weapons, that he and Groover checked each other for bloodstains and that Parker burned his shoes. (R 1478, et. seq.).

Parker also had the foresight to bring blocks and rope to the Dalton murder, weigh her body down and sink it. Parker also realized he had lost his knife and had the group return to the murder scene, where Parker found his wallet and joked about its value as evidence. (R 1519-28).

Parker's conduct throughout this murder spree was competent, goal oriented and rational. Parker manifested no problems in walking, speaking, using machinery or in handling weapons. If Parker used drugs or alcohol, he obviously had a high tolerance to them. Clearly, the jury could not have possibly concluded a life sentence was warranted on these "circumstances."

The trial judge, while expected to consider evidence of intoxication, was not obliged to assign significant weight to said evidence where Parker's conduct did not support his theory of intoxication. Koon v. State, 513 So.2d 1253 (Fla.1987); Kokal v. State, 492 So.2d 1317 (Fla.1986); Hardwick v. State, 521 So.2d 1071 (Fla.1988); Cook v. State, 542 So.2d 964 (Fla.1989). In addition, Parker's detailed guilt-phase testimony refuted his claim of intoxication just as similar testimony refuted a similar defense in Kokal, supra.

Parker's cited cases involved a different level of intoxication, usually accompanied by either actual mental illness, see Downs v. State, 574 So.2d 1095 (Fla.1991); Masterson v. State, 516 So.2d 256 (Fla.1987); Holsworth v. State, 522 So.2d 348 (Fla.1988); Cannady v. State, 427 So.2d 723 (Fla.1983); Amazon v. State, 487 So.2d 8 (Fla.1986) or some extreme emotional stress, Downs, supra, Fead v. State, 512 So.2d 176 (Fla.1987); Buckrem v. State, 355 So.2d 111 (Fla.1978); Buford v. State, 570 So.2d 923 (Fla.1990) involved strong proof of actual impairment supported by expert testimony, while Norris v. State, 429 So.2d 688 (Fla.1983) contained substantial evidence that the 19 year old defendant did not intend to kill anyone.

None of these cases are akin to the cold-blooded murder spree orchestrated and controlled by Robert Parker in order to establish his drug business. Thus, returning to Zeigler, supra, an "override" is not subject to reversal just because a defendant can point to some mitigating evidence in the record. Even if Parker thinks he was "high" for sentencing purposes, the trial court was not obliged to agree. Pope v. State, 441 So.2d 1073 (Fla.1983).

(C) Parker was not the Triggerman

Actually, while Parker ordered Billy Long to either shoot Ms. Sheppard or join her, Parker did slit Ms. Sheppard's throat while she was still alive. Parker cannot seriously suggest he was uninvolved in the actual killing.

Parker's brief makes quick reference to three issues which, in turn, depend upon cases which Parker apparently cites in error.

First, Parker suggests death is inappropriate under Enmund v. Florida, 458 U.S. 782 (1982), apparently unaware of Tison v. Arizona, 481 U.S. 137 (1987) which he fails to cite or address. Parker set out to murder Ms. Sheppard and forced Mr. Long, under a death threat, to serve as the instrument. Note: Antone v. State, 382 So.2d 1205 (Fla.1980); Diaz v. State, 513 So.2d 1045 (Fla.1987). Long's culpability is not as great as Parker's under these circumstances. Long's fear of Parker was supported by Parker's having shot Long once before, so the threat to Long's life was very real.[10]

Second, Parker questions the propriety of his "general verdict" under Stromberg v. California, 283 U.S. 359 (1931). Had Parker familiarized himself with Stromberg, he would not have cited it. Stromberg dealt with the propriety of a general verdict which was capable of convicting the defendant of either criminal activity (inciting a riot) or constitutionally protected activity (simply flying a red flag due to leftist political beliefs). Since the general verdict could attach to protected activity, the verdict was condemned. Stromberg is limited in scope to verdicts attaching to constitutionally protected conduct - a point clarified in Griffin v. United States, Case No. 90-6352, ___ U.S. ___ (1991). Neither felony murder nor premeditated murder are constitutionally protected activities, so Parker's reliance on Stromberg is misplaced.

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[10] See Van Poyck v. State, 564 So.2d 1066 (Fla.1990) (met Tison standard where evidence did not establish he was triggerman but was instigator and primary participant in aiding escape of inmate transported.)

Finally, Parker makes a passing reference to "innocence of sentence" in connection with his Stromberg - Enmund arguments. The term "innocent of sentence" is linguistically incorrect and conceptually impossible. One receives a sentence, one is not "guilty" or "innocent" of a sentence. The term was explained in Johnson v. Singletary, 938 F.2d 1166 (11th Cir.1991) (en banc) as referring to mere eligibility for the death sentence (i.e., by virtue of conviction of a capital crime.) Since both[11] "felony" and "premeditated" first degree murder qualify as capital offenses, Parker has no argument.

The bottom line, however, is that Parker not only ordered Sheppard's death and orchestrated the shooting, he also cut her throat. The jury could not have found this a "reasonable" basis upon which to support a "life" recommendation.

(D) Various Factors

Parker was a braggart, a bully and a small time thug. He was also a dope dealer.

In spite of the proven factors, Parker tries to assert that he is, in fact, a nice family man and good neighbor. (Brief at 23, 24).

The fact that Parker has a child, lived on and off with his (ex) wife and let her work to support him is not mitigating. The fact that Parker violated drug laws and used illegal drugs is not

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[11] By "both" we do not imply the existence of two separate crimes. There is only one offense: First degree murder. "Felony" and "Premeditated" are merely forms of "intent." Schad v. Arizona, ___ U.S. ___, 115 L.Ed.2d 555, 111 S.Ct. 2491 (1991).

mitigating. The fact that Parker sometimes took care of his children does not make him unique.

Parker did not have an abusive childhood. Parker was the spoiled "baby" of the family and always enjoyed special treatment. (R 2319-21). While his father treated his mother poorly, Parker himself was spoiled. (R 2321). His grandmother agreed he was a normal child. (R 2342).

Unlike many who come before this Court, Parker was not forced into crime by poverty, hunger, abuse or physical problems. He was a spoiled, hedonistic child who caused trouble (R 2358), played with dope, got his girlfriend pregnant (R 2326-7) and then sponged off her and her parents. (R 2326). In one drunken fight, Parker broke his own mother's arm. (R 2332).

How did Parker treat his neighbors? In addition to pushing dope and the murders at bar, Parker bullied and picked a fight with Brother Caps, (R 1885), he attempted to fire a gun at Caps from outside Jerry Buruce's home, (R 1186), he started yet another fight at the Bradley home after the murders (R 1599-1606) and engaged in a drive-by shooting against the Bradleys later that day. (R 1607-08). Parker also slapped around another customer ("Anthony") for payment. (R 1181-2). This, according to the brief, is Parker the good neighbor. Certainly no basis was submitted that would justify "life."

(E) Disparate Treatment

Parker cannot avoid responsibility by blaming his "cohorts." Groover and Long did as Parker ordered, under penalty of death (in the case of Long especially). Groover was sentenced to death

for the Padgett and Dalton murders but was not the triggerman in this (Sheppard) murder. Long, again, was under a direct death threat from Parker.

There is no record evidence supporting the assertion that Long or Elaine Parker or Tommy Groover were as culpable as Parker during the Sheppard murder.

The superior culpability of Parker therefore justifies an override death sentence here, just as it did in Thompson v. State, 553 So.2d 153 (Fla.1989) and Eutzy v. State, 458 So.2d 755 (Fla.1984).

(F) There was No Reasonable Basis for the Jury's Recommendation

There is no logical explanation for the jury's decision to spare the life of Parker. It is possible that the jury unreasonably misunderstood Parker's culpability in the Sheppard murder. Certainly, the trial court did not.

Parker relies on Dolinsky v. State, 576 So.2d 271 (Fla.1991), a case more suited to Billy Long's circumstances than Mr. Parker. Dolinsky's crime occurred during an eruption of gunfire during a drug rip-off. Dolinsky shot one of the victims in a "premeditated" murder, but he was only following orders. The only aggravating factors in Dolinsky's case were a "prior felony conviction" (the underlying drug rip-off) and murder during that same robbery. There is no comparison between Dolinsky and Parker, however.

Judge Olliff's decision in the Padgett murder was based upon the weight of the evidence, not a mindless counting of aggravating factors. It is given that the same statutory

aggravating factors "will" have different weight in different contexts.

(g) Proportionality

Parker suggests that death is a disproportionate sentence for the shooting a seventeen year old girl and slitting her throat.

Parker again suggests he is less culpable than the defendant in Dolinsky v. State, supra. This is refuted by the record. Dolinsky killed one person during an eruption of gunfire in a drug rip-off. Dolinsky was a follower and Dolinsky only supplied "priors" (in aggravation) in the form of the underlying felonies.

Parker was the ringleader. Parker ordered all three deaths and actively participated in the Sheppard killing.

In Fuente v. State, 549 So.2d 652 (Fla.1989), this Court looked to the fact that Fuente's two codefendants were not prosecuted (one codefendant assisted the murder, the other was the victim's wife, who hired Fuente). Parker was not merely a hit man and no one "above" him received lenient treatment. Parker and Groover both received death sentences and Billy Long - who acted under a death threat - received a lesser sentence. The comparison to Fuente, or to Brookings v. State, 495 So.2d 135 (Fla.1986) (similar factually to Fuente) is inapt.

The planning and overall carnage in this crime spree compares with Zeigler v. State, 402 So.2d 365 (Fla.1981) or even White v. State, 403 So.2d 331 (Fla.1981). Parker's liability as the primary instigator (if not triggerman) is akin to that of the defendants in Van Poyck v. State, 564 So.2d 1066 (Fla.1990); Diaz

v. State, 513 So.2d 1045 (Fla.1987) and Cave v. State, 476 So.2d 180 (Fla.1985). In Antone v. State, 382 So.2d 1205 (Fla.1980) this Court upheld the defendant's death sentence, rejecting Antone's claim that he was not personally involved in the killings but rather just "hired the killers."

In Thompson v. State, 553 So.2d 153 (Fla.1989) the defendant put out a contract on the life of the victim, Mr. Savoy. Thompson and his accomplices abducted Savoy, took him out in a boat, beat him wrapped him in chains and then executed him (and disposed of the body).

Thompson's jury suggested "life," but the trial court overrode the jury in the presence of five valid aggravating factors similar to Parker's. (Prior violent felony, unnumerated felony (kidnapping), pecuniary gain, cold, calculated, premeditated, H-A-C).

Thompson, like Parker, complained that the jury may have been swayed by his accomplice's lighter sentence. This "disparity" argument was rejected, as noted above, and the death sentence was affirmed.

Parker was not the "only" person punished. Parker was sentenced to death in this particular instance due to his unique involvement. Groover did not kill Ms. Sheppard, Long was under a death threat and Elaine Parker did not kill anyone. Groover was sentenced to death for the related murders of Padgett and Dalton.

Parker's death sentence is justified. The trial court properly reviewed the evidence presented and found that death was warranted on appeal, the Court correctly performed its appellate

function and found the trial court override justified and supported by the evidence. There was no reasonable basis for the jury recommendation. A similar result must be found today.

CONCLUSION

The sentence of death should once again be affirmed.

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 Jonathan C. Koch, HOLLAND AND KNIGHT, Post Office Box 1288, Tampa, Florida 33601 this 13th day of January, 1992.

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