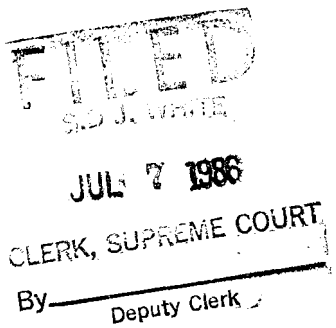
68,987

IN THE SUPREME COURT OF FLORIDA

CASE NO.:



ROBERT LACY PARKER,

Appellant,

vs.

THE STATE OF FLORIDA

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DUVAL COUNTY

BRIEF OF APPELLANT

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INDEX

TABLE OF CITATIONS AND AUTHORITIES

OTHER AUTHORITIES

INTRODUCTION

The Appellant, Robert Lacy Parker, was the Movant in the trial court below, and was the Defendant in the original trial in this cause. All parties will be referred to as they appeared in the original trial of this proceeding. All emphasis is supplied unless otherwise indicated. The symbol "R.____" shall designate the three volumes labeled "Transcript of Record" in the direct appeal of this cause; the symbol "T.____" shall designate the stenographic transcript of the in-court proceedings in the original trial. The symbol "RP.____" shall designate the volume designated from the post-conviction motion hearings. The symbol "TP._____" shall designate the transcript of the hearing conducted in the post-conviction motions.

STATEMENT OF THE CASE

On February 28, 1983, the Defendant began his trial on an indictment charging three counts of first degree murder. (R. 133) On March 9, 1983, the jury returned a verdict of guilty as charged as to Counts One and Two, and guilty of third degree murder as to Count Three. (R. 409-411; T. 2307). On March 14, 1983, an advisory sentencing proceeding was conducted before the jury. (T. 2313-2315) The jury specifically found that the mitigating circumstances outweighed the aggravating circumstances and recommended sentences of life imprisonment. (R. 434-435; T. 2516-2517). On April 29, 1983, the trial court judge sentenced the Defendant to life imprisonment on Count One, death on Count

Two, and fifteen years imprisonment on Count Three, to run consecutively. (R. 470-475; T. 2577-2578).

The convictions and sentence were affirmed by this Court on September 6, 1984, and re-hearing was denied on December 3, 1984. Parker v. State, 458 So. 2d 750 (Fla. 1984). On May 19, 1986, the Defendant filed a Motion to Vacate Judgment and Sentence with the trial court. (RP. 7-41). On June 20, 1986, a death warrant was signed and execution was scheduled for July 15, 1986, at 7:00 a.m. On June 26, 1986, a Supplement to the Motion to Vacate was filed. (RP. 54-9). Argument was heard by the trial court on June 25, 1986. (TP. 3-44). On June 26, 1986, the trial court denied the Defendant's request for an evidentiary hearing. (TP. 45-47). On June 27, 1986, further argument on the motion was had. (TP. 48-88). On July 1, 1986, the trial court denied the Motion to Vacate and the application for stay of execution. (RP. 74).

At all proceedings in this cause, the trial court has been the Honorable R. Hudson Olliff, Circuit Judge of the Fourth Judicial Circuit, in and for the State of Florida.

After the trial and advisory sentencing proceeding, and shortly before the sentencing hearing before the trial court, counsel learned that prosecuting attorney Ralph Greene had made twenty dollar cash payments during the trial to three state witnesses: Joan Bennett, Carl Barton, and Spencer Hance. (R. 464, T. 2526-2527). Counsel had previously made specific requests for such evidence in a

Motion for Production of Favorable Evidence (R. 44) and a Motion to Compel Discovery (R. 156-158). The prosecution admitted these payments at the argument on Defendant's Amendment to Motion for New Trial (R. 464-465). However, the payments were excused as "lunch money." (T. 2527-2530). The prosecution did not reveal that other payments were made. The trial court denied the Motion for New Trial. (T. 2530).

On July 26, 1985, the U.S. Attorney for the Middle District of Florida, Robert Merkle, forwarded to the Florida Attorney General copies of investigative reports prepared by the Federal Bureau of Investigation. These reports were FBI "Form 302" reports prepared by special agents and containing the substance of interviews with various witnesses about cash payments made by Mr. Greene to witnesses in this case. Mr. Greene had been indicted by a federal grand jury on other grounds.

It was not until April 28, 1986, that this material was mailed to defense counsel by Assistant State Attorney John Delaney. As soon as the Defendant was aware of the additional payments, the Motion to Vacate was filed. At argument on the motion, counsel requested an evidentiary hearing so that he could present evidence that several thousand dollars had been paid to witnesses in this cause. (TP. 36). The request for an evidentiary hearing was denied. (TP. 45). After additional argument, the Motion to Vacate and the Application for Stay of Execution were denied. (RP. 74).

ISSUE ONE

THE TRIAL COURT ERRED IN REFUSING TO PERMIT AN EVIDENTIARY HEARING AT WHICH THE DEFENDANT WOULD PRESENT EVIDENCE THAT THE PROSECUTING ATTORNEY HAD WITHHELD REQUESTED FAVORABLE EVIDENCE OF SUBSTANTIAL CASH PAYMENTS TO NUMEROUS PROSECUTION WITNESSES, BOTH BEFORE AND DURING THE TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

ARGUMENT

A. The Relevance of the Newly Discovered Evidence

The prosecution's evidence that Robert Parker was present at the scene of three homicides was compelling. However, the evidence as to what actually happened during the homicides was based exclusively on the testimony of Joan Bennett and Billy Long. Bennett and Long were co-defendants who had made "deals" with the prosecution to testify against the Defendant. Bennett pled guilty to being an Accessory after the Fact to the murder of Jody Dalton, was released from jail before Christmas, 1981, and was eventually sentenced to probation. Long was allowed to plead guilty to second degree murder for shooting Nancy Sheppard three times in the head and twice in the chest. He received a thirty-year prison sentence, with immediate parole eligibility.

The Defendant testified in his own behalf, admitting his presence but denying any participation in the homicides. His credibility was repeatedly assailed, however, by evidence presented through collateral witnesses. These

witnesses included Spencer Hance, Morris Johnson, Wayne Johnson, Mike Green, Lewis Bradley, and Denise Long.

Clyde Morris Johnson testified that on Friday, February 5, 1982, the Defendant offered to give he and Richard Padgett some "T" (phenocycledine) for sanding down a truck. (T. 1125). They agreed, and went to the mobile home where Robert Parker was living with his ex-wife, Elaine. (T. 1125-6). Morris Johnson said that Tommy Groover provided he and Padgett with some of the Defendant's drugs, and they all got "high." (T. 1129). Morris Johnson said that the Defendant later paid he and Padgett by giving them a gram of "T." (T. 1130-1). Morris Johnson testified that the Defendant's source of income was selling drugs, (T. 1132), and that Groover worked for Robert Parker by dealing drugs. (T. 1699-1700). Morris Johnson also said that Groover was afraid of the Defendant. (T. 1700). On Sunday, February 7, 1981, he had gone to the Defendant's residence to talk to him about Tommy Groover and Billy Long, and had armed himself because he was afraid of the Defendant, too. (T. 1700, 1144-5). He further testified that the Defendant always carried a gun. (T. 1701). Morris Johnson also testified that, on Friday, February 5, 1986, the Defendant had threatened Brother Caps with a gun. (T. 1133).

According to the statement he provided the FBI, Morris Johnson was paid $100 to $120 cash by Ralph Greene. (RP. 29)

Walter Wayne Johnson (Morris' brother) was called by the defense in the belief that his testimony would be favorable. Wayne Johnson testified that Billy Long and Tommy Groover came to his house on Saturday, February 6, 1982. (T. 1684-5). He further testified that Long was driving and that Groover was carrying a loaded shotgun. (T. 1685). The shotgun was broken open so that Johnson could see the shells in it. (T. 1685-6). Long told Wayne that they were looking for Morris Johnson and Richard Padgett because they owed Tommy money for "four quarter racks of T." (T. 1686). Wayne testified that Tommy said he was going to get the money "one way or the other." (T. 1686-7). As a result of this conversation, he was "shook up" and concerned for his brother. (T. 1687).

This testimony was important because it contradicted the testimony of Billy Long, who had described this as a friendly encounter with an unloaded gun. (T. 1365-1377). It also showed Groover acting independently of Parker. However, on cross-examination, Wayne told Ralph Greene that he was not really sure that the gun was loaded, he was just speculating because he saw shells in the car. (T. 1688). Wayne also testified that Groover was trying to collect the money for the Defendant. (T. 1689). This was a significant change from his earlier deposition when he had said he was sure the gun was loaded. (T. 1692). On re-cross, Wayne again told Mr. Greene that he was just guessing that the gun was loaded. (T. 1692). The Court acknowledged that was a

significant change in testimony. (T. 1693). Wayne said he had discussed his testimony with Mr. Greene one or two times since his deposition. (T. 1692-3).

According to the FBI interview with Wayne Johnson, (RP. 31) Greene paid him thirty dollars on six different occasions. Such evidence would have gone a long way towards explaining why Wayne Johnson's testimony went from favorable to the defense to favorable to the prosecution.

The State also called Mike Green (no relation to the prosecutor) to testify against the Defendant. Green testified that on Friday, February 5, 1982, he had gone to the trailer where Robert Parker was living and given him a .22 revolver in lieu of thirty dollars he owed the Defendant for drugs. (T. 1164-1165). Green said the Defendant was complaining about people owing him money for drugs, and waving the pistol around. (T. 1164-1165). Green claimed to have seen the Defendant threaten to hang Tommy Groover from a tree in his yard, where there was a rope with a noose in it. (T. 1177). According to Green, the Defendant was threatening to hang Groover if Groover did not pay him the money Groover owed him, and Groover promised to have the money the next day. (T. 1177). Green testified that the next day, Saturday, February 6, 1982, the Defendant had gone to see someone named Anthony, slapped him, and demanded payment of a drug debt. (T. 1181-2). Green said that Robert Parker then went to Billy Long's house, where Groover was living and told Groover he wanted his money. "today." (T.

1182-3). According to Green, later that day he and the Defendant and Elaine Parker went to an oyster roast at Jerry Buruce's house. (T. 1183). Green testified that the Defendant got into a fight at the oyster roast with Brother Caps over a gold necklace. (T. 1185-6). Green said he secretly unloaded the gun he had given the Defendant. (T. 1186). He said that Robert Parker then tried to shoot into the windows of Jerry Buruce's house, where there were a number of people. (T. 1186-7). According to Green, he saw the Defendant and Groover together the following Thursday, burning a portion of the rope that had been hanging in the tree. (T. 1188-90).

The testimony contradicted the Defendant's testimony in several critical respects. The Defendant stated that Tommy Groover was not working for him selling drugs, (T. 1813), though he did often "front" drugs to both Groover and Billy Long. (T. 1813-15). The Defendant considered himself to be a friend to both Richard Padgett and Morris Johnson. (T. 1816). Robert Parker insisted that Groover was not even at his house on Friday night, and that he did not threaten to hang Groover in his front yard. (T. 1821-22). The Defendant stated that Groover gave him a gold necklace and cross as collateral for the money he owed him when he saw Groover Saturday at noon. (T. 1825-7). He denied trying to shoot a gun into Jerry Buruce's house. (T. 1829-1830).

According to the FBI interview with Mike Green, Ralph Greene paid him $100 in cash in a lump sum. (RP. 27) The

testimony of Mike Green contradicted the Defendant's in many respects. Like Morris and Wayne Johnson, Mike Green had no obvious motive to lie or slant his testimony. Because of this, knowledge of these cash payments was not just material; it was essential to show the witnesses' bias on behalf of the prosecution.

The FBI interviews also disclose additional information about payments to Spencer Hance and Joan Bennett. Spencer Hance testified that the Defendant had told him "We wasted two of them." (T. 1490-1). Joan Bennett testified, in essence, that the Defendant and Tommy Groover together planned and carried out the murder of Jody Dalton. (T. 1502-1596). Hance indicated in his FBI interview that Greene paid him $80 cash and had seen that his girlfriend's traffic citation "had been taken care of." (RP. 22-3) Bennett, in her FBI interview, admitted to having received only $20 from Greene on one occasion. (RP. 16-17) However, Hance said he witnessed Greene giving Bennett cash on two occasions. (RP. 23) Jane Sheppard, in her FBI interview, speaks of Bennett coming to see "Uncle Ralph" for "Easter money." (RP. 19-20)

In his FBI interview, Billy Long denied receiving any money from Ralph Greene. (RP. 37-8). However, State Attorney Investigator Jack Austin told the FBI that he had seen Greene give money to Long and that $600 in cash was paid out to witnesses during Robert Parker's trial. (RP. 40-1)

Because there was no evidentiary hearing in the trial court, it could not be determined whether or how much money was paid to state witnesses Lewis Bradley, and Denise Long. Both of these witnesses testified to collateral criminal acts by the Defendant on Sunday, February 7, 1982, and contradicted portions of the Defendant's testimony. (T. 1597-1648).

B. The Issue Was Not Previously Litigated

On direct appeal, the Defendant asked for a new trial because the State had failed to disclose that it had paid $20 cash to three witnesse: Joan Bennett, Spencer Hance, and Carl Barton. This court found that this issue was "...insufficient to require reversal." Parker v. State, 458 So. 2d 750, 752 (Fla. 1984). This resolution may be understandable considering the small amounts of money known at the time, and considering the inescapable conclusion that, in light of the third degree murder verdict as to the death of Jody Dalton, the jury did not believe Joan Bennett anyway.

It is important to note that, at the motion for new trial, and even on direct appeal, the State continued to maintain silence regarding other, much more substantial payments. To this day, the extent of these payments has not been disclosed. Surely the State should not be permitted to refuse to reveal favorable evidence and then claim the issue has been litigated because counsel was able to discover some small portion of it and complain about it earlier.

It is well-settled that a denial of favorable evidence is a cognizable issue under Florida Rules of Criminal Procedure 3.850. Arango v. State, 437 So. 2d 1099 (Fla. 1983). It is equally well-settled that payments of money to government witnesses is favorable evidence that must be disclosed. U.S. v. Bagley, 105 S. Ct. 3375 (1985). Where the allegations in the motion make out a prima facie case that favorable evidence was not disclosed, an evidentiary hearing is required to determine the materiality of the violation. Arango, supra. Counsel repeatedly stated at arguments before the trial court that his sources indicate that thousands of dollars was paid to witnesses in this case. The State did not deny or affirm the extent of the payments, but argued against being required to produce its records of the payments. The allegations must then be considered as true except to the extent that they are conclusively rebutted by the record. Harich v. State, 484 So. 2d 1239 (Fla. 1986). It is important to note that the allegations of substantial payments have never been denied; the State has simply "stonewalled" the issue by refusing to reveal the extent of the payments. At the very least, a full and fair evidentiary hearing is required at which the testimony of the named witnesses, the records of the State Attorney's Office, and the testimony and records of Ralph Greene can be presented so that the full extent of the payments to these witnesses can be determined. An assessment of the materiality of favorable evidence can

hardly be made without the finder of fact knowing what it is.

C. The Payments Cannot Be Analogized to "Witness Fees"

The payment of witnesses is governed by statute in Florida, and is limited to five dollars per day plus six cents per mile, unless the witness is in another county and more than 50 miles from the courthouse. Section 92.142(1), Florida Statutes. Per diem and travel expenses must be approved by the Court. Id. The payments to the witnesses in this case were according to the FBI interviews, cash payments, without receipts, and in addition to statutory witness fees paid by the clerk.

D. This Cause Is Not Governed By Groover v. State, 11 FLW 239 (Fla. 1986)

After Robert Parker filed his Motion to Vacate Judgment and Sentence, Groover's attorneys attempted to use the same material in a Motion to Vacate filed on Groover's behalf. This Court ruled that no evidentiary hearing was required because a review of the record showed that, had the evidence been disclosed, there was no reasonable probability that the result would have been different. Groover v. State, 11 FLW 239, 240 (Fla. 1986).

This Court's position in Groover is understandable. The evidence against Groover was overwhelming. Not only had Groover provided the State with a 58 page sworn statement that was introduced in evidence against him, he had given a 245 page deposition that was also used against him. Morris and Wayne Johnson were insignificant witnesses in Groover's

trial who testified about matters that were not in dispute. Mike Green did not testify in Groover's case at all.

Most of the payments described in the FBI interviews occurred during Parker's trial, not Groover's, and therefore could have had no relevance. There was no basis to conclude that these payments could "undermine confidence in the outcome" of Groover's trial. Bagley, supra, at 3384.

However, this rationale has no application to the evidence in Robert Parker's trial. As has been shown, Morris Johnson, Wayne Johnson, Spencer Hance, and Mike Green were important witnesses used by the prosecution to discredit Robert Parker's character and testimony. The trial boiled down to a test of credibility between the Defendant on the one hand and Joan Bennett and Billy Long on the other. Any witness that could have caused the jury to discredit Parker was important for the prosecution, and they were doubly important where they had no apparent reason to lie or shade their testimony. Only now has it become known that there was such a reason.

Parker's trial was also unlike Groover's because, in Parker's trial, Assistant State Attorney Ralph Greene deliberately deceived the judge and jury as well as defense counsel.

During jury selection, the following occurred:

MR. LINK: Okay. You Understand that the Judge will tell you that you should receive testimony of someone

who claims to have been an accomplice with great caution, you think you can follow that instruction?

MR. DYAL: Yes, sir.

MR. LINK: You understand basically what I have been saying about what I am getting at?

MR. DYAL: Right.

MR. LINK: Yes, sir.

A JUROR: Let me understand what you are saying. First of all, you are going to tell us that a person has been bribed to make a confession or to make a statement. All right. Then you are saying that this person is going to be brought before us to make a testimony. Right?

MR. LINK: Essentially, yes, sir.

MR. GREENE: Your Honor, I object to that. These people haven't been bribed at all. They have come in here and pled guilty. This man is misconstruing it and Mr. Link is agreeing with his assessment.

THE COURT: Yes. Gentlemen, just one moment. The word that was used was confirmed by Mr. Link as bribe. No one has been bribed, we don't accept any bribe testimony in this court from anyone.

MR. LINK: I would --

THE COURT: It is not legally acceptable in court. Mr. Greene has stated that a defendant has negotiated a plea in this case and that will be brought out to you during the course of the trial, but there is no bribery

involved. And if you think that that's what's been done, put that out of your mind. You want to ask the question -- if you don't understand anything further beyond that, you can ask the question if you'd like to do so.

A JUROR: Okay. Your Honor, what I am trying to clear in my mind was what I thought I understood a person had been paid to give testimony.

THE COURT: No, sir, no one has been paid for anything.

A JUROR: Well, that clears that up.

MR. LINK: What we are getting at, someone has been given a deal in a sense that charges have been reduced against him in order that he might -- he will testify.

A JUROR: I'm straight.

MR. LINK: Okay. It relates to sentencing. May we approach the bench, Your Honor?

THE COURT: No, sir. Let's move along, Counselor.

MR. LINK: Judge, I would have to object to the Court's characterization in stating the witnesses have not been bribed. I think that's a question for the jury to decide to whether it is bribery.

MR. GREENE: I am appalled at Mr. Link's characterization. It upsets me. I'd ask the Court to instruct Mr. Link --

MR. LINK: I object.

MR. GREENE: --to cease and desist from using such language or characterizing it in any way at all,

instruct them to disregard it and instruct Mr. Link to cease it. There's no bribe here, he knows that.

THE COURT: I have ruled on it, go on, you have made your objection, Mr. Link. Let's move along.

As demonstrated clearly in the record, a juror asked, in the presence of the entire venire, if "a person had been paid to give testimony;" The trial court judge, because of Greene's objections, told the juror that "no one has been paid for anything." (T. 730). As we now know, nothing could have been further from the truth. Numerous witnesses had been given cash payments in addition to statutory witness fees, yet the jury heard the judge announce that no one had been paid for anything. There was no attempt to correct the statement of the trial court judge by the prosecution, and the defense had to accept that statement throughout the trial.

The theme of the defense in this case was that the State had purchased the testimony to use against the Defendant. This theme was mentioned by the defense in opening statement (T. 921, 923) and in summation (T. 2191, 2217-19).

During the State's summation, the prosecutor argued at some length about the importance of Morris Johnson's testimony (T. 2131-2137). Greene emphasized the witnesses whose testimony "makes him (Parker) out to be an unmitigated liar.": Morris Johnson, Mike Green, Billy Long, Lewis Bradley, Denise Long, Carl Barton, Spence Hance. (T. 2137).

It is noteworthy that all of these were paid by Greene, with the possible exception of Denise Long. Greene referred to Mike Green as a "key witness" (T. 2137). Later in summation, Greene argued that Mike Green and Morris Johnson "are really truthful," (T. 2141), because:

> ...they had no interest in the outcome of this case, they had been given absolutely nothing. And they came in here and they laid it on the line. They told you this man is intimidating, that this man is the ring leader, the puppeteer, he's the guy holding the leash, he's the guy that has the gun, he's the guy that people are afraid of, he's the man building the drug empire, a wounded man. (T. 2142)

Later in his argument, Greene referred to Spencer Hance and Carl Barton as "two really totally unbiased witnesses for the State." (T. 3155).

The above arguments by the prosecutor were blatant misrepresentations of the truth, based upon what we now know. These same misrepresentations were given the sanctions of the Court, who had earlier told the jury venire that "no one has been paid for anything."

The prejudicial effect of these misrepresentations was emphasized even further in the summation of Mr. Austin, when he reminded the jury of the judge's statements during jury selection and stated that the use of the term bribery was improper. (T. 2253). Mr. Austin argued that these collateral witnesses were sufficient to prove the State's case even without Billy Long and Joan Bennett, (T. 2261), and that they were "untouched" as to having any interest in the case. (T. 2270). (Indeed, they were untouched, because the defense was not aware they were being paid.) In talking

about the witnesses presented by the State, Mr. Austin stated that "...we brought them to you honestly and in good faith." (T. 2274). Though these comments were probably not intentional misrepresentation, the effect was the same.

E. The Legal Standard to be Applied

The prosecution contends that this Court should apply the standard of materiality described in U.S. v. Bagley, supra, for the failure to reveal favorable evidence after a specific request: "...if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., at 3384. While it is submitted that, under the circumstances of this case, this standard is satisfied, it is also submitted that this is not the correct standard.

As Bagley makes clear, a more rigorous standard of review applies when a conviction is obtained by the knowing use of perjured testimony. Id., at 3382. Here, the situation was even more egregious than the known use of false testimony. Here, the conviction was obtained by the known use of false representations by the prosecutor, and the failure to correct a false statement made to the jury by the trial court judge. The statement by the court to the effect that "no witness has been paid for anything" was absolutely false, as was the argument of Ralph Greene that "they have been given absolutely nothing."

The prejudicial effect that comments of the trial judge can have upon the Defendant's right to a fair trial is well

recognized. See State v. Wheeler, 468 So. 2d 978 (Fla. 1985); Parise v. State, 320 So. 2d 444 (Fla. 3rd DCA 1975); Abrams v. State, 326 So. 2d 211 (Fla. 4th DCA 1976). When the comment by the trial court is an incorrect comment on the evidence, such comments are particularly damaging. See Moore v. State, 386 So. 2d 590 (Fla. 5th DCA 1980). Here, the court told the jury that no witness had been paid, and the prosecutors not only failed to correct it, they repeated the false statement in summation, and reminded the jury of the judge's comment.

The standard of review that should be applied is if there is any reasonable liklihood that the false statements "could have affected the judgment of the jury." Bagley, id., at 3382. Using this standard and applying it to the circumstances of these cases can lead only to the conclusion that a new trial is in order. At the very least, this Court should remand this cause for a full and fair evidentiary hearing.

ISSUE TWO

WHETHER SECTION 921.141, WAS UNCONSTITUTIONALLY APPLIED IN THIS CASE, IN THAT THE DEFENDANT WAS SENTENCED TO DEATH DESPITE THE JURY HAVING NOT CONVICTED THE DEFENDANT OF A CAPITAL OFFENSE AS DEFINED IN ENMUND V. FLORIDA, 458 U.S. 782 (1982), AND DESPITE THE JURY'S LIFE RECOMMENDATION WHEN THE ENMUND ISSUE WAS BEFORE THEM, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

ARGUMENT

A. This Issue Could Not Have Been Raised On Direct Appeal

In Enmund v. Florida, 458 U.S. 782 (1982), the United States Supreme Court held that the Eighth Amendment prohibits the imposition of the death penalty upon a Defendant who neither kills nor intends to kill. The ruling in Enmund was issued on July 2, 1982, several months after the conclusion of the trial in this cause, so that this issue could not be raised in the trial court, or on direct appeal. This Court has held that Enmund was a significant change in the law such as to permit its being litigated by motion pursuant to Florida Rules of Criminal Procedure 3.850. State v. White, 470 So. 2d 1377 (Fla. 1985). This issue was therefore properly raised in the trial court.

B. The Applicability of Enmund to this Case

The Supreme Court has held that the findings of fact required by Enmund need not be made by a jury, because Enmund does not affect the states' definition of a capital offense. Cabana v. Bullock, 106 S. Ct. 689 (1986). The decision in Cabana v. Bullock essentially leaves it to the

individual states to determine by whom the Enmund findings should be made.

In Florida, however, the Court has traditionally defined capital offenses as crimes punishable by death. When the Supreme Court declared Florida's death peanlty unconstitutional in Furman v. Georgia, 408 U.S. 238 (1972), this Court held that capital crimes had been abolished in Florida, because there were no crimes punishable by death. Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972); State ex rel Manucy v. Wadsworth, 293 So. 2d 345 (Fla. 1974). Defendants charged with first degree murder at that time were not eligible for the death penalty, and so were not charged with a capital offense. Donaldson, supra. Similarly, after this Court ruled that death was not a possible punishment for sexual battery on a child, the offense was no longer a capital crime. Rusaw v. State, 451 So. 2d 469 (Fla. 1984). It follows, then, that the decision in Enmund further narrows the classification of capital crimes in Florida to those cases of first degree murder where the Defendant either killed or intended to kill. One does not commit a capital crime in Florida without satisfying the Enmund criteria. Surely, the Defendant has a right to have his guilt of a capital offense decided by a jury upon proof beyond a reasonable doubt.

The jury's guilty verdict in Count Two of this cause did not encompass the findings required by Enmund. At trial, the State made no claims that Robert Parker actually

killed any of the victims, and the evidence was undisputed that Billy Long killed Nancy Sheppard, the victim in Count Two.

The prosecution proceeded on alternative theories of premeditated murder and felony murder, and asked the trial court to instruct the jury on both theories. (T. 2001-3). The State's request was granted over objection by the defense. (T. 2109-12). The trial court also granted the State's Requested Jury Instruction No. 4, which stated that duress is not a defense to homicide. (R. 320, T. 2093-6). This instruction was also granted over objection. (T. 2119-22, 2265-6). In summation, the prosecutors argued that the Defendant was guilty under either theory, premeditated murder or felony murder. (T. 2274-5). The prosecutors also argued that the Defendant was guilty even by his own testimony. (T. 2147-9, 2153). The jury was then specifically instructed that it was not necessary for the Defendant to have an intent to kill to be guilty of first degree felony murder. (R. 388, T. 2289). The Defendant requested a specific verdict form in which the jury would have to specify whether the Defendant was guilty of premeditated murder or felony murder, but this was denied. (R. 336, 2049). The jury returned a general verdict of guilty of first degree murder. (R. 410).

It should be readily apparent that the jury did not make a determination that the Defendant killed or intended to kill Nancy Sheppard. To the contrary, they were

specifically told, by both the judge and prosecutor, that they did not have to find that intent in order to find the Defendant guilty. The guilty verdict therefore cannot be interpreted as a finding by the jury that the Defendant killed or intended to kill.

Where felony-murder was provided as a theory of criminal liability, and the Defendant is not the actual killer, Enmund requires a finding that the Defendant intended that a killing take place or that lethal force be employed. Enmund, supra, at 797; White, supra, at 1379. The jury was never called upon to make such a determination in Robert Parker's trial.

Without making the findings required by Enmund, the jury could not convict the Defendant of a capital offense as that term has been defined in Florida.

In this case, it is no solution that the trial court made Enmund-type findings in his sentencing order. To permit such a procedure would be to permit the judge to convict the Defendant of a capital crime when the jury did not. The Enmund findings were not found beyond a reasonable doubt by either the jury or the judge. Confidence in the reliability of the sentence can only be further undermined when it is recognized that the conviction in Count Two was probably based upon a theory of criminal liability that this Court previously found was unsupported by the evidence.

This Court previously struck the trial court's finding that the felony murder aggravating circumstance was present

because of insufficient evidence. Parker, supra, at 754. However, because the jury was instructed on felony murder, and because the prosecution argued a felony murder theory to the jury, the jury could very well have relied upon felony murder as the basis for its guilty verdict. It is well-established in this State that an erroneous instruction on felony murder will not require reversal of a first degree murder conviction where there is evidence of premeditation to sustain the verdict. Teffeteller v. State, 439 So. 2d 840 (Fla. 1983); Moody v. State, 418 So. 2d 989 (Fla. 1982); Griffin v. State, 414 So. 2d 1025 (Fla. 1982); Adams v. State, 412 So. 2d 850 (Fla. 1982); Alicia v. State, 392 So. 2d 960 (Fla. 4th DCA 1981); McEver v. State, 352 So. 2d 1213 (Fla. 2nd DCA 1977). However, this fact seriously undermines the validity of the findings and sentence of the trial court. Had they not been instructed on felony murder the jury might very well have acquitted the Defendant outright. It is fundamentally unfair to permit the trial court to make Enmund findings in this case where the jury's guilty verdict may have been based on a theory of criminal liability that was unsupported by the evidence.

The unreliability of the trial court's Enmund findings is further emphasized by the jury life recommendation. A significant portion of the defense penalty phase argument related to the Defendant's lack of intent to kill, and to the truth of the Defendant's version of the facts. (T. 2464, 2469-74). It was argued that the ones who intended

Nancy Sheppard's murder were Billy Long and Tommy Groover, not the Defendant. (T. 2480-1), and that the Defendant was only present at the scene of her murder because he was intoxicated and in fear of his life. (T. 2481-4). It was argued that he was an unwilling participant in the murder (T. 2486), that his participation was less than that of any of the other three co-defendants, (T. 2487), and that he should not be executed where we could not be sure of the extent of his participation. (T. 2493-5). In light of the mitigation presented and the life recommendation, it is probable that there would have been no finding of intent to kill had the jury been asked to determine it.

The Court now has before it a case in which the Defendant was convicted by a jury that was instructed on a theory of liability that was unsupported by the evidence, and in which the Defendant was sentenced to die despite the fact that the jury was never asked to convict him of a capital crime and despite the fact that the jury recommended life when the issue was put before it. In this State, where the judge can over-rule the jury, due process and fundamental fairness require that the jury determine whether the Defendant is guilty of a capital crime before the judge is given the opportunity to sentence him to death. In a State where the judge may overrule the jury's recommendation, a Defendant should at least be entitled to the protection of proof beyond a reasonable doubt that he committed a capital offense. In a case where the Enmund

findings are a significant issue, a jury life recommendation can hardly, if ever, be called unreasonable. In a case where the jury's guilty verdict may be based on a jury instruction that was unsupported by the evidence, we are left with "...a level of uncertainty and unreliability in the fact-finding process that cannot be tolerated in a capital case." Beck v. Alabama, 447 U.S. 625, 643 (1980). See, Presnell v. Georgia, 99 S. Ct. 235 (1978). Under the rather unique facts of this case, Enmund requires that the death sentence be set aside.

ISSUE THREE

THE FLORIDA SUPREME COURT HAS ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE TEDDER STANDARD OF REVIEW OF JURY OVER-RIDES AS TO VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

ARGUMENT

In Spaziano v. Florida, 104 S. Ct. 3154 (1984), the Supreme Court upheld the constitutionality of the jury override provision of Section 921.141, Florida Statutes, both on its face and as applied, and stated:

> We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case. Regardless of the jury's recommendation, the trial judge is required to conduct an independent review of the evidence and to make his own findings regarding aggravating and mitigating circumstances. If the judge imposes a sentence of death, he must set forth in writing the findings on which the sentence is based. Fla. Stat. 921.141(3) (Supp. 1984). The Florida Supreme Court must review every capital sentence to ensure that the penalty has not been imposed arbitrarily or capriciously. Fla. Stat. 921.141(4). As Justice STEVENS noted in Barclay, there is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review of each death sentence, either in cases in which both the jury and the trial court have concluded that death is the appropriate penalty or in cases when the jury has recommended life and the trial court has overriden the jury's recommendation and sentenced the Defendant to death. See Barclay v. Florida, _____ U.S., at _____ and n. 23, 103 S. Ct., at 3436, and n. 23 (opinion concurring in the judgment).

Before Spaziano, the practice of the Florida Supreme Court in jury override cases had always been to examine the entire record to see if there was any reasonable basis for the jury's life recommendation. Malloy v. State, 382 So. 2d 1190, 1193 (Fla. 1979). This review consisted of a search

for mitigating circumstances in the record that could have formed the basis for the jury recommendation. See Welty v. State, 402 So. 2d 1159, 1164 (Fla. 1981); Barfield v. State, 402 So. 2d 377, 382 (Fla. 1981). This review was not limited to the sentencing order of the trial court; indeed, even where the trial court found no mitigating circumstances, the Florida Supreme Court had always looked to the record to see if there were mitigating circumstances that may have been rejected by the trial court judge. In numerous cases, the Florida Supreme Court vacated death sentences in jury overrides despite a finding of valid aggravating circumstances by the trial judge and no mitigating circumstances: Kampff v. State, 371 So. 2d 1007 (Fla. 1979); Neary v. State, 384 So. 2d 881 (Fla. 1980); Williams v. State, 386 So. 2d 538 (Fla. 1980); Welty v. State, 402 So. 2d 1149 (Fla. 1981); Gilvin v. State, 418 So. 2d 996 (Fla. 1982); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Hawkins v. State, 436 So. 2d 44 (Fla. 1983); Richardson v. State, 437 So. 2d 1087 (Fla. 1983); Herzog v. State, 439 So. 2d 1372 (Fla. 1983).

However, in Parker v. State, 458 So. 2d 750 (Fla. 1984), the Florida Supreme Court limited itself to a review of the trial court's sentencing order in sustaining the override. The extensive evidence in mitigation was ignored. The arbitrary and capricious nature of the decision in Parker is emphasized when it is compared to the very next case in the Southern Reporter, Eutzy v. State, 458 So. 2d

755 (Fla. 1984). In Eutzy, no evidence in mitigation was presented. Id. at 757. Eutzy contains an extensive analysis by the appellate court, including a search of the record in an effort to find a reasonable basis for the jury's life recommendation. The authorities discussed in Eutzy would have required a reversal of the death sentence in Parker had they been applied:

> 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); 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). In every case, the jury has had before it, in either the guilt or the sentencing phase, direct evidence of the accomplice's equal culpability for the murder itself. That is not the case before us.

In Parker's case, the Defendant was not the killer, the evidence was equivocal as to the extent of his participation, and none of the accomplices were sentenced to death, yet the jury override was sustained.

The contention that the Tedder standard has been applied in an arbitrary and capricious fashion since Spaziano is not based only upon what happened in Robert Parker's case. From 1972 through the date of Spaziano in

1984, the Florida Supreme Court reviewed 62 jury overrides and upheld 18 of them, for an affirmance rate of 29%. Since Spaziano, the Court has reviewed 17 jury overrides and upheld ten of them, for an affirmance rate of 58.8%.

The statistics support the position that the jury override procedure now is resulting in the arbitrary and capricious application of the death penalty, as typified by this case. At the very least it is clear that there was no "meaningful appellate review" of the death sentence in this cause, as required by Spaziano. In Godfrey v. Georgia, 100 S. Ct. 1759 (1980), the United States Supreme Court vacated a death sentence because the Georgia Supreme Court had adopted such a broad and vague construction of an aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the U.S. Constitution. Id., at 1762. The Supreme Court vacated Godfrey's death sentence because, after comparing it to other decisions of the Georgia Supreme Court, it was determined that "(T)here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id., at 1767. A comparison of the decision in Parker with other decisions of the Florida Supreme Court in jury override cases leads to the same conclusion. The death sentence must be set aside.

CONCLUSION

What has happened to Robert Parker in the judicial system is reminiscent of a Kafka novel. Though he killed no one, he is tried for first degree murder. The judge tells the jury that no witness has been paid for anything. The prosecution tells the jury that the witnesses have received nothing. The judge then instructs the jury on two theories of criminal liability, one of which is not supported by the evidence. As if that were not enough, the judge also instructs the jury that the defense that the Defendant has presented is not a lawful defense. The jury convicts the Defendant of first degree murder and recommends a life sentence. The judge ignores the recommendation, sentences the Defendant to death and then sentences the actual killer to 30 years prison. Now, it has come to light that the prosecutor deceived the judge and jury as well as the Defendant, because he was in fact making cash payments to witnesses before and during the trial. Shortly after Robert Parker files his complaint about the concealed witness payments, the governor signs his death warrant, and the trial court refuses to give him a hearing. The enormity of the injustice in this case is almost beyond belief. At the very least, a stay of execution should issue, and this cause should be remanded for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301 by hand this 3rd day of July, 1986.

_____
Attorney