IN THE

SUPREME COURT OF FLORIDA

ROBERT LACEY PARKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 68,987

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief is being filed without benefit of service of the Appellant (Parker's) brief. The State has responded to the issues as they were raised and argued to the Circuit Court. The State will object to any de novo arguments.

References to the original record on appeal will be designated (ROA). References to the record of the post-conviction relief proceeding will be designated as (R).

STATEMENT OF THE CASE AND FACTS

Robert Lacey Parker was properly convicted of First Degree Murder and sentenced to death. The details of the crime are set forth in Parker v. State, 458 So.2d 750 (Fla. 1984).

On May 19, 1986, Parker filed a motion for post-conviction relief pursuant to Fla.R.Cr.P. 3.850. On June 26, 1986, Parker amended his motion to include two additional claims.

The State filed a motion to dismiss the amended petition and argument was heard. Relief was summarily denied on the basis of the pleadings and arguments. This appeal ensued.

Three claims were raised by the motion for post-convction relief. The facts relevant to each are set forth in order: (as anticipated, the Appellant's brief being unreceived).

(A) Facts: Brady claim

After trial, but prior to sentencing, Parker became aware of compensation being paid to certain State witnesses. Parker amended his motion for new trial to include a claim that the State violated Brady v. Maryland, 373 U.S. 83 (1963) by "paying" witnesses and not advising him.

Parker enjoyed full discovery prior to trial and deposed all witnesses. Parker cross examined every State witness during

trial. At no time did Parker inquire of any witness whether their expenses had been met, even though compensation is standard practice. When Parker learned of three witnesses being paid, he did not bother to see if any others were paid.

Parker, with this record, appealed the so-called "Brady" violation without success.

Parker's attorney, Mr. Link, wrote a letter to the United States Attorney in 1983 asking him to investigate Ralph Greene's conduct in this case. (R 16) Link took no further action to investigate this "issue" until May of 1986. In the interim, the FBI cleared Greene of any wrongdoing in this case.

Parker's co-defendant,Groover, raised the so-called Brady claim in his motion for post-conviction relief. (The two were tried separately but the same witnesses and prosecutor were involved). This Court rejected any Brady claim. see Groover v. State, 11 FLW 239 (1986).

Although Groover sought to incorporate the Parker case with his own, claiming identity of issues, when Parker argued his 3.850 claim, fully aware of Groover's loss, he desperately tried to disassociate his case. In renewing this claim, all Parker did was substitute the names of different witnesses for those previously used and then reargue the same issue rejected in his prior appeal.

(B) Facts: Enmund claim

Parker was convicted of this crime in 1983 . His appeal was not decided until February of 1984. Enmund v. Florida, 458 U.S. 782 (1982) was decided in July 1982, one and one half years before Parker's case was decided.

Parker attempted to raise an Enmund claim by representing that that case "changed" the law, but without advising the trial court that Enmund antedated his case by over a year, and thus did not "change" the law. Parker did concede, however, that the trial court did make the requisite finding that he intended to, anticipated or actually killed the victim. (Parker urged the others to kill and, personally, slit the victim's throat after she was dead. (ROA 476-483).

(C) Facts: "Spaziano"

While conceding that jury overrides are constitutional, Parker tried to circumvent Spazian v. Florida, __U.S.__, 82 L.Ed.2d 340 (1984) by claiming that the Supreme Court had (has) misapplied Tedder in every case "since" Spaziano. This obvious effort to negate the impact of Spaziano on all subsequent cases was, in addition to its lack of merit, an attempt to ask a Circuit Court to review the conduct of the Florida Supreme Court!

This case was decided in September of 1984. Spaziano was

decided in July of 1984. At (R 69), Parker's lawyer said that immediately after Spaziano was published this Court began "arbitrarily and capiciously" resolving death cases. (see R 70)

Parker brazenly asserted that, after Spaziano, this Court "abandoned" the Tedder analysis (R 70), ceased examining records on appeal (R 70) and "eviscerated" Tedder (R 74). It is presumed he shall repeat the charge on appeal.

SUMMARY OF ARGUMENT

The Circuit Court did not err in summarily disposing of issues previously argued on direct appeal and, in any event, clearly refuted by the record.

Parker's so-called "Brady" issue was disposed of on direct appeal.

Parker's Enmund claim is not justified as a "change in the law" because Enmund was decided in 1982, seven months before this case was tried, and over a year before appellate briefs were filed. Insofar as Enmund could have been argued, but was not, the issue is procedurally barred. Even so, the claim is clearly refuted by the record given Parker's obvious knowledge that someone would die, his intent to kill and his actions (including taking a knife and slitting the victim's throat).

Parker's Spaziano claim contends that this Court is arbitrary and capricious in its handling of capital cases. In addition to its facial lack of merit, the claim must fail because (1) Circuit Courts cannot review Supreme Court action and (2) in truth, the claim is really just an improper effort to reargue the sentencing issues disposed of on appeal.

ARGUMENT I

THE TRIAL COURT DID NOT ERR IN SUMMARILY DISPOSING OF PARKER'S "BRADY" CLAIM

Parker's motion for post-conviction relief improperly attempted to reargue an issue litigated, and lost, on direct appeal. In an effort to overcome this procedural bar, Parker tried the discredited practice of substituting new or additional "facts" (here, the names of additional witnesses).

The trial court did not specify the basis for its summary disposition but, if the court was correct for any reason, its decision must be affirmed, Stone v. State, 481 So.2d 478 (Fla. 1985). More than one basis for affirmance is present in this case.

The cases of Shriner v. Wainwright, 735 F.2d 1236 (11th Cir. 1984) and Straight v. State, 11 FLW 227 (Fla. 1986) clearly state that it is improper to attempt to reargue a previously litigated claim by substituting new or additional facts behind an old argument. That is precisely the gambit played by Mr. Parker.

As Parker, or any reasonable person, has probably known all along, no witnesses were "bribed" but, if some were compensated for expenses, then probably all were. Parker used the names of only a few witnesses during his appeal. Having lost, he now relies upon payments to other, lesser, witnesses in an attempt to

reargue his appeal.

Should Parker ever attempt another petition, will other names be used to support a third reargument? Hopefully not, since even the petition at bar was improper and was subject to summary dismissal. Just as motions filed pursuant to Rule 3.850 are not substitutes for appeal see e.g. Thomas v. State, 11 FLW 174 (Fla. 1986); McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983), so too, they do not permit limitless reargument of appellate claims.

The trial court's decision is, of course, clearly supported by the record (just as it was on direct appeal).

It is standard practice in most, if not all, jurisdictions for prosecutors and defense attorneys to compensate witnesses for mileage, travel expense, meals and possibly lodging. Indeed, despite his reciprocal discovery obligation, Mr. Link has yet to reveal payments made to his own witnesses, (if any). Confronted with this at the trial itself, Mr. Link did not deny the practice. (ROA 2528-2530)

There is a fundamental difference between "paying" for testimony and simply reimbursing expenses. The mere payment of meal and travel expense is not and never has been Brady material. First, it is not "exculpatory evidence tending to negate the guilt of the accused". Second, this informaton is

available simply by asking the witness if he has been paid. Thus, the information is not "exclusively in the control of the State". Halliwell v. Strickland, 747 F.2d 607 (11 Cir. 1984); James v.State, 453 So.2d 786 (Fla. 1984)

An adroit defense lawyer will not try to mislead the jury by implying that expense money is a "bribe" for obvious reasons. While counsel may, on cross, get a witness to say he received cash, the state will easily rehabilitate the witness on redirect. The net result, of course, is jury resentment of defense counsel's effort to mislead them.

Mr. Link, as an excellent lawyer, knew (and knows) full well that this so-called "evidence" would not have been used at trial even if he had known about it. The sums, contrary to his "surprise" post-trial, are not unusual given the fact that these witnesses had to appear in two trials (Groover and Parker) over an extended period of time, in a foreign city.

Thus, this evidence was not "exculpable". Similarly, it was not even "material" under United States v. Antone, 603 F.2d 566 (5th Cir. 1979) and United States v. Bagley, 473 U.S.__. 87 L.Ed.2d 481 (1985). Its absence from the trial in no way undermines the result. Indeed, it would have been a significant strategical error to have tried to use it, as noted above.

Therefore, just as this issue was rejected in Groover,

supra, so too it must fail here.

ARGUMENT II

THE COURT PROPERLY DISPOSED OF APPELLANT'S ENMUND CLAIM

Appellant's claim that the Eighth Amendment forbids the imposition of the death penalty for his involvement in the murder of Nancy Sheppard must also be dismissed on procedural grounds.

The case Appellant relies on in support of his claim, Enmund v. Florida, 458 U.S. 782, 73 .L.Ed.2d 1140, 102 S.Ct. 3368 (1982), was decided more than seven months before jury selection began in this case and well over a year before Appellant filed his brief on direct appeal to this Court. As stated earlier, motions for post-conviction relief are not substitutes for direct appeal and are not vehicles to argue points which could have and should have been raised at trial or in the appellate court. Fla.R.Crim.P. 3.850.

Respondent would submit that an Enmund claim was not raised earlier for the obvious reason it lacked any merit whatsoever. Thus, even if this Court were to review this claim, it should be denied on the merits.

In Enmund v. Florida, the United States Supreme Court ruled that the Eighth Amendment forbids the imposition of the death penalty on someone "who aids an abets a felony in the courts of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or

that lethal force will be employed." 458 U.S. 797. It is submitted that Appellant's own testimony implicates his intent to voluntarily assist in the murder of Nancy Sheppard.

Enmund was convicted of the first degree murder of Thomas and Eunice Kersey during the commission of a robbery in which Enmund drove the get-away car. As stated by the United States Supreme Court:

> As recounted above, the Florida Supreme Court held that the record supported no more than the inference that Enmund was the person in the car by the side of the road at the time of the killling, waiting to help the robbers escape. This was enough under Florida law to make Enmund a constructive aider and abettor and hence a principal in first-degree murder upon whom the death penalty could be imposed. It was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape. We have concluded that the imposition of the death penalty in these circumstances is inconsistent with the Eighth and Fourteenth Amendments. (Emphasis added).

458 U.S. at 788. This is easily distinguishable from the instant case in which a review of Appellant's self-serving testimony indicates that he knew of Defendant Tommy Groover's plan to murder Sheppard, believed Billy Long also knew of the

plan, was the person to whom Groover owed the drug money (and victim Richard Padgett in turn owed Groover), and participated in the kidnapping and murder of Padgett. All the evidence points to the fact that Sheppard was killed to cover up the murder of her boyfriend Padgett. Thus, even under Appellant's theory, he is a perpetrator of the underlying felony and a principal of the homicide. Goodwin v. State, 405 So.2d 170 (Fla. 1981); Adams v. State, 341 So.2d 765 (Fla. 1976), cert. den., 434 U.S. 878 (1977). It is unnecessary to consider the overwhelming evidence (outside of Appellant's self-serving testimony) which reveals Appellant to be the ringleader of the drug dealing conspiracy and the instigator of the three murders resulting from nonpayment of drug money. Thus, it is clear that any attempt to raise an Enmund claim at trial or on direct appeal would have been futile.

In Cabana v. Bullock, 474 U.S. __, 88 L.Ed.2d 704, 106 S.Ct.__ (1986), the United States Supreme Court reaffirmed its decision in Spaziano v. Florida, supra, in which it rejected the argument that a defendant has a constitutional right to have a jury consider the appropriateness of a capital sentence. 88 L.Ed.2d at 716. In addressing an Enmund claim, the Court stated:

> Moreover, the decision whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case, like other questions bearing on whether a criminal defendant's constitutional rights have been violated, has long been viewed as one that a trial judge or an appellate

> court is fully competent to make. See, e.g., Solem v. Helm, 463 U.S. 277, 77 L.Ed.2d 637, 103 S.Ct. 3001 (1983); Weems v. United Staes, 217 U.S. 349, 54 L.Ed.2d 793, 30 S.Ct. 544 (1910).

88 L.Ed.2d at 716. The Cabana decision also enunciated the standard of review in a federal habeas claim:

> Accordingly, when a federal habeas court reviews a claim that the death penalty has been imposed on one who has neither killed, attempted to kill or intended that killing take place or lethal force be used, the court's inquiry cannot be limited to an examination of jury instructions. Rather, the court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made.

88 L.Ed.2d at 717, (emphasis added).

In the case at bar, the trial court noted that immediately after forcing Billy Long to kill Nancy Sheppard by threatening to kill Long in her place Appellant cut the victim's throat (ROA 476-483). These findings comply with Cabana and thus render an Enmund claim as meritless.

This point should be dismissed on procedural grounds because it could or should have been raised at trial or on direct appeal, or in the alternative, should be dismissed as meritless.

ARGUMENT III

THE CIRCUIT COURT DID NOT ERR IN REJECTING APPELLANT'S SPAZIANO CLAIM

Mr. Parker, in a poorly concealed effort to use his 3.850 petiton as a rubric to reargue his appeal, asked the Circuit Court to:

> (A) Engage in de novo "proportionality review" of his sentence, and
>
> (B) Enter an order reversing the Florida Supreme Court after reviewing the propriety of this Court's conduct, despite Hoffman v. Jones, 280 So.2d 431 (1973).

Since it cannot seriously be alleged that Circuit Courts can sit in judgment of the Supreme Court, it is clear that that portion of the Appellant's argument is without merit. Nevertheless, the State is concerned with Parker's accusations that this Court "ignores" the record and "arbitrarily and capriciously" decided capital cases.

Parker does not allege personal bias (against him) by this Court, so his words were carefully chosen.

"Arbitrary" means that the decision was rendered by a judge acting on a whim, as a despot. see Webster's II, New Riverside University Dictionary, (1984) Similarly, "caprice" means "on impulse" or a "whim". id. The State does not accept this

assessment of the operation of the Supreme Court.

The real matter before the Circuit Court was Parker's desire to reargue the issue already resolved on appeal, to wit: his death sentence.

Motions for post-conviction relief do not exist for the purpose of endless reargument of appellate claims. Thomas v. State, 11 FLW 174 (Fla. 1986) see Adams v. State, 11 FLW 94 (Fla. 1986).

In the absence of record support for his accusations against the justices of this court, and given the true nature of Parker's complaint, summary dismissal was entirely proper.

CONCLUSION

Mr. Parker has failed to demonstrate any legal basis for relief.

Respectfully submitted,

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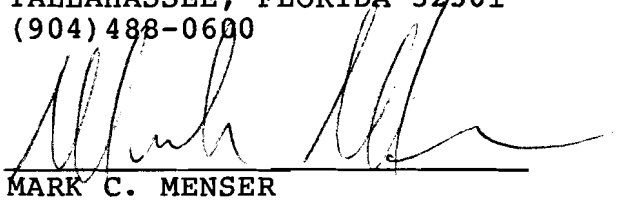

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert J. Link, esq., 305 Washington Street, Jacksonville, Florida 32202, on this 11th day of July, 1986.

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