SUPREME COURT OF FLORIDA

ROBERT LACY PARKER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 63,700

(On Remand From United States Supreme Court)

REPLY BRIEF OF APPELLANT ROBERT LACY PARKER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

ARGUMENT

I. DE NOVO ANALYSIS ON THE TEDDER ISSUE IS REQUIRED.

A. This Court Must Independently Evaluate the Reasonableness of the Jury's Life Recommendation.

In Robert Parker's trial, as the United States Supreme Court has noted, there was substantial, uncontested evidence of mitigation which must have been accepted by the jury, was found by the trial judge, and has been acknowledged by every court to review this record (except this Court in 1984). The Supreme Court summarized this evidence in three categories:

> [1] The evidence of Parker's intoxication at the time of the murders was uncontroverted. [2] There is also no question that Long, despite being the triggerman for the Sheppard murder, received a lighter sentence than Parker. Respondent conceded this fact in oral argument before this Court. [citation omitted.] [3] 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. 731, 736-37 (1991). Earlier, the Supreme Court stated that this character evidence established "both a difficult childhood, including an abusive, alcoholic father, and a positive adult relationship with his own children and with his neighbors." Id. at 737. The Supreme Court directed that this evidence be evaluated in the context of the entire evidentiary record to see whether it provided a reasonable basis for the life recommendation.

This Court must independently assess the reasonableness of the jury's life recommendation based upon the entire evidentiary record of Robert Parker's case. Parker v. Dugger, 111 S.Ct. at 740. The United States Supreme Court held that Parker's earlier direct appeal was constitutionally defective because this Court failed to consider mitigating factors found by the trial judge. As a result, Parker was deprived of the individualized treatment required by the United States Constitution, and his death sentence must be reconsidered in light of this mitigating evidence.[1]

Despite the unambiguous statement by the United States Supreme Court that this Court "affirmed Parker's death sentence without considering the mitigating circumstances [,]" the State contends that the Supreme Court's remand was "based upon this Court's failure to explain whether, in the course of any Tedder analysis, nonstatutory mitigating evidence was considered." Answer Brief of Appellee at p.3; see also Answer Brief at p.12 ("The United States Supreme Court remanded this case because it could not tell whether this Court's Tedder analysis violated

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[1]In Santos v. State, 16 F.L.W. S633 (Fla. 1991), this Court recognized the scope of the holding in Parker v. Dugger:

> There, the majority stated that it was not bound by this Court's erroneous statement that no mitigating factors existed. Delving deeply into the record, the Parker Court found substantial, uncontroverted mitigating evidence. Based on this finding, the Parker Court then reversed and remanded for a new consideration that more fully weighs the the available mitigating evidence.

16 F.L.W. at S634 (emphasis added).

Lockett....."). The State further suggests that the "error" committed by the United States Supreme Court in so holding "is painfully obvious." Answer Brief at 14.

The State suggests that the 1991 Court can absolve the 1984 Court's constitutional error by "clarifying" the earlier opinion with an ex cathedra pronouncement that everything was all right, after all. This assertion contradicts Parker v. Dugger, which requires reconsideration of the trial and sentencing evidence, not the unwritten or silent portions of the prior appeal. It also invites further constitutional error. To establish, as the State suggests, that the 1984 Court properly considered all the mitigating evidence would require resort to evidence outside the record of Parker's trial and his appeal, because only three justices remain from the Supreme Court which heard his case in 1984. The deliberations of the four missing justices and what they considered in 1984 cannot be known without discovery or investigation outside the existing record. Any such process would violate Robert Parker's due process rights by making former justices of this Court witnesses against him who could not be confronted.

In our federal system, the United States Supreme Court is the final arbiter on federal constitutional questions. That Court has clearly spoken, and it has found a constitutional defect in Robert Parker's 1984 appeal. To suggest, in effect, that this Court should conduct an investigation outside the record to rehabilitate itself after the fact, rather than

confront the evidence in Robert Parker's case, is worse than pointless. It would disown federalism and compound the original error by shifting the focus to the undocumented processes of this Court rather than the evidence in Parker's trial. To do so would deprive him once again of the individualized treatment he is entitled to.

The time for reargument of the State's losing position in the United States Supreme Court has come and gone. The arguments presented in Point I, Section A of the State's brief ("Scope of Review") were considered and rejected by the Supreme Court. That Court ordered a reconsideration of Parker's sentence based on the evidentiary record of his trial and sentencing. It did not order, nor did it authorize, a psychological autopsy of the unwritten appellate deliberations of this Court in 1984.

II. THE PRIOR RULINGS ON AGGRAVATING FACTORS SHOULD NOT BE RECONSIDERED.

The State takes the extraordinary position that two aggravating factors should be added to the balance in Robert Parker's case, as if the State, not Parker, had successfully petitioned the Supreme Court for a reconsideration. This proposal is unsound. One of the aggravators the State seeks to rely on was not proven at trial, was rejected by this Court in 1984, and has been law of the case since that time. The trial judge found in the sentencing order that Nancy Sheppard's murder was heinous, atrocious and cruel, but this Court found that the

evidence did not support that finding. Parker v. State, 458 So.2d 750, 754 (Fla. 1984).

The State accepted this appellate ruling in 1984, and did not seek a rehearing of that portion of the original appeal. Any disagreement the State may have had with this ruling was waived at that time, State v. Wells, 539 So.2d 464 (Fla. 1989), aff'd, 110 S.Ct. 1632 (1990), and the absence of the H-A-C factor became law of the case. This ruling should not be revisited unless necessary to avoid manifest injustice. Hart v. State, 149 Fla. 388, 5 So.2d 866 (1942); Haddock v. State, 141 Fla. 132, 192 So. 802 (1940). This Court's finding that the evidence was insufficient to establish that factor amounts to an acquittal on the evidence, and to revisit that point at this stage would probably also violate double jeopardy. See Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981); but see, Poland v. Arizona, 476 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986).

The trial court also found that the Sheppard murder was committed during a robbery, and that an aggravating factor under §921.141 (5)(d), Fla. Stat., was established as a result. This Court eliminated this aggravating factor in 1984, observing that the evidence did not establish beyond a reasonable doubt that Parker, who removed the victim's necklace and ring after her death, had a specific intent to do so before she died. 458 So.2d at 754.

The State now contends instead that the Sheppard murder occurred during the commission of a kidnapping, and that the § 921.141(5)(d) aggravating factor should be reinstated as a result. However, it was never contended at trial or in Parker's previous appeal that a kidnapping was the enumerated felony which supports the finding of this aggravating factor. This argument also was waived by the State years ago, and it cannot now be raised for the first time on appeal.[2] State v. Wells, supra; Occhicone v. State, 570 So.2d 902 (Fla. 1990); White v. State, 446 So.2d 1031 (Fla. 1984); Castor v. State, 365 So.2d 701 (Fla. 1978).

III. THE STATE MISCHARACTERIZES THE RECORD AND THE LAW.

A. The State Treats Disputed Testimony as Established Fact.

Throughout its brief, the State overlooks the difference between evidentiary disputes and established facts. Exposure of this problem illuminates the weakness of the State's position. Virtually all the key record citations relied upon by the State

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[2]Even if this issue remains open, the evidence does not prove beyond a reasonable doubt that the alleged kidnapping "by trick" was Parker's doing. Elaine Parker was the person who persuaded Nancy Sheppard to join the defendants in the car (T.1869), Billy Long led them to her house (T.1253, 1402), and, as has been amply noted, there was evidence that Robert Parker was participating under duress. The evidence supports the conclusion that Parker himself was there against his will and that he believed he was in danger of meeting the same fate as Nancy Sheppard. Whatever may have been the case as to the co-defendants, the evidence creates a reasonable doubt, as to whether Robert Parker had anything to do with Nancy Sheppard's kidnapping, and leaves open the reasonable possibility that he did not want her to be there at all.

are taken from the testimony of Billy Long, Parker's co-defendant and principal accuser, or from Judge Olliff's sentencing order, which reiterates Long's testimony. For example, the following statements are identified by the State, without qualification, as factual:

- "Parker...threatened to kill Long unless Long killed Sheppard." (Answer Brief at p. 5, citing trial judge at R. 482.)

- "Long shot Sheppard while Robert Parker screamed at him to shoot her again." (Answer Brief at p. 5, citing trial judge at R. 483.)[3]

- "To finish the job, Robert Parker slit Nancy Sheppard's throat." (Id.)[4]

- "Parker planned Sheppard's abduction...." (Answer Brief at p. 23, citing Long testimony at R. 1254-56.)

- "Parker cut Ms. Sheppard's throat." (Answer Brief at p. 23, citing Long testimony at R. 1260-61.)

- "Parker, however, elected to subject Ms. Sheppard to as much anguish as possible. To the sadistic amusement of Parker and his cohorts, Ms. Sheppard 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." (Answer Brief at pp. 20-21, citing nothing at all.)

- "...Parker did slit Ms. Sheppard's throat while she was still alive. Parker cannot seriously suggest he was uninvolved in the actual killing." (Answer Brief at p. 25, citing nothing at all.)

- "Parker set out to murder Ms. Sheppard and forced Mr. Long, under a death threat, to serve as the instrument." (Answer Brief at p. 26, citing nothing at all.)

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[3]The judge actually said that Parker and Groover screamed at Long. Parker denied doing so.

[4]The judge did not say "to finish the job...."

- "The bottom line, however, is that Parker not only ordered Sheppard's death and orchestrated the shooting, he also cut her throat." (Answer Brief at p. 27, citing nothing at all.)

- "Parker was the ringleader. Parker ordered all three deaths and actively participated in the Sheppard killing." (Answer Brief at p. 30, citing nothing at all.)

The State's errors and overstatements are unmitigated, anywhere in its brief, by the recognition that Robert Parker took the stand and contradicted all these points. Parker testified that Long killed Nancy Sheppard while Parker stayed at the car. (T.1870). Parker testified that Groover told Long to cut Nancy Sheppard's throat (T.1871) and denied that he (Parker) did so (T.1880). Parker testified that he could not do anything to stop Nancy Sheppard from being killed (T.1880) and testified that he was there out of fear for his life and that of his family (T.1863-64). Parker's credibility in front of the jury was enhanced by his truthful statements against his own interest (e.g., his admission that he removed Sheppard's jewelry).

Long's credibility, on the other hand, was undermined by the plea agreement he entered with the State to reduce his own punishment for this crime, by his admission that he did not see Parker with a gun that morning, by his own evident motive to kill Sheppard and by his leading the defendants to her home. Long's testimony was also contradicted by two witnesses who reported Long's admissions that Parker stayed behind at the car, that he (Long) and not Parker cut Sheppard's throat, and by one witness

who stated that Long said he was willing to lie to send Parker to death row. Long's bias against Parker was also established by evidence that Parker shot Long on a previous occasion.

The State fails to confront the fact that on the issue of Nancy Sheppard's death, this trial came down to a credibility test between Parker and Long. In the eyes of the jury, Parker apparently won, and there is ample record evidence justifying this result. This comparison is the crux of this appeal, but the State has attempted to assume this issue away.

The best example of this problem is the gross exaggeration that Robert Parker slit Nancy Sheppard's throat "to finish the job," "while she was still alive." These statements simply are not proven, and cannot be from the record in Robert Parker's case. First, Robert Parker denied cutting Nancy Sheppard's throat; the record was in direct contradiction on this point, and the weight of the evidence clearly favored Parker. Second, Parker implicitly denied any intention for her to die when he stated he could do nothing to prevent her murder because of his fear of Groover and Long (T.1880). Third, by the time her throat was cut, by whoever did it, she had been shot three times in the head and twice in the chest by Billy Long. The assertion that she was still alive at this time is pure speculation, and highly unlikely. Fourth, the uncontradicted testimony of the medical examiner was that the neck wounds she sustained were superficial and would not have caused death (T.1029, 1032, 1049). Therefore, even if the jury believed Parker inflicted the knife

wounds, they could not have concluded that these wounds were either a cause of death or evidence of an intent to cause death. Their superficial character is equally consistent with an effort, under duress, to appear to be carrying out orders without inflicting serious harm. These nuances in the proof, although unavoidable in the record, are invisible in the State's brief. Although the State must show by clear and convincing proof that the jury recommendation was unreasonable, its brief relies primarily on unfounded rhetoric, not evidence.

Similarly, the State's conclusion that Parker "cannot seriously suggest he was uninvolved in the actual killing" amounts to nothing more than the assertion that homicide defendants who are testifying to save their own skins always offer untruthful, self-serving testimony. This rule apparently does not apply to homicide defendants, like Billy Long, who are testifying to save their own skins on behalf of the prosecution.

B. The State Mischaracterizes the Law.

To compensate for the absence of clear evidence supporting its position, the State proffers the "facts as found by the sentencer (Judge Olliff) at the time of trial." (Answer Brief at p. 3.) The State's entire legal premise on the substantive Tedder issue is that the trial judge may weigh contested evidence on key issues of culpability in a manner different from the jury, and that if he does so, his resolution of the evidentiary disputes is per se "reasonable" while the jury's is not. For example, on page 29 the State asserts:

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

This premise contradicts the existing Tedder jurisprudence and elevates to decisive significance a sentencing order which is both unlawfully derived and demonstrably wrong.

Under Tedder and its progeny, if the jury's recommendation is reasonably supported by the evidence, the judge is not free to reweigh the aggravating and mitigating factors and substitute his view of contested facts for the jury's. The jury's recommendation eliminates any presumption that death is the appropriate penalty even if one or more aggravating factors are present. Williams v. State, 386 So.2d 538 (Fla. 1980). The jury's recommendation is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion." Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983). The obligation of this Court in applying Tedder is to scrutinize the trial record for any mitigating circumstance that could form a "reasonable basis" for the jury's recommendation:

> Therefore, we must examine this record to determine whether there are clear and convincing facts that warranted the imposition of the death penalty, and, in doing so, we must determine if there was a reasonable basis for the jury's recommendation.

Mallory v. State, 382 So.2d 1190, 1193 (Fla. 1979).

If there is a reasonable basis in the record for the jury's recommendation, the fact that the judge views the case differently is irrelevant. The State simply begs the question by insisting that Judge Olliff's version is the only reasonable version of the facts. Because Billy Long was the triggerman but received a lesser sentence, Robert Parker's jury may reasonably have believed that no death sentence was appropriate for the Sheppard murder. This belief alone would be enough to prevent an override.[5] See, e.g., Brookings v. State, 495 So.2d 135 (Fla. 1986).

The State's reliance on Judge Olliff's sentencing order is misplaced for another reason. Judge Olliff, who presided over the earlier trial of Parker's co-defendant, Tommy Groover, had previously found as fact in Groover's sentencing order that Long did not cut Nancy Sheppard's throat. Therefore, Judge Olliff apparently credited Long's testimony on the facts of the Sheppard murder before Parker's trial ever began.

Other evidence in Parker's sentencing order suggests that Judge Olliff commingled the evidence from the two trials. He described the material he considered in rendering Parker's sentence:

> Before imposing sentence, this Court has carefully studied and considered all the evidence and testimony at trial and at advisory sentence proceedings, the Presentence

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[5]And in this case, as noted earlier, other unrebutted mitigating factors supported the jury's recommendation, including intoxication and evidence of an abusive childhood. Parker v. Dugger, 111 S.Ct. at 736-37.

> Investigation Report, the applicable Florida Statutes, the case law, and all other factors touching upon this case.

(R.488; emphasis added.) "All factors" apparently included the evidence in Tommy Groover's trial. In the description of Richard Padgett's killing in Parker's order (which is quoted verbatim from Groover's) the Judge made an error in who he was sentencing: "[Padgett] went through tortuous hours before he was finally shot in the head by the defendant." (R. 502.) No one at Parker's trial ever said Parker shot anyone; it was Groover who shot Richard Padgett. Parker's sentencing order also contains a description of the Dalton homicide which depends on the testimony of Joan Bennett and, as to Parker's premeditation of that crime, matches Judge Olliff's description in the Groover sentencing order. In Parker's trial, however, the jury clearly rejected Bennett's testimony when it convicted Parker of only third degree murder in Dalton's death.

Judge Olliff almost certainly commenced Parker's trial having already formed a conclusion in favor of Billy Long's veracity on the facts of the Sheppard case, and, in particular, on the issue of who cut Sheppard's throat, which was key to Parker's culpability. In various ways, he failed to keep the evidence straight between the two trials. This commingling of the evidence is fundamental error. Dailey v. State, 438 So.2d 181, 193 (Fla. 1991); Jackson v. State, 575 So.2d 181, 193 (Fla. 1991); Engle v. State, 438 So.2d 803 (Fla. 1983). At a minimum, it undermines the State's exclusive reliance on Judge Olliff's sentencing order as the definitive description of the facts of

these crimes, or as an analysis of Parker's culpability in Nancy Sheppard's death.

IV. THE IMPOSITION OF THE DEATH SENTENCE WOULD BE UNUSUAL PUNISHMENT IN VIOLATION OF THE FLORIDA CONSTITUTION.

Florida's Constitution is a primary and independent source of individual rights which may exceed those granted by the Federal Constitution in a given case. Traylor v. State, 16 F.L.W. S42 (January 16, 1992). Article I, Section 17 of the Florida Constitution prohibits "cruel or unusual" punishments. Unlike the federal Constitution's "cruel and unusual" punishments clause, Florida's provision is worded in the disjunctive. This difference has substantive significance. Tillman v. State 16 F.L.W. S674, S675, S675n.2 (October 17, 1991); Cherry Lake Farms, Inc. v. Love, 129 Fla. 479, 176 So.2d 486 (1937) (use of the word "or" indicates alternatives were intended); see People v. Anderson, 493 P.2d 880 (Cal. 1972) (construing similar language in California Constitution).

According to Tillman, "unusual" as used in Article I, Section 17, invokes a proportionality analysis at the microscopic level of case by case comparison. The objective is to assure uniformity in death penalty law. Tillman, supra, 16 F.L.W. at S675. In addition to the cases cited in Parker's initial brief, many other decisions of this Court indicate that death would be a disproportionate punishment here, and therefore unusual.

Of the five defendants whose jury overrides were sustained

by this Court in the last five years,[6] two personally inflicted the injuries that caused death, and the other three were equally culpable in the homicides which occurred. In none of them was there copious and substantial mitigating evidence, or evidence of duress, intoxication, or disparate treatment of equally or more culpable co-defendants.

A brief rendition of the facts of these crimes as they pertain to the defendants' moral culpability demonstrates that Robert Parker does not belong in this company.

In Zeigler v. State, 580 So.2d 127 (Fla. 1991), defendant personally killed four people and attempted to kill one more in a plot to collect his wife's life insurance and eliminate witnesses to the crime. One of the capital murders was heinous, atrocious and cruel. There was apparently no evidence of intoxication or duress, no evidence of an abusive childhood, and no evidence of disparate sentencing.

In Thompson v. State, 553 So.2d 153 (Fla. 1989), defendant personally executed an "old friend and associate" after placing a contract on his life, kidnapping him, and torturing him. The murder was heinous, atrocious and cruel. Although there was medical evidence of brain damage, it was contested and ultimately rejected by this Court and the trial court as not establishing mitigation. There was no evidence of duress or intoxication, or any other valid mitigating circumstance. Thompson's claim of

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[6]A sixth defendant had the propriety of his override affirmed but his sentence was remanded for other reasons. This Court reviewed approximately 50 overrides during that period.

disparate treatment of co-defendants was rejected because they were not equally culpable (Thompson was the sole triggerman).

In Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), defendant was convicted for a gunshot murder occurring during the perpetration of a robbery. Circumstantial evidence pointed to his role as triggerman. There was apparently no evidence of duress or intoxication, or any other mitigating circumstance affecting defendant's mental state at the time of the crime. The meager mitigating evidence offered (testimony of a clinical psychologist as to defendant's high intelligence and good potential for rehabilitation) was not of sufficient weight to offset the aggravating factors, and was itself offset by a prior conviction for another homicide committed by defendant after the Florida murder.

In Engle v. State, 510 So.2d 881 (Fla. 1987), the defendant was convicted for the abduction, sexual torture, and murder by strangulation and multiple stabbing of a convenience store clerk in order to conceal a robbery of the store. The murder was heinous, atrocious and cruel. Engle denied commission of the crime, but his knife probably was the murder weapon. Although there was no direct, certain evidence that Engle was the killer, this Court believed that he may have been and held that Engle was "directly involved" and a "major participant" in the crimes. There was no evidence of duress and apparently, no evidence of intoxication which rose to the level of mitigation. Significantly, there was no issue of unequal culpability or

disparate sentencing: Engle's co-defendant, Rufus Stevens, was also sentenced to death, and his sentence had been affirmed as of the time of Engle's appeal. Stevens v. State, 419 So.2d 1058 (Fla. 1982), cert. denied, 459 U.S. 1228 (1983).

In Echols v. State, 484 So.2d 568 (Fla. 1985) (rehearing denied, March 31, 1986), defendant was a contract killer who arranged a murder/robbery and made three separate trips into Florida to commit it, on the last of which an accomplice completed the crime in Echols' presence and with his assistance. The murder was clearly premeditated: Echols was described as "a mature, experienced person of fifty-eight years, of sound mind and body who knew very well what he was undertaking," and "a cunning, conscienceless criminal capable of carrying out a sophisticated murder without a twinge of regret." 484 So.2d at 568. There was no evidence of duress, intoxication or disparate treatment of equally culpable co-defendants. The mitigating evidence which was offered either was not mitigating as a matter of law (defendant's age) or was directly contradicted by other evidence in the record (defendant's character evidence).

Nor does Parker's case merit the death sentence in comparison to the cases of the three jury override defendants who have been executed since 1974. In Dobbert v. State, 328 So.2d 433 (Fla. 1976), defendant tortured and killed his nine year old daughter and was convicted of first degree murder as a result. In the same trial, he was convicted of second degree murder of his seven year old son, torture of his eleven year old son, and

child abuse of his five year old daughter. There was no issue of disparate sentencing because there was no co-defendant involvement. There was no evidence of duress or intoxication. The first degree murder was heinous, atrocious and cruel. The homicides apparently culminated a long history of criminal child abuse. No mitigating factors were found by the trial court or this Court.

In Francis v. State, 473 So.2d 672 (Fla. 1985), defendant killed a police informer after travelling to Key West, laying in ambush, and torturing the victim for several hours, including beating, taping the victim's hands and mouth, shooting into the floor while the victim was on his knees, and injecting or attempting to inject the victim with Drano. Finally, the victim was shot twice by Francis. There was no evidence of intoxication, duress or disparate sentencing of co-defendants, all of whom were of lesser culpability than Francis. The murder was heinous, atrocious and cruel.

In White v. State, 403 So.2d 331 (Fla. 1981), defendant was convicted of six first degree murders, two attempted murders, and four counts of robbery. The witnesses were exterminated by White's co-defendants to prevent them from testifying and identifying one of the robbers. Five aggravating factors were sustained by this Court and no mitigating factors were found. There was apparently no evidence of duress or intoxication. Although, like Parker, defendant White personally killed no one, he was armed throughout the episode and his participation was

held to be equal to that of his co-defendants. There was no disparate sentencing because the only participant who received a lesser sentence (the "wheelman" who was not present at the murder scene) was indisputably less culpable, and White's two co-defendants each received a death sentence. Significantly, this Court noted:

> Our decisions in Slater and Malloy would perhaps warrant the reversal of defendant's death sentence if the two participants who did the actual shooting in this case received something less than a death sentence. However, this is not the case. We take judicial notice that the other two intruders, Francois and Ferguson, have both been sentenced to death.

403 So.2d at 340 (emphasis added). In this case, the jury probably believed that Tommy Groover was more culpable in Nancy Sheppard's death, and perhaps believed that Elaine Parker was equally culpable. They knew that both received sentences less than death. Most importantly, the jury was aware that Billy Long, the undisputed triggerman, who, according to the weight of the evidence, slit Nancy Sheppard's throat, also received a lesser sentence. In addition to making the jury's recommendation reasonable, these facts make Robert Parker's death sentence disproportional and therefore, unusual, in comparison to both his own co-defendants and to others whose death sentences have been sustained.

In addition, the analysis of unusual punishments necessarily has a macroscopic, historical dimension in the unique context of jury override cases. Of the 121 death-sentenced defendants who have come before this Court in the jury

override posture, 16 are still active in post-conviction activity. Of the remaining 102 (some 84% of the total), almost all have received a life sentence or had their convictions reversed (a few are awaiting resentencing proceedings).

These figures become even more significant when viewed in conjunction with homicide defendants whose jury life recommendations are accepted by the trial judge. If there was one such defendant for each of the 121 individuals whose juries were overridden, 242 defendants have received jury life recommendations since 1974, but only three have been executed. If the acceptance of a jury life recommendation was only twice as common as an override in the period since 1974, then 363 defendants have received a life recommendation, but fewer than one in 100 of them have been executed. In this context, the execution of Robert Parker, who personally killed no one, would be unusual by any definition, and would violate the Florida Constitution as a result, especially where the actual triggerman had bargained for a lesser sentence before trial and today is free.

CONCLUSION

The unrebutted evidence, standing alone, provided a reasonable basis for the jury's life recommendation. In addition, the jury may have believed Parker's version of the disputed facts, which also was sufficient basis for the life recommendation. The execution of Robert Parker would be

disproportional punishment. Robert Parker's death sentence should be vacated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was furnished by U. S. Mail to MARK Menser, Esquire, and CAROLYN SNURKOWSKI, ESQUIRE, Office of the Attorney General, The Capitol, Tallahassee, Florida 32301 this 4th day of February, 1992.

Attorney

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