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SUPREME COURT OF FLORIDA

ROBERT LACY PARKER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 63,700

(On Remand From United
States Supreme Court)

**BRIEF OF APPELLANT
ROBERT LACY PARKER**

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ISSUE PRESENTED FOR REVIEW

Can a trial judge's override of the jury's recommended life sentence be sustained under the standard of Tedder v. State, 322 So.2d 908 (Fla. 1975), and its progeny, where the record of the trial and sentencing hearing contains copious and substantial evidence of mitigating circumstances?

STATEMENT OF THE CASE

This appeal involves only one issue. Appellant Robert Lacy Parker challenges the validity of his death sentence pursuant to Tedder v. State, 322 So.2d 908 (Fla. 1975), and its progeny. Parker's death sentence was imposed by Judge R. Hudson Olliff for the murder of Nancy Sheppard in 1982. (App. 1) In his sentencing order, Judge Olliff found six statutory aggravating factors and no statutory mitigating factors, and overrode a jury recommendation of life imprisonment.

The death sentence was affirmed in Parker's initial direct appeal, despite the disallowance by this Court of two aggravating factors.¹ Parker v. State, 458 So.2d 750 (Fla. 1984) (App. 2). Neither the trial court's sentencing order nor this Court's original opinion on direct appeal specifically discussed the substantial evidence of non-statutory mitigating factors presented at trial and sentencing.

A federal habeas corpus proceeding eventually resulted in a remand of this case by the United States Supreme Court for a new direct appeal on the Tedder/jury override issue. Parker v. Dugger, 498 U.S. ___, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991) (App. 5). Pursuant to 28 U.S.C. § 2254, the Supreme Court determined that the trial court found non-statutory mitigating factors established during trial and at sentencing. The Supreme

¹The Court held that the murder was not "especially heinous, atrocious and cruel" and that it was not committed during a robbery, and disallowed those two aggravating factors. Parker v. State, 458 So.2d at 754 (App. 2).

Court also concluded that this Court's opinion in Parker's original appeal was based upon the erroneous factual conclusion that no nonstatutory mitigating factors were found by the trial court below, that this Court did not conduct an independent review to determine whether such factors were supported by the evidence below, and that the affirmance of his sentence violated the Eighth Amendment as a result.

A plenary review of the entire record of Parker's trial and sentencing hearings and a reconsideration of his sentence based upon the non-statutory mitigating factors established at trial and sentencing are the purpose of this appeal.

STATEMENT OF THE FACTS

A. The Guilt Phase: Undisputed Facts

The jury which recommended Robert Parker's life sentence heard contested evidence on many points. The following facts, however, were undisputed.²

On the morning of Friday, February 5, 1982, appellant Robert Parker provided a gram of phencyclidine (or "PCP"), a controlled substance referred to during the trial as "T," to Tommy Groover (T.1817). Groover was to sell the T at a profit and then pay Parker after the sale, keeping the profit for himself (T.1813-4). Groover, Richard Padgett and another acquaintance then consumed the T (T.1128-9, 1140). This made Parker upset with Groover, because he was concerned that Groover would not be able to pay him back for the T (T.1817). Padgett told Groover that he would give him some T of his own later that evening (T.1141). The next day, appellant Parker went to the residence of Billy Long, where Groover was living (T.1182, 1334-5). Groover and Long were going out to try to collect money that was owed to them for drugs that the two of them had sold (T.1361). Groover was armed with a shotgun (T.1212). Long and Groover went looking for Padgett (T.1361-78, 1686-7). That evening, Groover and Long met up with Padgett and his girlfriend, Nancy Sheppard, at The Sugar Shack, a local topless bar (T.1245-6). They all proceeded to the mobile

²The references herein are to the original appellate record in this case. Trial transcript references are abbreviated: "(T.____)". References to other parts of the original record are abbreviated: "(R.____)". Appellant has filed a separate appendix for this appeal; references to it are abbreviated: "(App.____)".

home where Robert and Elaine Parker (Robert's ex-wife) were living, picked up the Parkers, and returned to the Sugar Shack (T.1387-92). Long took Nancy Sheppard home and dropped her off (T.1249-52).

Later that night, a witness observed Groover beating up Padgett at a junkyard owned by Parker's parents (T.1457-8, 1468-9). Parker came to the witness' door and asked for a wash cloth to care for Padgett, who was bleeding (T.1469-70). Groover was heard arguing with Padgett, and was seen with a gun in his hand as he left the witness' premises (T.1470-3). Parker was unarmed (T.1471-2). Padgett was killed soon thereafter. Shortly after midnight, another witness observed Groover and Parker melting down a gun at the junkyard (T.1482-4). This witness noticed that Groover had something stuck in his pants off to one side, covered by his shirt (T.1497-8).

Groover asked Elaine and Robert Parker to take him to another bar, where Groover met a girlfriend, Jody Dalton (T.1851-2, 1341-2). Dalton accompanied Groover and the Parkers to the Parkers' trailer. Dalton was dropped off there and Groover and the Parkers proceeded to pick up another friend, Joan Bennett (T.1853-6). They all returned to the Parkers' trailer, and then went to an area called Donut Lake (T.1512-3). Once at the lake, Groover kicked and beat Dalton, then pulled a gun from his boot and shot her (T.1518-19). Parker shouted "What are you doing you crazy m__f__?" (T.1559). Dalton's body was then tied to concrete blocks and sunk in the lake (T.956-985). As they left

the lake, Groover told Bennett that he would kill her if she said anything, and that he would have somebody kill her even if he was in jail (T.1563-4). Bennett was dropped off at her trailer (T.1564-5).

Groover and the Parkers then went to Billy Long's house and picked up Long (T.1252-5). While Groover drove Elaine's car, Long told Groover how to get to Sheppard's house (T.1253, 1402). Elaine went to Sheppard's door and got Sheppard to accompany them in the car (T.1869). Sheppard was taken to a wooded area, where she saw Padgett's body in a ditch (T.1260). Long then shot her (T.1410). Long threw her body into the ditch next to Padgett (T.1427-9).

The next day, Monday, a conversation between Groover and appellant Parker was overheard by a State witness. Groover stated that he (Groover) had cut Padgett's throat after Padgett was shot (T.1494). Groover was heard to say that he (Groover) had "made Billy Long shoot the girl" (T.1494). Robert Parker was heard telling Groover that he (Parker) did not know Padgett was going to be killed, and that he thought that Padgett was going to be left in the woods to walk home (T.1494).

Medical evidence showed that Padgett had been killed by a gunshot wound to the back of the head, and that he had also received two potentially fatal stab wounds to the chest and non-fatal slash wounds across his neck (T.1019-21). Dalton died of four gunshot wounds to the head (T.1058-66). Sheppard died from five gunshot wounds, two to the back of the head, one over the

eye, and two in the chest (T.1025-31). Sheppard also received seven non-fatal, superficial stab wounds to the neck (T.1029, 1032, 1049).

Throughout his long trial, no one ever said that Robert Parker killed anyone.

B. Disputed Facts

1. Defense Evidence.

Robert Parker testified that, though Groover did owe him money for the gram of T, Groover had given him a gold cross and necklace as collateral until he could pay him back, so he (Parker) was not concerned about getting his money (T.1826). Parker denied threatening Padgett or being angry with Padgett at all, because Groover, not Padgett, owed him money (T.1832-3). Because Groover and Padgett were arguing and beginning to fight in the car, the Parkers took them to Parker's parents' junkyard to let them fight (T.1838-40). Parker broke up the fight when Groover hit Padgett with brass knuckles (T.1840-1). Parker obtained assistance for Padgett, who was bleeding from the fight (T.1841-2). Parker testified that Groover told them that they should take Padgett out into the woods, drop him off, and let him walk home, because they would risk attack from Padgett's brothers and cousins if they took Padgett home in a beaten condition (T.1843-4). Elaine followed Groover's instructions and drove them into an isolated, wooded area (T.1844). Robert and Elaine remained in the car and Groover and Padgett got out (T.1844). They heard a gunshot, and Robert jumped out of the

car (T.1845). Parker then saw Padgett laying on the ground, and Groover attempting to shoot Padgett again, then stabbing him with his knife (T.1845-6). After killing Padgett, Groover told the Parkers to keep quiet about the murder or he would "get them" or "get their children" (T.1847-9). Parker melted down the murder weapon at his parents' junkyard, after observing that Groover had another pistol in his pants (T.1849-50).

Parker testified that he was unaware of any intention on Groover's part to kill Jody Dalton until, while at Donut Lake, Groover knocked her down, kicked her, pulled the pistol out of his boot and shot her (T.1860-1). Parker agreed that he shouted at Groover, but denied that he was concerned about the noise (T.1861-2). Parker said he was afraid of Groover, after having seen him kill two people, and that when Groover told him to tie concrete blocks to the body and take it into the lake, he did so (T.1863-4).

Parker testified that he and Elaine were hoping that Groover would leave them when he found Billy Long, but instead, Long joined them in the car (T.1866-7). Parker believed that Long was aware of Groover's plan when he got into the car (T.1868). Elaine went and got Nancy Sheppard to come out to the car upon Groover's orders (T.1869). Parker testified that once at the wooded area where Padgett had been killed, he (Parker) got out of the car only to let others get out behind him (T.1870). When Sheppard walked over to the ditch, she fell to her knees and Long walked over and shot her (T.1870). Parker

heard Groover tell Long to cut Sheppard's throat, then turned and got back in the car because he did not want to watch (T.1871).

2. State's Theory.

The State's case was based primarily upon the testimony of Billy Long and Joan Bennett, two of Parker's co-defendants.

Billy Long testified that Parker had threatened Padgett with a gun at Parker's mobile home (T.1391). Long said that Groover and Parker tricked him into going with them to Sheppard's house on the morning of her death by telling him that Padgett wanted to see Sheppard (T.1252-3, 1397-8). Long further claimed that appellant showed him the body of Padgett in the ditch and then ordered Long to kill Sheppard, or to "lay in the ditch with them" (T.1257, 1404). Long said that Elaine Parker then handed him a pistol and that he proceeded to shoot Sheppard (T.1260-1, 1410). Long said that appellant then obtained a knife from Groover and cut Sheppard's throat (T.1261, 1410-1). Long stated that Parker took Sheppard's necklace and class ring before Long threw her body into the ditch (T.1261, 1427-9). Long said that he was afraid of Robert Parker because Parker had shot him during an argument two years earlier (T.1257-9, 1336-8).

Joan Bennett testified that, on the way to Donut Lake, Groover told Parker that he (Groover) was going to "waste" Jody Dalton because "she had seen the piece that we used on Richard" (T.1514). Bennett alleged that appellant agreed with Groover (T.1551). Though Bennett confirmed that Parker shouted, "What are you doing?" at Groover at the time Groover shot Dalton, she

added that Parker was only concerned about the noise (T.1519, 1559).

In summation, the State argued that Padgett was not killed for money, but that he was killed because Parker and Groover were afraid of Padgett's family, and had to silence Padgett (T.2130-1). The State argued that the Dalton and Sheppard murders were perpetrated to cover up the Padgett murder (T.2261).

3. Defense Rebuttal.

The credibility of Bennett and Long was vigorously attacked. It was shown that Bennett was allowed to plead guilty to accessory after the fact to first degree murder in exchange for her testimony for the State. Upon her agreement to testify for the State, she had been released from jail (T.1582-3). Long was charged with first degree murder in Sheppard's killing and had been facing prior, unrelated charges (which he admitted were valid) of sale and possession of methaqualone and sale and possession of cocaine. He was permitted to plead guilty to second degree murder, and the pre-existing drug charges were dismissed (T.1436-40). Though Long said that he killed Sheppard because he was afraid of Parker, he admitted that he did not see Parker with a gun at all that morning, and that appellant at no point said that he was armed (T.1418-20). Long was 6'2" tall, weighed 240 pounds, and had been employed as a bouncer at a local topless bar (T.1334, 1338). According to the police report at the time of his arrest, Parker was 5'10" and weighed approximately 190 pounds (R.1). Long had sworn to police that

Parker had forced him to shoot Sheppard by pointing a gun at him, but at trial, Long admitted that this was not true (T.95-7, 1414-7, 1417-21, 1424, 1432).

The defense also presented the testimony of several other jail inmates concerning statements made by Billy Long. One inmate heard Long talking to Groover and advising him "if you don't want to get the electric chair, you better do like I did and say Robert made you do it" (T.1749). Another jail inmate overheard Long boasting that he would lie to see to it that Robert Parker got the death penalty (T.1765). Long confided to this inmate that he, not Parker, had cut Sheppard's throat (T.1765). Long told this inmate that Parker was at the car at the time Sheppard was killed, and that only Long and Groover were outside the car with Sheppard (T.1766). Parker's version of the Sheppard homicide was further corroborated by statements Groover made to this same inmate, that Parker was back at the car when Sheppard was murdered, and had no active involvement in her death (T.1788). A third jail inmate also testified that Long told him that Long, not Parker, had cut Sheppard's throat (T.1799-1800).

2. Trial Court's Submission of Guilt Issue to Jury.

The indictment charged Robert Parker with first degree murder in the death of Richard Padgett in Count One, first degree murder in the death of Nancy Sheppard in Count Two, and first degree murder in the death of Jody Dalton in Count Three (R.133-4). At the charge conference, the State requested that the jury

be instructed on first degree felony murder as to both Count One and Count Two, arguing that the applicable felony in Count One was kidnapping and, in Count Two, robbery (of Sheppard's necklace and ring) (T.2001-2). The defense objected to the felony murder instruction on the ground that it was not supported by the evidence, but the objection was overruled (T.2002-3).

The defense submitted an instruction concerning the common law defense of duress or coercion, but the requested instruction was denied (T.2087-90). The trial court ruled that the State's "duress is not a defense to homicide" instruction would be given without limiting its applicability in any manner (T.2096). This decision by the trial judge contradicted the defense theory of the case: throughout the trial, the defense contended before the jury that Parker acted under duress. The judge proceeded to charge the jury in the words proposed by the State (T.2286).

In summation, the defense emphasized the undisputed fact that Robert Parker did not kill anyone (T.2191), and argued that he did not actively participate in the murder of Nancy Sheppard (T.2237).

The jury returned general verdicts finding the Defendant guilty of first degree murder in Count One (Padgett), first degree murder in Count Two (Sheppard), and third degree murder in Count Three (Dalton) (R.409-11).

C. Penalty Phase.

The only evidence presented by the State in aggravation consisted of a judgment showing appellant Parker had been

convicted of aggravated battery in the shooting of Billy Long in 1980 (T.2314-7).

The defense presented testimony from a number of Parker's relatives and friends (T.2318-2365). This evidence showed that he was raised by an alcoholic, wife-beating father, and was influenced by Elaine, an older woman, to leave school after the ninth grade and to use illegal drugs. Despite these problems, the evidence showed that Parker was a good father to his two young children, then aged nine and eleven, and that he had unselfishly assisted relatives and neighbors in times of personal crisis and need.

The defense also presented the written negotiated plea agreement of Elaine Parker, in which the State had dropped two first degree murder charges and reduced the murder of Nancy Sheppard from first degree to second degree, in exchange for a guilty plea and her promise to testify for the State (T.2366). Despite this agreement, the State did not call Elaine Parker as a witness, because she could not rebut appellant's testimony (T.2053-4, 2056-8).

The defense also introduced documents showing that Tommy Groover had previously been convicted of three counts of first degree murder, and that the trial court had sentenced Groover to death for the murders of Padgett and Dalton, and to life imprisonment for the Sheppard murder (T.2377-8).

The State presented no rebuttal evidence.

The jury was given a specific verdict form and found that sufficient mitigating circumstances existed to outweigh any aggravating circumstances. Therefore, they recommended a sentence of life imprisonment as to both the Padgett and Sheppard murders (R.434-5).

At the final sentencing hearing before the court, the State, over objection, presented the testimony of relatives of Richard Padgett and Nancy Sheppard, in which they described the decedents in sympathetic terms and asked the court to impose the death penalty (T.2533-51).³ The defense presented no additional evidence and, after hearing argument, the court imposed a life sentence for the Padgett homicide, a death sentence for the Sheppard homicide, and a term of fifteen years imprisonment for the Dalton homicide (R.476-508). The sentencing order is replete with factual errors, including a description of the Padgett homicide that is without any evidentiary basis whatsoever,⁴ and a description of the Dalton homicide that requires the acceptance of Joan Bennett's testimony, despite its obvious rejection by

³The recommendation of the death penalty by the victims' relatives violated the Constitution. Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597, 2611 n.2, ___, L.Ed.2d ___ (1991); Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

⁴The trial judge in appellant's case had previously conducted the separate trial of Tommy Groover. Examination of the sentencing orders from the two cases, in comparison with the evidence at Parker's trial, establishes that the judge carried evidence presented at Groover's trial over into Parker's sentencing. This error violated Parker's constitutional right to confront all the evidence against him at sentencing. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Engle v. State, 438 So.2d 803, 814 (Fla. 1983).

the jury.⁵ The court found six aggravating circumstances and no statutory mitigating circumstances for either the Sheppard and Padgett homicides, but imposed the death sentence only for the Sheppard murder. Nowhere in the sentencing order did the trial judge specifically discuss the evidence of non-statutory mitigating circumstances (R.476-508). However, every federal court which has addressed the issue has found that non-statutory mitigating factors were established by the evidence at trial and sentencing. The United States Supreme Court found that the trial court considered this evidence at sentencing. The issue here is whether he considered it correctly.

⁵The jury only convicted Parker of third degree murder in Dalton's case, despite Bennett's testimony that Parker agreed with Groover that Dalton should be killed in the car on the way to Donut Lake. Parker denied that this conversation occurred, and the jury must have accepted his testimony that he was surprised when Dalton was killed.

SUMMARY OF ARGUMENT

The jury's life recommendation was supported by copious and substantial evidence of nonstatutory mitigating factors presented at trial and sentencing, including evidence that appellant Parker acted under the domination of Tommy Groover; that he was less culpable than two of his co-defendants (Groover and Long, the triggerman); that he was raised in an alcoholic, abusive, violent home; that he became addicted to alcohol and drugs at an early age; that he was intoxicated the night of the offenses; that he was a good parent and neighbor; that equally or more culpable co-defendants had received lesser sentences (Groover, Elaine Parker and Long); and other factors. This evidence in the record below (which is substantially unrebutted except for the evidence of domination and relative culpability) provides a reasonable basis for the jury's life recommendation. The imposition of the death penalty on Robert Parker, who did not kill anyone and whose jury recommended life, would be disproportional and unusual. Therefore, Parker's death sentence must be reduced to life imprisonment.

ARGUMENT

I. THE RECORD CONTAINS COPIOUS AND SUBSTANTIAL MITIGATING EVIDENCE WHICH PROVIDES A REASONABLE BASIS FOR THE LIFE RECOMMENDATION.

In capital cases in Florida, the jury represents "the conscience of the community." Its advisory opinion "is entitled to great weight . . . and should not be overruled unless no reasonable basis exists for the opinion." Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983). The jury is especially well suited to weigh aggravating and mitigating factors in the sentencing context, because these factors pertain to culpability. "Evidence is mitigating if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime." Wickham v. State, Case No. 73,508, slip op. at 5-6 (Fla. Dec. 12, 1991); Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988).

The record of Robert Parker's trial and sentencing contains copious and substantial evidence of non-statutory mitigating factors. See Parker v. Dugger, 876 F. 2d 1470, 1475 n.7 (11th Cir. 1989) ("copious" evidence) (App. 4); Parker v. Dugger, 111 S. Ct. at 738 ("substantial" evidence) (App. 5). Most of this evidence was unrebutted. "[W]hen a reasonable quantum of competent, unrebutted evidence of a mitigating circumstance is presented, the trial court must find the mitigating circumstance has been proved." Nibert v. State, 574 So.2d 1059, 1062 (Fla.

1990). The United States Supreme Court determined that non-statutory mitigating factors were found by the trial judge, Parker v. Dugger, 111 S. Ct. at 736-37, and by the Eleventh Circuit Court of Appeals. Id. The Supreme Court itself identified three categories of mitigation which were clearly established by the record:

The evidence of Parker's intoxication at the time of the murders was uncontroverted. There is also no question that Long, despite being the triggerman for the Sheppard murder, received a lighter sentence than Parker. Respondent [the State] conceded this fact in oral argument before this Court. [Citation omitted.] And, as noted, there was extensive evidence going to Parker's personal history and character that might have provided some mitigation.

Parker v. Dugger, 111 S. Ct. at 736-37 (App. 5). In an earlier passage, the Court described this life history evidence:

. . . [N]umerous witnesses testified on Parker's behalf at the sentencing hearing concerning his background and character. Their testimony indicated both a difficult childhood, including an abusive, alcoholic father, and a positive adult relationship with his own children and with his neighbors.

Id. at 736 (citing T.2322-2360) (App. 5).

At the advisory sentencing proceeding, Mr. Parker argued in favor of both statutory and non-statutory mitigating circumstances supported by the evidence at the guilt and penalty phases of the trial. Virtually every one of these mitigating circumstances, standing alone, has been held by this Court to provide a reasonable basis for a jury life recommendation in decisions preceding and following Parker's trial. Taken

together, they provide ample basis for the jury's recommendation of life.

A. Parker Was Motivated By His Fear Of Tommy Groover And Threats By Groover Against Parker's Family.

The evidentiary basis for this mitigating circumstance was Parker's testimony of the threats by Tommy Groover (T.1847-8, 1851, 1852, 1863, 1865, 1880-1) and the testimony by two state witnesses that Parker had been acting frightened (T.1697, 1562-3). The circumstance was argued to the jury (T.2483-4), and throughout the trial was clearly the major theme of the defense. This Court had previously held that a jury override should not be sustained where evidence supported this mitigating circumstance, because such evidence provided a reasonable basis for the jury's life recommendation. See, Goodwin v. State, 405 So.2d 170 (Fla. 1981); Hawkins v. State, 436 So.2d 44 (Fla. 1983).

B. Parker's Mental Condition Was Impaired By Drug And Alcohol Intoxication At The Time Of The Offenses.

Parker's intoxication on drugs and alcohol are a significant mitigating factor. (T.2481-3). Evidentiary support for this mitigating circumstance was found in the testimony of appellant himself (T.1834, 1837, 1880-1), the testimony of five state witnesses, including Joan Bennett and Billy Long (T.1619, 1497, 1632, 1540-1, 1401-2), and two additional defense witnesses (T.1738-9, 1766). This Court has held that drug and alcohol intoxication constituted a reasonable basis for a jury life recommendation requiring death sentences to be set aside in

Buckrem v. State, 355 So.2d 111 (Fla. 1978); Cannady v. State, 427 So.2d 723 (Fla. 1983); Norris v. State, 429 So.2d 688 (Fla. 1983); Amazon v. State, 487 So.2d 8 (Fla. 1986); Fead v. State, 512 So.2d 176 (Fla. 1987); Masterson v. State, 516 So.2d 256 (Fla. 1987); Holsworth v. State, 522 So.2d 348 (Fla. 1988); and Pentecost v. State, 545 So.2d 861 (Fla. 1989); see also Downs v. State, 574 So.2d 1095, 1099 (Fla. 1991); Buford v. State, 570 So.2d 923 (Fla. 1990).

C. Parker Did Not Commit The Sheppard Murder, And His Participation Was Relatively Minor.

The evidence was uncontradicted that Parker was not the actual perpetrator of any of the three homicides. A critical factual controversy throughout Parker's trial, however, was whether Parker or Groover was in charge of events and the "ringleader" of the triple homicide. Parker presented substantial evidence to show that Groover was in control and that he, not Parker, directed Billy Long to kill Nancy Sheppard. This mitigating circumstance was argued to the jury (T.2484-7), on the grounds that Billy Long was lying to protect himself and Tommy Groover, his roommate and best friend; that it was Groover who advised Long to kill Nancy Sheppard; and that Long both shot her and cut her throat while Parker was at the car with his wife. The argument was supported by the testimony of Parker himself (T.1870-1), three defense witnesses (T.1749, 1765-6, 1788, 1799-1800), and at least one State witness (T.1494). One defense witness testified that Tommy Groover admitted Parker had no

active involvement in Nancy Sheppard's death (T.1788). The same witness testified that **Billy Long admitted** Parker was at the car when Sheppard was killed (T.1766), and that he (Long) and not Parker had cut her throat (T.1765; see also T.1799-1800). Long had at least as much reason as Parker to fear Nancy Sheppard's potential testimony about Padgett's death: it had been Groover and Long (not Parker) who went looking for Padgett (T.1361-78, 1686-7) and found him with Sheppard in a bar (T.1245-46), and Long (not Parker) who took Sheppard home just before Padgett was killed (T.1249-52). The jury may have concluded that these facts diminished Long's credibility on the issue of who was the impetus behind Sheppard's death. The contention that Parker's testimony should be accepted over that of Long was argued to the jury a second time in the penalty phase as mitigation (T.2468-74).

This Court has held that where defendant was not the actual perpetrator of the homicide and there was dispute as to the extent of his participation, a jury could reasonably find a mitigating circumstance that would require its life recommendation to be followed.⁶ See Taylor v. State, 294 So.2d

⁶Because of the felony-murder charge, the jury could have believed Parker's testimony as to his lesser culpability and still found him guilty of first-degree murder. There is a substantial issue in this case as to whether Parker's sentence violates the rule of Enmund v. Florida, 458 U.S. 782 (1982); see also Jackson v. State, 575 So.2d 181 (Fla. 1991). The general verdict given to the jury on Count II does not permit us to tell whether Parker was convicted only of felony murder, without the intention to cause a death. For this reason, his death sentence violates the rule in Stromberg v. California, 283 U.S. 359 (1931), because he may be "innocent of the death penalty." In addition, the "robbery" which served as the predicate for the felony-murder charge in Count II, the Sheppard murder (for which

648 (Fla. 1974); Slater v. State, 316 So.2d 539 (Fla. 1975); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Goodwin v. State, 405 So.2d 170 (Fla. 1981); Hawkins v. State, 436 So.2d 44 (Fla. 1983). In reversing two override death sentences for two execution-style murders, this Court stated:

We find that the jury's action was reasonable because of the conflict in the testimony as to who was actually the triggerman and because of the plea bargains between the accomplices and the state. From the evidence presented, the jury could have believed the appellant's story that he was not the triggerman and still have convicted him of first degree murder.

Malloy, supra, 382 So.2d at 1193. Similar reasoning resulted in the reversal of jury override death sentences in Gilvin v. State, 418 So.2d 996 (Fla. 1982), and in Holsworth v. State, 522 So.2d 348 (Fla. 1988). This factor can be a non-statutory mitigating circumstance even when the defendant's conduct is not so minor as to qualify under Section 921.141(6)(d), Florida Statutes. See Spivey v. State, 529 So.2d 1088 (Fla. 1988). If, because the evidence is in dispute, the jury might have believed Parker as to who was in control, mitigation is established and the life recommendation was proper; the trial judge's finding to the contrary is of no effect. Cooper v. State, 581 So.2d 49, 51 (Fla. 1991).

Parker is sentenced to death), was disallowed by this Court as a statutory aggravating factor on grounds which would have disallowed a felony-murder conviction on that Count. Parker v. State, 458 So.2d 750, 754 (Fla.1984).

D. Various Factors Concerning Parker's Character And Background Mitigated The Offense.

As noted, the Eleventh Circuit described the evidence presented in support of non-statutory mitigating circumstances relating to the Defendant's character and background as "copious." Parker v. Dugger, 876 F.2d at 1475, n.7 (App. 4). This evidence included the following: Robert Parker's father was an alcoholic who beat his mother in Robert's presence (T.2322-3). His father began giving Robert alcoholic beverages and taking him to bars at an early age (T.2323-4). Robert began dating Elaine, his co-defendant, when he was only 14 years old and Elaine was 16 years old (T.2325). When Elaine became pregnant, he married her at age 16 (T.2326-7). Elaine supported Robert and their baby with money from her job; he left school in the tenth grade to take care of his baby son and, later, his baby daughter (T.2327-30). Elaine introduced Robert to the use of illegal drugs (T.2357-8). Robert developed a drug and alcohol problem, and sought professional help, but Elaine was not supportive and he could not shake the problem (T.2330). Elaine was the dominant figure in the relationship (T.2333, 2361). Robert and Elaine had been married twice and divorced twice, and, at one point, he became so distraught over Elaine leaving him that he attempted suicide (T.2332). Parker had a son age 11 at the time of the trial, and a daughter age 9 at the time of the trial. He had always been a good father to his children, and had maintained a very close relationship with them (T.2338-9, 2342-4, 2346, 2351-

2, 2361). He had often gone out of his way to help relatives and neighbors, including taking a neighbor's husband to a hospital three or four times a month for over a year for cancer therapy, as a favor and without reimbursement (T.2346-8), comforting a cousin through a crisis involving her baby (T.2352-4), and providing financial and emotional support for a sister when she was in marital distress (T.2359-60).

This un rebutted evidence was presented and argued to the jury as mitigation (T.2388-91). This Court had previously held that such life history evidence forms a reasonable basis for a life recommendation, prohibiting a jury override. See Neary v. State, 384 So.2d 881 (Fla. 1980); Jacobs v. State, 396 So.2d 713 (Fla. 1981); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Washington v. State, 432 So.2d 44 (Fla. 1983). It has reiterated this holding in many cases since Parker's trial. See, e.g., Campbell v. State, 571 So.2d 415, 419 (Fla. 1990); Brown v. State, 526 So.2d 903, 908 (Fla. 1988).

E. Equally Or More Culpable Co-Defendants Received More Lenient Treatment For Their Involvement In The Sheppard Murder.

The defense introduced evidence of the disposition of the co-defendants' cases and argued it as mitigation in the advisory sentencing trial (T.2366, 2378, 2491-6). Billy Long, who admitted murdering Nancy Sheppard by shooting her five times in the head and chest, and who, according to one defense witness, admitted cutting her throat after she was shot, was permitted to plead guilty to one count of second degree murder, and drug charges in

two other felony cases were dropped against him.⁷ Tommy Groover, the perpetrator of the Padgett and Dalton murders, was sentenced to death for those crimes, but to life imprisonment for the murder of Nancy Sheppard. As noted, there was substantial evidence in Parker's trial that Groover, not Parker, instructed Long to kill Nancy Sheppard (although this issue was disputed). Elaine Parker, who owned both the car and the murder weapon, drove the car throughout the evening, lured Nancy Sheppard out of her home, and (according to Billy Long) gave Long the murder weapon, was permitted to plead guilty to one count of second degree murder in the Sheppard homicide, and charges as to the other two murders were dropped against her.⁸

In 1984, the Florida Supreme Court noted how it had applied this mitigating circumstance in numerous other cases:

This Court has upheld the reasonableness of jury recommendations of life which could have been based, to some degree, on the treatment accorded one equally culpable of the murder. McCampbell v. State, 421 So.2d 1072 (Fla. 1982). In such cases we have reversed the judge's decision to override the recommendation when the accomplice was a principal in the first degree; Herzog v. State, 439 So.2d 1372 (Fla. 1983); McCampbell v. State; when the accomplice was the actual triggerman; Barfield v. State, 402 So.2d 377 (Fla. 1981); Slater v. State, 316 So.2d 539 (Fla. 1975); when the evidence was equivocal as to whether defendant or the accomplice committed the actual murder; Smith v. State, 403 So.2d 933 (Fla.1981); Malloy v. State, 382 So.2d 1190 (Fla. 1979);

⁷Billy Long was paroled and released from prison in 1991.

⁸Elaine Parker was paroled and released from prison in 1990.

Halliwell v. State, 323 So.2d 557 (Fla. 1975); or when the accomplice was the controlling force instigating the murder; Stokes v. State, 403 So.2d 377 (Fla. 1981); Neary v. State, 384 So.2d 881 (Fla. 1980).

Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984). This Court has accepted this mitigating circumstance as a basis for disallowing jury override death sentences in many recent cases as well. See Brookings v. State, 495 So.2d 135 (Fla. 1986); DuBoise v. State, 520 So.2d 260 (Fla. 1988); Caillier v. State, 523 So.2d 158 (Fla. 1988); Harmon v. State, 527 So.2d 182 (Fla. 1988); Spivey v. State, 529 So.2d 1088 (Fla. 1988); Pentecost v. State, 545 So.2d 861 (Fla. 1989); Fuente v. State, 549 So.2d 652 (Fla. 1989); Dolinsky v. State, 576 So.2d 271 (Fla. 1991).

Some of this evidence was offered by the defense to support statutory mitigating factors, but rejected by the trial judge. Although Judge Olliff found no statutory mitigating factors, that ruling does not prevent the inclusion of defendant's evidence on those points in the roster of non-statutory mitigation. It is axiomatic that the constitutional requirement of individualized sentencing established in Lockett, Eddings, Hitchcock and other cases requires the sentencer to consider all facets of the offender and the offense.

A comprehensive review of the record here establishes that substantial mitigating factors were proven at trial by un rebutted evidence and that the jury may have found additional mitigating circumstances from substantial evidence on disputed issues.

F. The Mitigating Evidence Provides a Reasonable Basis for The Jury's Life Recommendation.

This evidence establishes a reasonable basis for the jury's life recommendation, which must be followed regardless of how the judge weighed the evidence. "Where there is some reasonable basis for the jury's recommendation of life, clearly it takes more than a difference of opinion for the judge to override that recommendation." Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988). Tedder establishes a "stern test":

The test to be applied by the judge is whether the facts are such that the jury's recommendation is reasonable and not whether the judge would reach the same conclusion. The benefit of any doubt on the reasonableness of a recommendation of life must be given the defendant.

Cheshire v. State, 568 So.2d 908, 914 (Fla. 1990) (McDonald, J., concurring). As Tedder makes clear, the judge may reject the jury's sentencing conclusion entirely only where it is clearly and convincingly shown that virtually all reasonable persons would recommend death. This will rarely be the case where basic facts pertaining to the commission of the offense are in dispute, and cannot be the case here.

Facts are clearly evident from the record upon which a reasonable juror could rely in recommending life imprisonment. Downs v. State, 574 So.2d 1095, 1099 (Fla. 1991). The jury had to conclude that Robert Parker was intoxicated at the time of these offenses, that he did not personally kill anyone, that Billy Long, the triggerman in the Sheppard murder, received a

lesser sentence, and that Parker had a violent, abusive childhood marred by alcohol and drug abuse, a limited education and premature parenthood. Nevertheless, Parker had established many positive family and social relationships as an adult. All these factors, which were unrebutted, unquestionably reduce his moral culpability.

In addition, there was substantial evidence that Parker did not personally direct the killing of Nancy Sheppard. The only person who said he did was Billy Long, who was the admitted triggerman and who had already negotiated a very favorable deal with the State, pursuant to which he received a substantially reduced sentence for his role in this homicide and the dismissal of unrelated drug charges. Long also admitted at trial that Parker, the alleged ringleader, did not threaten him (Long) with a gun before Sheppard was killed. It would have been reasonable for the jury to have rejected Billy Long's testimony entirely, or to have decided that in fairness, Robert Parker should not suffer the death penalty for this crime when no one else did. These facts also provide a reasonable basis for the jury's recommendation. Dolinsky v. State, 576 So.2d 271 (Fla. 1991). If the jury believed Robert Parker, who testified in his own defense, they must have concluded that he was participating under duress and did not want Nancy Sheppard to die. Although they were instructed that this duress evidence was not a defense to murder, virtually any jury accepting this proof would reject the death penalty.

Many reasonable persons have reached the conclusion that death is not the right sentence here. A majority (of unknown size) of Robert Parker's jury heard the evidence of his role in this triple homicide and recommended life in each instance. Justice McDonald of this Court apparently reached the conclusion that the jury's life recommendation was reasonable when this case was originally appealed in 1984. Parker v. State, 458 So.2d 750, 755 (Fla. 1984) (McDonald, J., dissenting from sentence, without opinion) (App. 2). Judge Melton of the Middle District of Florida also apparently believed the jury's life recommendation had a reasonable basis in the record.⁹ (App. 3 at 50-57). Judge Olliff also recognized that this same mitigation evidence justified the jury's life recommendation in Richard Padgett's homicide, which he accepted and did not override, despite the presence of five aggravating factors in Padgett's case.

II. IMPOSITION OF THE DEATH PENALTY WOULD BE DISPROPORTIONAL AND UNUSUAL PUNISHMENT.

A comparison of the Sheppard murder to other recent cases establishes that the death penalty would be disproportional punishment for Robert Parker's involvement in her death. As this Court has recently noted:

It is well settled that a fundamental requirement of the eighth amendment of the

⁹The Eleventh Circuit, although finding copious nonstatutory mitigation, deferred to precedent indicating that Tedder review was the province of this Court. Parker v. Dugger, 876 F.2d 1470, 1475 (11th Cir. 1989) (App. 4). Apparently so did the United States Supreme Court, which remanded to this Court after finding that an adequate Tedder review had not been conducted.

United States Constitution is that the death penalty must be proportional to the culpability of the defendant. . . . Individualized culpability is key, and "[a] critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime."

Jackson v. State, 575 So.2d 181, 190 (Fla. 1991), citing Tison v. Arizona, 481 U.S. 137, 156 (1987). Disproportion of constitutional significance may be shown by comparison of similar cases to determine the relative culpability of the defendants and the severity of their punishments. See Nibert v. State, 574 So.2d 1059, 1063 (Fla. 1990); Jackson v. State, supra, 575 So.2d at 191-93.

Robert Parker was less culpable than two recent defendants released from their jury-override death sentences by this Court. In Dolinsky v. State, 576 So.2d 271 (Fla. 1991), and Fuente v. State, 549 So.2d 652 (Fla. 1989), the defendants were clear-headed, pre-meditated triggermen in multi-defendant cases who nonetheless received life sentences in their direct appeals at this Court.

Dolinsky is dispositive of Robert Parker's case. As in Parker's case, Dolinsky presented a triple homicide arising from commerce in illegal drugs. Dolinsky's co-defendants lured three victims to a remote location in the Keys, purportedly to conclude a drug deal for which defendants had been promised and shown \$16,000. Dolinsky lay in wait at the location armed with a gun, apparently to ambush the victims and complete defendants' theft

of their drug money. All three victims were killed, presumably to prevent them from testifying.

The comparisons to Parker's case are striking. Like Parker, Dolinsky presented evidence that another defendant masterminded the operation. As in Parker's trial, a co-defendant who shot the victim testified against Dolinsky and received a lesser sentence. As in Parker's trial, Dolinsky's relatives testified "as to his good qualities as a hardworking man who had, at least to some extent, overcome serious adversities." 576 So.2d at 275.

The differences, however, are decisive. Unlike Parker, Dolinsky presented no evidence of intoxication at the time of the offense.¹⁰ Unlike Parker, Dolinsky presented no evidence of duress: he travelled separately and in advance to the remote location of the ambush and murder. Unlike Parker, Dolinsky was armed, actually shot at one victim twice (inflicting wounds which may have been fatal), and may have shot another victim.¹¹

Despite these facts, this Court held that Dolinsky's jury had a reasonable basis for its life recommendation based on mitigation evidence less extensive than Parker's and aggravating factors which were virtually the same. Dolinsky's override was vacated.

¹⁰Dolinsky presented an alibi defense which apparently was rejected by the jury.

¹¹These facts, although based only upon the testimony of one co-defendant, must have been accepted by the jury, which convicted Dolinsky of first-degree premeditated murder.

All the differences between the two cases point to a dramatically lower level of culpability on Robert Parker's part. In addition to showing all the mitigating factors Dolinsky showed, Parker presented substantial evidence that his mental condition was impaired by intoxicants, and substantial evidence that he was present only under duress based upon his fear of Tommy Groover and Groover's threats against Parker's family. In addition, Dolinsky's jury must have found that he personally killed or attempted to kill one victim, and the record leaves open the possibility that he killed a second. By contrast, in Robert Parker's trial, no one ever said he killed Nancy Sheppard or anyone else. In fact, at Parker's trial, the state's primary witness against him could not even testify that Parker was armed at the time of Nancy Sheppard's death, for which he now sits on death row.

Dolinsky's death sentence was vacated under Tedder. Because of this fact alone, Robert Parker's execution would be disproportional and unconstitutional under the Eighth Amendment.

In Fuente v. State, another jury override case, defendant Fuente was a contract killer who personally shot a man in exchange for promised payment of \$2500 to \$5000. Fuente also planned the killing and directed an accomplice to arrange many of the details in advance. Like Parker, he was convicted after a co-defendant who received a lesser sentence testified against him. The only evidence offered in mitigation was that he had saved a woman from drowning since the offense, and that his two

co-conspirators received more lenient sentences. This Court held that this evidence of disparate treatment provided a reasonable basis for the jury's life recommendation, notwithstanding three aggravating factors which were assumed to be valid.

Unlike Parker, Fuente was a triggerman. Unlike Parker, Fuente apparently did not present evidence of intoxication, character evidence of a difficult childhood, or (obviously) evidence of duress. Fuente was clearly more culpable in the contract killing he committed than Robert Parker was in the death of Nancy Sheppard, yet Fuente's override was vacated almost solely because of disparate treatment of co-defendants by prosecutors. This precedent, standing alone, would also make Robert Parker's execution disproportional. See also Brookings v. State, 495 So.2d 135, 143 (Fla. 1986) (jury override vacated as to triggerman in contract killing based upon disparate prosecution and sentencing, despite presence of four aggravating factors).

Robert Parker's execution would also be unusual (and therefore unlawful) in the broader, historical context of this Court's jury override jurisprudence. Article I, Section 17 of the Florida Constitution prohibits punishments which are cruel or unusual. This disjunctive phrasing is constitutionally significant. Cf. People v. Anderson, 493 P.2d 880, 883 (Cal. 1972).

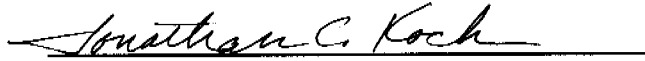
Since January 1, 1986, this Court has considered 46 jury override cases on appeal and reversed the death sentence in 41

(37 by vacation of the sentence and four by reversal of the conviction). Because of the evidence at Parker's trial and sentencing which the jury had to believe (because it was unrebutted) and that which it might have believed, a reasonable basis existed for the jury's recommendation. Robert Parker was not the triggerman, and his mental condition was impaired by intoxicants. The jury may have believed that he acted under duress. His family circumstances had not been conducive to the development of a high moral sensibility. To affirm his death sentence despite that evidence when everyone else involved received a lesser sentence, and two of his co-defendants, including the acknowledged triggerman, are free, would contradict the modern Florida jurisprudence in jury override cases and constitute an "unusual" punishment, especially in light of cases like Dolinsky and Fuente. The Florida Constitution would therefore be violated by an affirmance of Parker's sentence here. Article I, Section 17, Florida Constitution.

CONCLUSION

The copious and substantial mitigating evidence presented at Robert Parker's trial and sentencing most of which was unrebutted, provided a reasonable basis for the jury's recommendation of life imprisonment for the murder of Nancy Sheppard. The execution of Robert Parker, who killed no one, would be an unusual event in the history of Florida capital punishment and would be constitutionally disproportionate to his

offense. This Court should vacate his death sentence and sentence Robert Parker to life.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was furnished by U.S. Mail to Mark Menser, Esquire, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, this 16th day of December, 1991.


Attorney

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