

IN THE SUPREME COURT OF FLORIDA

Case No.

74749

FILED

SID J. WHITE

SEP 21 1989

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J.B. PARKER,

By

Deputy Clerk

Petitioner,

v.

RICHARD L. DUGGER, Secretary,  
Department of Corrections, State of Florida,

and

TOM BARTON, Superintendent,  
Florida State Prison,  
Starke, Florida,

Respondents.

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PETITION FOR A  
WRIT OF HABEAS CORPUS  
AND REQUEST FOR STAY OF EXECUTION

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PROSKAUER ROSE GOETZ & MENDELSON  
Attorneys for Petitioner  
300 Park Avenue  
New York, New York 10022  
(212) 909-7000

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IN THE SUPREME COURT OF FLORIDA

J.B. PARKER,

Prisoner No. **789049**,  
Florida State Prison  
Starke, Florida,

Petitioner,

v.

RICHARD L. DUGGER,

Secretary, Florida  
Department of Corrections,

and

TOM BARTON,

Superintendent,  
Florida State Prison,  
Starke, Florida,

Respondents.

Case No. \_\_\_\_\_

PETITION FOR  
A WRIT OF HABEAS CORPUS  
AND REQUEST FOR STAY OF EXECUTION

I. INTRODUCTION AND SUMMARY OF CLAIMS

Petitioner J.B. PARKER is a prisoner on death row in Florida State Prison. He was sentenced to death by the Honorable Philip G. Nourse following an eight to four jury recommendation that death was the appropriate penalty. Parker, by his undersigned counsel, respectfully petitions this Court to issue a writ of habeas corpus on the grounds of violations of his fundamental rights under the Sixth, Eighth and Fourteenth

Amendments to the Constitution of the United States, the Constitution and laws of the State of Florida, and decisions of the United States Supreme Court and this Court.

On August 29, 1989, the Governor of the State of Florida signed a death warrant against Parker. (A copy of the warrant is Appendix A.) Parker is presently scheduled to be executed on October 27, 1989. Parker requests that a stay of execution be entered in order to ensure that his Due Process rights to this Court's full, fair, and judicious consideration of his claims are not violated. See Barefoot v. Estelle, 463 U.S. 880 (1983) (expedited review is permitted in capital cases as long as the petitioner is given an adequate opportunity to address the merits). By definition, Barefoot also requires that a court have a reasonable time to consider any non-frivolous claims.

This petition raises substantial claims of violations of Parker's rights on his direct appeal to this Court and at his original trial. Specifically, Parker asserts: (i) a violation of his right, under the decisions of this Court, section 921.141(3) of the Florida Statutes and the Eighth and Fourteenth Amendments and their Florida counterparts, to written, specific findings of fact by the trial court entered contemporaneously with the sentencing decision; (ii) a failure by this Court, on his direct appeal, in violation of Parker's Eighth and Fourteenth Amendment rights, through its reliance on an invalid and superseded

sentencing order, to conduct a meaningful review of the adequacy of the trial court's sentencing determination; (iii) a violation of his Sixth and Fourteenth Amendment rights to the effective assistance of appellate counsel arising out of counsel's failure to raise on direct appeal the fundamental errors committed by the trial court in connection with the sentencing determination, and by this Court in its review of that determination; and (iv) a violation of his Eighth and Fourteenth Amendment rights to an individualized, reliable and non-capricious sentencing, under the United States Supreme Court's decisions in Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 109 S. Ct. 2207 (1989), resulting from the State Attorney's comments in his penalty phase argument that focused on the impact of the offense on the victim and her family.

The trial court, in imposing the death penalty on Parker, violated section 921.141(3) of the Florida Statutes, as well as the Eighth and Fourteenth Amendments and their Florida counterparts, by: 1) failing, at the time the sentence was pronounced, to set out, either orally or in writing, the specific statutory factors he relied upon or the specific facts supporting his conclusion that death was the proper sentence; 2) merely listing two weeks after the sentence was pronounced, in a conclusory fashion, in an order dated January 25, 1983 (the "1983 Sentencing Order"), without specific findings of fact, five aggravating circumstances, including a non-statutory and improper aggravating circumstance; and 3) failing to enter, until

January 1, 1984, after the record on appeal had been certified to this Court and almost a year after the death sentence was imposed on Parker, an order (the "1984 Sentencing Order") containing specific written fact findings in support of the four aggravating circumstances ultimately found by the trial court. In entering the 1984 Sentencing Order, the trial court gave no explanation for the deletion of the fifth aggravating circumstance initially relied upon as part of the sentencing decision. These actions violated Parker's constitutional right to a reliable, reasoned and non-arbitrary decision by the trial court that a death sentence was the appropriate penalty. This failure, in turn, precluded this Court from engaging in the meaningful and constitutionally-mandated appellate review of the trial court's decision imposing a sentence of death.

Moreover, on its review of Parker's conviction and sentence on the direct appeal, this Court incorrectly based its decision on five aggravating circumstances in support of Parker's sentence -- including an inappropriate, non-statutory circumstance (defendant's previous conviction for a "delinquent act") initially found by the trial court. See Parker v. State, 476 So. 2d 134, 136 (Fla. 1985). This aggravating circumstance should not have been considered by either the trial court or this Court. This Court's citation to and consideration of five aggravating circumstances, including the improper circumstance originally listed by the trial court, instead of the four aggravating circumstances and the specific facts found by the

trial court in its 1984 Sentencing Order, demonstrate the inadequacy of its review.

In violation of the Eighth and Fourteenth Amendments, and their Florida counterparts, Parker thus was denied his right to meaningful appellate review because this Court apparently premised its appellate review on the 1983 Sentencing Order which: (a) was later superseded by the trial court; (b) included an invalid, non-statutory aggravating circumstance; and (c) set out the aggravating circumstances in conclusory terms, without specific findings of fact.

In violation of Parker's Sixth and Fourteenth Amendment rights to the effective assistance of counsel, Parker's appellate counsel never brought these critical errors in the trial court, and in this Court's review of Parker's conviction and sentence, to the attention of this Court.

Parker's rights to an individualized, reliable, and non-capricious sentencing under the Eighth and Fourteenth Amendments also were violated when the State Attorney at Parker's trial made numerous prejudicial and inflammatory comments to the jury regarding the impact of the crime on the victim's family and the victim's personal characteristics. These comments by the State Attorney, made after the trial court had granted, in part, a motion by Parker's trial counsel intended to prevent such comments, caused the jury to consider improper factors in



deciding whether Parker should live or die, factors not relevant to the personal culpability of Parker.

As a result of these violations of Parker's constitutional and legal rights, this Court, pursuant to sections 3(b)(7) and (9) of Article V of the Florida Constitution and Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure, should grant a writ of habeas corpus, vacate petitioner's death sentence and enter a life sentence or, in the alternative, require a new sentencing hearing or a new direct appeal.

## **II. PROCEDURAL HISTORY**

The case against Parker was commenced in the Nineteenth Judicial Circuit Court, In and For Martin County. Parker moved for a change of venue, R 1630-38<sup>1</sup> and, upon the granting of that motion, R 1647, venue was changed, for purposes of trial only, to the circuit court of the Fifth Judicial Circuit, In and For Lake County, Florida. At the conclusion of the trial, the case was transferred back to the Nineteenth Judicial Circuit Court.

Parker was charged with three offenses, including murder in the first degree. Parker entered a plea of not guilty to all charges.

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<sup>1</sup> References to the record on the direct appeal of Parker's convictions and sentences are indicated by the initial "R" followed the Clerk's stamped page number.

Parker's trial was conducted on January 3, 4, 5, 6, 7, 10 and 11, 1983. On January 7, 1983, the jury returned verdicts of guilty on all counts, R 1201-02, and Judge Philip G. Nourse adjudicated Parker guilty on all counts. R 1203.

On January 11, 1983, immediately after the jury voted eight to four to recommend a sentence of death, Judge Philip G. Nourse sentenced Parker to death. R 1504. In orally pronouncing his sentence, the judge merely stated:

As to the First Degree Murder conviction, the Court accepts the recommendation of the jury and sentences you to death by electrocution. May God have mercy on your soul. You may sit down.

R 1507. At sentencing, the trial judge made no other statements -- oral or written -- regarding the propriety of the sentence of death he had imposed.

On January 25, 1983, two weeks after the pronouncement of Parker's sentence of death, Judge Nourse signed an order encaptioned "Findings In Conformity With Florida Statute 921.141(3)." (A copy of this order is Appendix B.) This order listed five aggravating circumstances and three mitigating circumstances. The first aggravating circumstance listed was that "[t]he Defendant was previously convicted of a delinquent act of a similar type involving the use of threat of violence to the person." The order did not set forth any specific findings

of fact in support of the aggravating and mitigating circumstances but merely listed the circumstances.

On May 2, 1983, the record on the direct appeal of Parker's conviction and sentence was filed in this Court.

On November 17, 1983, after Parker's appellate counsel had submitted his initial brief (a copy of the initial brief is Appendix C), the State filed in this Court motions to relinquish jurisdiction and remand to the trial court for supplementation of the record with written findings pursuant to section 921.141(3) of the Florida Statutes. (Copies of these motions are Appendices D and E.) In these motions, the State asserted that the appellant had argued in his brief that the trial court's 1983 Sentencing Order "does nothing more than list the factors upon which the trial court relied without stating the evidence to support the findings," and that "appellant urges the lower court did not enter specific written findings of fact as to the imposition of the death penalty." (See Appendices D and E.) In fact, Parker's appellate counsel never raised this issue with this Court, either orally or in writing. (See Appendix C.)

On November 22, 1983, this Court, without first requesting or having received any responsive pleading, granted the State's motions and ordered that "jurisdiction . . . is temporarily relinquished to the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida for the purpose of supplementing the record on appeal with the written

findings of fact. . . ." (A copy of this Court's November 22, 1983 order is Appendix F.)

On January 1, 1984, one year after Parker's death sentence was imposed, Judge Nourse entered the 1984 Sentencing Order. This time, the trial court set forth specific findings of fact in support of the aggravating circumstances purporting to justify Parker's death sentence. (A copy of this order is Appendix G.) This order also differed from the 1983 Sentencing Order in that it listed only four aggravating circumstances, instead of five, eliminating the circumstance of a previous delinquent act. As of the filing of this Petition, Parker is without knowledge of the circumstances that led to the entry of the 1984 Sentencing Order. In particular, Parker does not know who prepared that order, or what impelled the trial court to delete one of the aggravating circumstances and yet still find that the aggravating circumstances outweighed the mitigating circumstances.

On August 22, 1985, this Court affirmed Parker's convictions and sentence of death. Parker v. State, 476 So. 2d 134 (Fla. 1985). In deciding Parker's direct appeal, this Court reviewed his sentence based upon the trial court's 1983 Sentencing Order, which listed five aggravating circumstances, rather than the 1984 Sentencing Order, which listed only four aggravating circumstances. In its opinion, this Court incorrectly stated that the trial judge found five aggravating

circumstances, including that "the defendant was previously convicted of a delinquent act involving the use of threat of violence to a person. . . ." Parker v. State, 476 So. 2d 134, 136 (Fla. 1985).

On direct appeal, Parker's counsel did not argue that the trial judge's sentencing orders violated section 921.141(3) of the Florida Statute, as well as the Eighth and Fourteenth Amendments to the United States Constitution and their Florida counterparts.

Rehearing was denied on October 28, 1985. The only aspect of this Court's affirmance of Parker's sentence and conviction challenged on the rehearing motion was its finding that the improper admission of certain evidence at the trial was harmless error. No mention was made concerning this Court's incorrect reliance on the 1983 Sentencing Order and on an improper, non-statutory aggravating circumstance. (A copy of the rehearing motion is Appendix H.) On December 3, 1985, this Court issued its mandate.

Parker filed a motion pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure in the Nineteenth Judicial Circuit Court, Martin County, on December 3, 1987. P 455-92.<sup>2</sup> The motion was denied on April 5, 1988. P 1599-1601.

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<sup>2</sup> References to the record on the appeal of Parker's first Rule 3.850 motion are indicated by the initial "P" followed by the clerk's stamped page number.

Parker appealed the denial of his Rule 3.850 motion to this Court. On August 25, 1988, Parker also filed a petition for a writ of habeas corpus in this Court. On March 23, 1989, this Court affirmed the trial court's denial of Parker's Rule 3.850 motion and denied his petition for a writ of habeas corpus. Parker v. State, 542 So. 2d 356 (Fla. 1989).

On April 6, 1989, Parker moved for a rehearing on his appeal and on his petition for a writ of habeas corpus. This Court denied the motion for rehearing on May 26, 1989.

Governor Martinez signed the first death warrant against Parker on August 29, 1989. That warrant is also the subject of the instant proceedings. Under the death warrant, the Superintendent of the Florida State Prison is directed to schedule Parker's execution for "**some** day of the week beginning noon, Thursday, the 26th day of October, 1989, and ending noon, Thursday, the 2nd day of November, 1989." The Superintendent has scheduled Parker's execution for 7:00 A.M. on Friday, October 27, 1989.

There are no other proceedings presently pending in either state or federal court in which Parker has collaterally attacked his convictions and **sentences**.<sup>3</sup> The claims raised in this petition have not been addressed previously by any court.

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<sup>3</sup> Parker anticipates filing a motion pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure in the Nineteenth Judicial Circuit Court premised on fundamental changes in law emanating from this Court and the federal courts.

III. JURISDICTION TO ENTERTAIN PETITION  
AND ENTER A STAY OF EXECUTION

A. This Court Has Jurisdiction **Over**  
The Claims Raised In This Petition

This is an original proceeding brought in accordance with Rule 9.100(a) of the Florida Rules of Appellate Procedure. This Court has jurisdiction pursuant to section 3(b)(1) and 3(b)(7), Article V, of the Florida Constitution and Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure.

On a petition for a writ of habeas corpus, this Court has jurisdiction over claims of fundamental errors which involve the appellate review process. See, e.g., Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1986), cert. denied, 481 U.S. 1016 (1987); Wilson v. Wainwright, 4746 So. 2d 1162 (Fla. 1985); Smith v. State, 400 So. 2d 956, 960 (Fla. 1981); Baggett v. Wainwright, 229 So. 2d 239 (Fla. 1969). The trial court's failure to make timely written findings sufficient to justify the imposition of the death penalty, thus precluding this Court from engaging in constitutionally-mandated meaningful appellate review, and this Court's failure properly to review the sentencing determination through its reliance on the trial court's 1983 Sentencing Order which contained a fifth, and inappropriate, aggravating circumstance, directly affected this Court's ability to fulfill its constitutional responsibility to review the appropriateness of the death penalty. See, e.g., Van Royal v. State, 497 So. 2d 625 (Fla. 1986). The ineffectiveness of Parker's appellate

counsel in failing to bring these errors to this Court's attention also directly affected the appellate review process. This Court thus has jurisdiction to address these claims.

This Court also has jurisdiction to consider claims raised in petitions for habeas corpus that are based on changes in the law when the original record on appeal contains all of the facts necessary to decide the claim. The facts underlying petitioner's claim that the State Attorney at his trial unconstitutionally emphasized the impact of the crime on the victim and her family are all contained in the record of Parker's direct appeal to this Court. That claim is also premised on a change in law. Therefore, this Court has the authority to consider and decide this claim. See, e.g., Jackson v. Dugger, 14 FLW 355 (July 14, 1989).

B. This Court Has Jurisdiction  
To Enter A Stay Of Execution

This petition for a writ of habeas corpus includes a request that this Court stay Parker's execution, which is scheduled to be carried out October 27, 1989. The claims raised here involve violations of Parker's fundamental rights under the United States Constitution and the Constitution and laws of Florida. As demonstrated below, these claims are substantial and warrant a stay of execution pending a full and fair presentation of the claims before this Court, and this Court's careful and reasoned consideration of the claims on their merits. Such



meritorious, non-frivolous claims certainly should not be considered under the time pressure of an impending execution.

This Court has previously entered stays of execution in other cases in order to permit full and fair consideration of claims presented by petitioners during the pendency of a death warrant. See, e.g., Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Groover v. State, 489 So. 2d 15 (Fla. 1986); Copeland v. State, 457 So. 2d 1012 (Fla. 1984), cert. denied, 471 U.S. 1030 (1985); Spaziano v. State, 489 So. 2d 720 (Fla.), cert. denied, 479 U.S. 995 (1986). This Court should exercise its authority to stay Parker's execution pending its consideration of the substantial and meritorious claims raised in this petition. As then Justice, now Chief Justice Ehrlich stated in his concurring opinion in Clark v. State, Case No. 72303 (Fla. April 26, 1988):

I shall always vote for a stay of execution in order to give every member of this court adequate time to review the documents and arrive at a decision on the merits. I thoroughly eschew having to deal with these momentous decisions of life and death on an emergency basis. When confronted with the decision of whether to grant a stay of execution or see colleagues have to vote when they are really not prepared to do so, I shall always vote to stay.

IV. LEGAL BASES FOR THE WRIT

CLAIM ONE

PARKER'S CONSTITUTIONAL RIGHTS AND RIGHTS UNDER FLORIDA LAW TO RELIABLE SENTENCING, A REASONED DETERMINATION THAT DEATH WAS THE APPROPRIATE PENALTY AND MEANINGFUL REVIEW OF HIS DEATH SENTENCE BY THIS COURT, WERE VIOLATED

A. The Importance Of Fla. Stat. Section 921.141(3) To The Defendant's Rights To Reliable Sentencing And Appellate Review

Parker's rights under the United States Constitution and Florida law to a reasoned, reliable and non-arbitrary sentencing, and a meaningful review of his death sentence by this Court, were violated by the trial court's failure to make timely and sufficient written findings in support of that sentence as required by section 921.141(3) of the Florida Statutes, the Eighth and Fourteenth Amendments, and their Florida counterparts. Because this violation cannot now be cured by the trial court, Parker's death sentence must be vacated and he should be sentenced to life imprisonment. In the alternative, this Court should require a new sentencing proceeding.

Section 921.141(3)(b) of the Florida Statutes in clear and unambiguous terms provides, in pertinent part:

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances

in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment . . . . (Emphasis added.)

The purpose of requiring written findings is to attempt to ensure that the trial court's imposition of the death penalty is the result of reasoned judgment based on a careful weighing of the evidence and the applicable statutory aggravating and mitigating circumstances. Such findings are constitutionally-mandated to guarantee a reliable and non-arbitrary sentence. See, e.g., State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943 (1974); Van Roval v. State, 497 So. 2d 125 (Fla. 1986); Proffitt v. Florida, 428 U.S. 242 (1976).

The requirement that the trial court make specific written findings also serves the critical function of permitting this Court to conduct a meaningful review of the trial court's decision to impose the death penalty. Van Roval, 497 So. 2d at 628. **As** this Court held in Van Roval:

[a] court's written finding of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it. . . . Without these findings this Court cannot assure itself that the trial judge based the oral sentence on a well-reasoned application of the factors set out in section 921.141(5) and (6) . . . .

497 So. 2d at 629. To afford a capital defendant the constitutionally-mandated meaningful appellate review, the trial

court's written findings must include specific findings of fact demonstrating the appropriateness of a sentence of death, and must not merely list the ostensibly applicable statutory factors. See, e.g., Rhodes v. State, 14 FLW 343, 346 (July 14, 1989) ("Unless the written findings are supported by specific facts and are timely filed, this Court cannot be assured the trial court imposed the death sentence based on a 'well-reasoned application' of the aggravating and mitigating **factors.**").

The United States Supreme Court also has emphasized the importance of the Florida trial court's written findings in protecting the defendant's Eighth and Fourteenth Amendment rights to non-arbitrary, non-capricious and reliable sentencing, and meaningful appellate review of his sentence. See Proffitt v. Florida, 428 U.S. at 251 ("Since . . . the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible. . . ."). Only if the trial court satisfies its statutory and constitutional obligation can this Court carry out its mandate to provide such a review.

**B. Parker's Rights Were Violated By  
The Trial Court's Failure To Make  
Timely Written Findings Supporting  
Imposition Of The Death Penalty**

This Court's own decisions demonstrate that the trial court failed to satisfy Parker's rights to a "reasoned judgment" and to a timely and careful weighing of the relevant aggravating

and mitigating circumstances in the imposition of his sentence. As a result of this failure, this Court was unable to engage in the constitutionally-mandated meaningful appellate review.

In Van Roval v. State, *supra*, the trial court did not enter written findings in support of its imposition of the death penalty until approximately six months after orally pronouncing sentence. In holding that the judge had violated section 921.141(3) of the Florida Statutes, thus requiring the imposition of a life sentence, this Court emphasized that the trial court had made no findings at the time of sentencing and entered the required written findings only after this Court had received the record on appeal. See Van Royal, 497 So. 2d at 628. Similarly, the trial court here made no findings until almost one year after pronouncing sentence.

In Van Royal, this Court specifically distinguished its earlier decisions in Cave v. State, 445 So. 2d 341 (Fla. 1984), Fersuson v. State, 417 So. 2d 639 (Fla. 1982), and Thompson v. State, 328 So. 2d 1 (Fla. 1976). In each of those previous cases, this Court did not vacate the defendant's death sentence, notwithstanding the absence of specific written findings of fact, because in each case the trial court had orally dictated sufficiently detailed and specific findings into the record at the time it imposed the sentence. Because the record thus was merely incomplete, and not inadequate, in Cave, Fersuson and Thompson, this Court held there was sufficient compliance with

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the death sentencing statute to permit the trial court to remedy the deficiency through a remand for specific findings. See Van Royal, 497 So. 2d at 628.

Unlike in Cave, Ferguson and Thompson, and as in Van Royal, at the time the trial judge orally pronounced Parker's death sentence, he did **not** recite the specific factual findings on which he based that sentence. Rather, the trial judge simply stated:

As to the First Degree Murder conviction, the Court accepts the recommendation of the jury and sentences you to death by electrocution. May God have mercy on your soul. You may sit down.

R 1507. This statement clearly violated Van Royal and its progeny by failing to set forth any factual basis for the imposition of the death sentence. As this Court stated in Patterson v. State, 513 So. 2d 1257, 1261 (Fla. 1987), quoting then Justice, now Chief Justice Ehrlich's concurring opinion in Van Royal:

"the trial court's written findings with respect to aggravating and mitigating circumstances must at least be coincident with the imposition of the death penalty. It is inconceivable . . . that any meaningful weighing process can take place otherwise." 497 So. 2d at 630.

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The entry, two weeks later, of the 1983 Sentencing Order, which simply listed, without any factual findings, the five aggravating circumstances and three mitigating factors the

trial court concluded were present, did not rectify this error since no specific written findings were made. The judge did not enter specific written findings until almost one Year after Parker's trial. At the time those findings ultimately were made, this Court had already received the record on appeal and appellant had already filed his principal brief.

In Van Royal this Court made the critical distinction between those cases in which the sentencing record is "inadequate" and those in which it is "merely incomplete." 497 So. 2d at 628. This Court's decisions establish that a sentencing record is "merely incomplete," and a remand is therefore appropriate, when the trial court orally made contemporaneous findings of fact but then failed to enter written findings. See, e.g., Cave v. State, supra; Thompson v. State, supra. A sentencing record is inadequate, and a remand is therefore inappropriate where, as here and in Van Royal, the trial court failed to set forth, either orally, or in writing, specific findings of fact.

To allow a full year to elapse between the imposition of the death sentence and entry of the statutorily and constitutionally-mandated specific findings of fact in support of that sentence would deprive Parker of his rights to the assurance that, at the time sentence is rendered, it is the result of a "reasoned judgment" by the trial court. As this Court held in Van Royal, such a delay is impermissible. To rule otherwise

would allow the trial court to impose a death sentence, without any assurance that it had conducted the mandated "well-reasoned application" of the aggravating and mitigating factors before imposing the sentence, and then attempt to justify its decision after the fact. See Rhodes v. State, 14 FLW 343, 346 (July 14, 1989); Van Roval v. State, 497 So. 2d at 628.

Since Van Roval, this Court has consistently reiterated the significance of the trial judge's concurrent recitation, on the record, of his findings in support of the death penalty at the time he pronounces sentence. Although the oral recitation of those findings does not literally satisfy the requirements of section 921.141(3), it allows this Court to determine whether the judge properly reviewed the evidence in support of his determination, appropriately weighed the aggravating and mitigating circumstances, and properly applied those circumstances, ~~before~~ he imposed the sentence. See Stewart v. Florida, 14 FLW 430, 432 (September 8, 1989) ("Here, the judge followed the jury recommendation and made detailed oral findings."); Rhodes v. State, 14 FLW 343, 346 (July 14, 1989); Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987) ("[t]he record reflects that the trial judge made the requisite findings at the sentencing hearing"). Cf. Patterson v. State, 513 So. 2d 1257, 1262 (Fla. 1987) ("This record, contrary to Nibert, does not demonstrate that the judge articulated specific aggravating and mitigating circumstances.")



Because the trial judge did not recite the basis of his decision when he imposed the death penalty on Parker, and did not do so in the 1983 Sentencing Order, this Court cannot possibly know whether the trial court's decision at that time was the result of "reasoned judgment" and a "well-reasoned application" of statutory aggravating and mitigating factors.<sup>4</sup> As then Justice, now Chief Justice Ehrlich noted in his concurring opinion in Van Royal:

How can this Court know that the trial court's imposition of the death sentence was based on a "reasoned judgment" after weighing the aggravating and mitigating circumstances when the trial judge waited almost six months after sentencing defendant to death before filing his written findings as to aggravating and mitigating circumstances in support of the death penalty? The answer to the rhetorical question is obvious and in the negative.

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<sup>4</sup> As revealed by the circumstances of Parker's case, the requirement of specific written findings by the trial judge at the time the sentence is imposed is not a mere technicality. The victim was the granddaughter of Frances Langford and Ralph Evinrude. The resulting intense publicity surrounding the offense and the trials of the four co-defendants had required a change of venue. Prior to sentencing Parker, the trial court was aware that two of his co-defendants had already received the death penalty. The combined pressure of these circumstances -- which would have affected any human being, including the trial judge -- clearly mandated that the judge set forth his findings at the time of sentencing to ensure that Parker's sentence of death was exclusively the result of "reasoned judgment" based solely on the relevant evidence and a careful weighing of the applicable statutory aggravating and mitigating circumstances.

497 So. 2d at 629-30. Here the trial judge waited a full year.<sup>5</sup>

C. This Court Erred In Relinquishing  
Jurisdiction And Remanding To The  
Trial Court To Enter Its Written Findings

This Court relinquished jurisdiction and remanded to the trial court after the record on Parker's appeal had been certified to this Court, and after Parker had submitted his initial brief on the appeal. The purpose of the remand was to allow the trial court to enter written findings pursuant to section 921.141(3). Such a remand was erroneous under this Court's decisions cited above.

It is indisputable that the trial court's 1983 Sentencing Order did not satisfy the requirements of section 921.141(3). Having merely listed purportedly applicable aggravating and mitigating circumstances, that order contained no specific fact findings. Nevertheless, this Court's remand was improper and inappropriate, because the trial judge had not orally dictated fact findings into the record at the time he pronounced sentence on Parker, thus rendering the sentencing inadequate, not merely incomplete. On such an inadequate record,

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<sup>5</sup> This case thus is unlike Grossman v. State, 525 So. 2d 833 (Fla. 1988), cert. denied, 109 S. Ct. 1354 (1989), and Muehleman v. State, 503 So. 2d 310 (Fla.), cert. denied, 108 S. Ct. 39 (1987), in which there were three-month and two and one-half month delays, respectively, between the imposition of sentence and the entry of specific, written findings. Moreover, in those cases, adequate written findings were entered before the record on appeal was received by this Court.

this Court cannot satisfy its duty to assure itself that the trial judge based the sentence on a well-reasoned application of the section 921.141(5) and (6) factors by supplementation, which was finally done almost one year after the sentence of death was imposed on Parker.

It is important to emphasize that it was a State-initiated remand which ultimately compelled the trial judge to enter written findings of fact pursuant to section 921.141(3), rather than a belief that a careful and timely weighing of the applicable aggravating and mitigating circumstances was necessary at the time the sentence of death was imposed. As then Justice, now Chief Justice Ehrlich stated in his concurring opinion in Van Royal under closely analogous circumstances:

Since the entry of this order came within a matter of days after the defendant had served his motion to dismiss and to vacate the death sentence because of the trial judge's failure to comply with section 921.141(3), Florida Statutes, it can be argued with some degree of persuasion that it was the defendant's aforesaid motion to dismiss that awakened the trial judge to the fact of his obvious dereliction and that his sentence was not the result of a weighing process or the "reasoned judgment" of the sentencing process that the statute and due process mandate.

497 So. 2d at 630.

Just as the defendant's motion in Van Royal awakened the trial judge to his responsibilities under section 921.141(3), so too this Court's remand, at the insistence of the State, and without hearing any opposition from Parker's counsel,

galvanized the trial court to attempt to remedy its obvious derelictions. Under such circumstances this Court cannot be certain that the findings ultimately entered are the result of the weighing process, or the reasoned judgment engaged in at the time of sentencing, mandated by the Constitution and Florida law. The trial court's belated efforts in its **1984** Sentencing Order to justify its imposition of the death sentence cannot serve to transform an inadequate record into one that satisfies Florida's death sentencing procedure.

The sentencing order entered on the remand may also be inadequate to cure any error because the fact that the remand was initiated and advocated by the State, and not Parker, suggests that the State, realizing the inadequacies of the **1983** Sentencing Order, may have improperly prepared the written findings of fact contained in the **1984** Sentencing Order. It apparently was the State, not Parker's counsel or the trial court, which understood both the critical importance of detailed findings supporting the imposition of the death sentence and the deficiencies, including the reliance on an improper aggravating circumstance, of the **1983** Sentencing Order. It may well also have been the State which prepared the language contained in the **1984** Sentencing Order in pursuit of its efforts to have Parker's sentence upheld.

This Court has held that the trial judge cannot delegate to the State the responsibility for identifying and preparing the fact findings underlying the judge's decision to

impose the death penalty. See, e.g., Patterson v. State, 513 So. 2d 1257, 1262 (Fla. 1987) ("the trial judge's action delegating to the state attorney the responsibility to identify and explain the appropriate aggravating and mitigating factors raises a serious question concerning the weighing process that must be conducted before imposing a death penalty"). As the Court thus has recognized, it is for the trial judge, the ultimate sentencing authority, to determine on his own the specific facts that support his imposition of the death sentence.

Parker, however, has been unable fully to raise this claim because the State Attorney's office has so far refused to comply fully with his counsel's request for access to public records pursuant to section 119 of the Florida **Statutes**.<sup>6</sup> Accordingly, this Court should at least require the State Attorney to grant Parker access to the public records in his files, and grant a stay of Parker's scheduled execution to permit his attorneys to examine those records to determine whether the State played any role in preparing the 1984 Sentencing Order.

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6 On December 8, 1987, petitioner's attorneys made a written request for access to public records pursuant to section 119, Florida Statutes, to the State Attorney for the Nineteenth Judicial Circuit. In its response, the State Attorney's office made clear that, in refusing to provide access to its files, it was not relying on any of the statutory exceptions to its disclosure obligations but simply was refusing to comply with its obligations unless Parker's counsel reciprocated. Needless to say, no such reciprocity is required.

The differences between the trial court's sentencing orders also illustrate why the trial court's 1984 Sentencing Order, even if properly entered, should not be held to have satisfied the requirements of section 921.141(3). In the trial court's 1983 Sentencing Order, the court listed five aggravating circumstances, including that "[t]he Defendant was previously convicted of a delinquent act of a similar type involving the use of threat of violence to the person." This alleged aggravating circumstance is not among those delineated in the statute and thus may not be cited in support of the imposition of a death sentence. See, e.g., Miller v. State, 373 So. 2d 882, 885 (Fla. 1979) ("The aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose.") In his 1984 Sentencing Order, the trial judge, without explanation, did not include this circumstance, listing only four aggravating circumstances.

A delinquent act, even if violent, is not a statutory aggravating circumstance, see, e.g., Jones v. State, 440 So. 2d 570 (Fla. 1983), and therefore should not have been considered by the trial court in sentencing Parker. The 1983 Sentencing Order, however, establishes that the trial judge considered this circumstance in sentencing Parker to death. Although the trial court eliminated this circumstance from the 1984 Sentencing Order, and purported to weigh the remaining aggravating and mitigating circumstances at that time, this Court's decisions unequivocally demonstrate that the required weighing and finding

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of specific facts cannot be done for the first time a year after sentencing. Accordingly, the elimination of the improper aggravating circumstance cannot be deemed to cure the judge's consideration of this improper factor at the time he sentenced Parker.

\* \* \*

As a result of the trial court's failure to make specific fact findings regarding the appropriateness of sentencing Parker to death, Parker's death sentence should be vacated and a life sentence imposed as required by section 921.141(3) and the United States and Florida Constitutions. In the alternative, a new sentencing hearing should be required.

**CLAIM TWO**

**ON THE DIRECT APPEAL OF  
PARKER'S CONVICTION AND SENTENCE,  
THIS COURT DID NOT PROVIDE PARKER  
THE MEANINGFUL REVIEW OF HIS DEATH  
SENTENCE REQUIRED BY THE UNITED  
STATES CONSTITUTION AND THE LAWS OF FLORIDA**

On the direct appeal of Parker's conviction and sentence of death, this Court did not conduct the meaningful review of Parker's death sentence to which Parker is entitled under the Eighth and Fourteenth Amendments, as well as Florida law. Accordingly, this Court should grant the writ of habeas corpus and allow Parker to file a new direct appeal of his death sentence to this Court.

This Court's opinion on the direct appeal of Parker's sentence of death demonstrates that this Court based its review of Parker's death sentence on the 1983 Sentencing Order (Appendix B), which listed five aggravating circumstances without setting forth any specific findings of fact in support of those circumstances. See Parker v. State, 476 So. 2d at 136 ("the trial judge found five aggravating circumstances"). There is no indication in the Court's decision that it ever considered the 1984 Sentencing Order (Appendix G), which listed only four aggravating circumstances and purported to include findings of fact underlying those circumstances.

Even assuming that the trial court was entitled to make specific fact findings a full year after pronouncing his sentence on Parker, it cannot be disputed that this Court affirmed Parker's sentence of death on the basis of the wrong order. This Court's citation and consideration of the 1983 Sentencing Order, rather than the 1984 Sentencing Order, deprived Parker of meaningful appellate review of his death sentence.

The trial court's 1983 Sentencing Order was wholly inadequate under section 921.141(3) of the Florida Statutes and this Court's decisions. Section 921.141(3) requires that the trial court judge set forth specific written findings of fact which justify his finding and consideration of statutory aggravating circumstances. See, e.g., Van Royal v. State, 497 So. 2d 125 (Fla. 1986); Patterson v. State, 513 So. 2d 1257 (Fla.



1987); State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). The rationale underlying this requirement is to allow this Court to review whether the decision to impose the death sentence was the result of a reasoned judgment by the trial court on the basis of a careful weighing of the applicable aggravating and mitigating circumstances. Id.

Without any specific fact findings in the 1983 Sentencing Order, this Court could not, on the basis of that order, conduct even the semblance of a meaningful review of the trial court's decision to sentence Parker to death. Without the benefit of such findings, this Court could not fulfill its responsibility to review whether the sentencing court had properly found and weighed the aggravating and mitigating circumstances before he imposed the death penalty on Parker.

This Court's consideration of the 1983 Sentencing Order also deprived Parker of meaningful appellate review of his death sentence because the order contained -- and this Court considered and relied upon -- a non-statutory and improper aggravating circumstance of conviction for a previous "delinquent act". See, e.g., Jones v. State, 490 So. 2d 570 (Fla. 1983). Despite the clear impropriety of the trial court's inclusion of this factor, this Court's reference to the trial court's finding of five aggravating circumstances reveals that this Court also relied upon this non-statutory aggravating circumstance in reviewing the propriety of Parker's death sentence. This Court's

original review of Parker's sentence of death was, and is, irreparably tainted by its reliance on a non-statutory and improper aggravating circumstance.

This Court's direct review of Parker's death sentence was also fatally infected by the Court's consideration of the wrong number of aggravating circumstances. By considering five aggravating circumstances, rather than four, which the trial court listed in its 1984 Sentencing Order, this Court simply did not engage in a proper proportionality review of the decision to sentence Parker to death.

The meaningful appellate review of a trial court's imposition of the death sentence is fundamental to a defendant's rights under the Eighth and Fourteenth Amendments to reliable, individualized and non-arbitrary sentencing. See Proffitt v. Florida, 428 U.S. 242, 251 (1976). Under the law of Florida, this Court's review of the trial court judge's specific findings of fact in support of his imposition of the death penalty is integral to ensuring that the sentence was the product of "a reasoned judgment" by the judge on the basis of the applicable statutory aggravating circumstances and the evidence. See, e.g., State v. Dixon, 283 So. 2d at 8.

The violation of this Court's fundamental duty under the United States Constitution and Florida law to conduct a meaningful review of Parker's sentence on the basis of an adequate sentencing order cannot be deemed harmless error.

Because this Court's decision on Parker's appeal was the result of a breakdown in the process of appellate review, Parker's writ of habeas corpus should be granted and he should be accorded a new sentencing hearing or a new direct appeal of his sentence of death in this Court.

### CLAIM THREE

**PARKER'S RIGHT TO THE EFFECTIVE  
ASSISTANCE OF COUNSEL WAS VIOLATED BY  
HIS APPELLATE COUNSEL'S FAILURE TO  
APPRISE THIS COURT OF FUNDAMENTAL ERRORS  
IN ITS REVIEW OF PARKER'S DEATH SENTENCE**

Parker's appellate counsel violated Parker's Sixth and Fourteenth Amendment rights to the effective assistance of appellate counsel by: 1) failing to address the inadequacy of the 1983 Sentencing Order and the impropriety of this Court's remand; and 2) failing to raise, at any stage of the proceedings, the trial court's and this Court's reliance on a non-statutory and improper aggravating circumstance.

In Strickland v. Washinston, 466 U.S. 668 (1984), the United States Supreme Court established the standards by which claims of ineffective assistance of counsel should be decided. In Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985), this Court set forth the following test for claims of ineffective assistance of appellate counsel:

The criteria for proving ineffective assistance of appellate counsel parallel the Strickland standard for ineffective trial

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counsel: Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. (Citation omitted).

Under the standards of Strickland and Wilson, there can be no doubt that Parker's appellate counsel rendered ineffective assistance on the direct appeal of Parker's conviction and sentence.

On November 17, 1983, after Parker's appellate counsel had filed his initial brief on appeal -- in which he failed to address the trial court's failure to comply with section 921.141(3) and the clear impropriety of the trial court's reliance on a non-statutory aggravating circumstance -- the State filed motions requesting this Court to relinquish jurisdiction to the trial court to allow the trial court judge to make adequate written findings in support of his imposition of the death penalty. As the ground for these motions, the State asserted:

The appellant argues in his brief that the trial court has included a pleading entitled "Findings In Conformity with Florida Statute 921.141(3)" which pertains to mitigating and aggravating circumstances in death cases but that this pleading does nothing more than list the factors upon which the trial court relied without stating the evidence to support the findings. See Appellant's Brief at 28.

Appendix D.

This assertion by the State was blatantly false -- Parker's appellate counsel had not raised the issue of the absence of any fact finding in his initial brief. See Appendix C. Nonetheless, appellate counsel did not reply to the State's motion, and did not oppose the application on the ground that, based on the clear provisions of the death sentencing statute, a life sentence was mandated because, as the State conceded in its motion, the trial court had utterly failed to enter the required written findings.

Appellate counsel's failings are even more egregious since, on February 2, 1984, this Court rendered its opinion in Cave v. State, 445 So. 2d 341 (Fla. 1984). In that case, Alphonso Cave -- one of Parker's co-defendants, who was tried separately -- had argued to this Court that, pursuant to section 921.141(3), his death sentence should be vacated because the trial court had failed to enter written findings of fact in support of its imposition of the death penalty. In rejecting this argument, and remanding for entry of written findings, the Court held:

It must be stressed that the trial judge did dictate his findings in support of the sentence of death into the record at the time of sentencing. We have previously held that "[s]uch dictation, when transcribed, becomes a finding of fact in writing and provides the opportunity for meaningful review, as required by 921.141, Florida Statutes." Thompson v. State, 328 So. 2d 1 (Fla. 1976).

445 So. 2d at 342. A quick review of the Cave opinion and sentencing record would have revealed to Parker's appellate counsel, in stark contrast to what occurred at Parker's sentencing, that the trial court in Cave's case dictated specific factual findings in support of his sentencing determination. (A copy of the trial court's dictated findings in State v. Cave is Appendix I.) Despite this Court's clear message in Cave that, absent such findings, a life sentence would be required, Parker's appellate counsel failed to bring to this Court's attention this critical distinction between the two cases which would make any remand improper.

Parker's appellate counsel clearly was or should have been aware of this Court's decision in an appeal involving a co-defendant. He also was or should have been aware of the fact that the trial court judge who sentenced Parker to death did not dictate any fact findings into the record at the time he imposed the death penalty on Parker.

Nevertheless, Parker's appellate counsel failed to raise the most obvious and meritorious issue emerging from this Court's opinion in Cave -- that, because the judge who sentenced Parker to death, unlike the judge in Cave, had **not** dictated any findings of fact into the record at the time he sentenced Parker to death, it was improper for this Court to allow the trial court to make those findings for the first time nearly one Year after the imposition of sentence. On the basis of the

inappropriateness of the Court's remand and, as the State had acknowledged in its November 17, 1983 motion, the inadequacy of the trial court's bare list of aggravating factors contained in the 1983 Sentencing Order, Parker's appellate counsel could have and should have raised the argument which was made in Cave -- that, in the absence of adequate written findings of fact pursuant to section 921.141(3), that section required that Parker's death sentence be vacated, and that he be sentenced to life imprisonment.

Parker's appellate counsel could have raised this obviously meritorious issue in his answer brief, which was not filed until February 16, 1984, or in the oral argument of the direct appeal of Parker's conviction and sentence, which was held on May 8, 1984. Parker's appellate counsel did neither. The inexcusable failure of Parker's appellate counsel to raise this issue was an omission which shows that his performance "fell outside the range of professionally acceptable performance. . . ." Wilson, supra, 474 So. 2d at 1163.

These failures also "**compromised** the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Id. Moreover, since a principal purpose of the trial court's written findings pursuant to section 921.141(3) -- as Parker's appellate counsel ought to have been aware -- was to permit this Court to conduct a meaningful review of the trial court's decision to impose the

death penalty on Parker, see State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), this Court's review process was affected, as was the trial court sentence of death being reviewed. Because, under its opinion in Cave, this Court should not have remanded for the entry of written findings in the absence of contemporaneous oral fact findings in the record at the trial court's oral pronouncement of sentence on Parker, Parker was entitled to receive a life sentence under section 921.141(3). Only the failure of Parker's appellate counsel to raise this argument prevented this result.

This Court's opinion revealed that, notwithstanding the trial court's 1984 Sentencing Order, which listed four aggravating circumstances, this Court reviewed Parker's death sentence from the perspective of the trial court's 1983 Sentencing Order, which cited five aggravating circumstances and included a non-statutory and improper aggravating circumstance. Parker's appellate counsel was thus egregiously ineffective for failing to bring to this Court's attention the fact that it had based its review of Parker's death sentence on the wrong order. Nonetheless, Parker's appellate counsel, in his motion for a rehearing of this Court's decision, failed to mention to this Court that its review of Parker's death sentence was deficient and inaccurate because it was based on the wrong number of aggravating circumstances and on an improper aggravating circumstance.



The failure of Parker's appellate counsel to raise these issues in his motion for rehearing clearly fell far "outside the range of professionally acceptable performance." Wilson, supra, 474 So. 2d at 1163. Even the most superficial reading of this Court's opinion and the record on appeal would have revealed these issues. See also Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987) (appellate counsel ineffective where issues were "obvious on the record, and must have leaped out upon even a casual reading of the transcript"). Furthermore, these failures prejudiced Parker because they deprived him of his constitutional and legal right to this Court's meaningful review of his sentence on the basis of the applicable statutory aggravating factors and the underlying evidence.

#### CLAIM FOUR

THE STATE ATTORNEY'S ARGUMENTS TO THE  
JURY EMPHASIZING THE IMPACT OF THE  
OFFENSE ON THE VICTIM'S FAMILY AND  
THE VICTIM'S PERSONAL TRAITS VIOLATED  
PARKER'S EIGHTH AND FOURTEENTH AMENDMENT  
RIGHTS AND THEIR FLORIDA COUNTERPARTS

A. Factual Bases For This Claim

Prior to the commencement of Parker's trial, his counsel moved the trial court for an order prohibiting the State Attorneys from making comments to the jury concerning the victim and/or her family that would tend to create sympathy for the victim or her family. This motion was premised on the

inflammatory nature and irrelevance of any information concerning the characteristics of the victim or her family.

Notwithstanding this motion, in his closing argument at the sentencing phase of Parker's trial, the State Attorney made the following arguments and statements to the jury:

What did Frances Julia Slater ever do to J.B. Parker? Absolutely nothing. Nothing. Frances Julia Slater, an eighteen Year old girl, tries to make her own way of [sic] life. She was gainfully employed.

R 1449-50 (emphasis added).

\* \* \*

Ask yourself, by what authority did J.B. Parker have to take this girl's life. By what authority did he have to prevent her from leading a normal life of having children, of having the parents enjoy the events of Christmas, watching their grandchildren playing with the Christmas tree, opening the presents. By what right did he have to deprive them of seeing their grandchildren blow out the birthday candles on their cake.

R 1450.

\* \* \*

Based upon the evidence, there is no sympathy for J.B. Parker. The only sympathy I have is for the Campbell family. Because there will always be an empty chair at their house due to the act of one person, J.B. Parker, okay?

R 1463-64.

\* \* \*

Difficult, extremely difficult for me to stand here because I keep thinking of what I have left out. Have I left anything out? If

I have, while you are in the jury room deliberating, will you please hear Julia Slater's voice while you are deliberating about what penalty you should bring in.

R 1465.

B. The State Attorney's Comments Violated Booth and Gathers

The State Attorney's comments in his penalty phase argument at Parker's trial that focused on the impact of the offense on the victim and her family, as well as comments directed to the victim's personal traits, violated Parker's Eighth and Fourteenth Amendment rights to an individualized, non-arbitrary and non-capricious capital sentencing decision. See South Carolina v. Gathers, 109 S. Ct. 2207 (1989); Booth v. Maryland, 482 U.S. 496 (1987); Jackson v. State, 14 FLW 355 (July 14, 1989).

In Booth, the United States Supreme Court held that the reading of a victim impact statement describing the emotional impact of the crime on the victim's family to the jury violated the defendant's Eighth Amendment rights. The victim impact statement in Booth concluded with the following comment:

It became increasingly apparent to the writer as she talked to the family members that the murder of [the victims] is still such a shocking, painful and devastating memory to them that it permeates every aspect of their daily lives. It is doubtful that they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them.

Booth, 482 U.S. at 500.

The Supreme Court in Booth reiterated that, under the Eighth Amendment, in order to insure reliability and to guard against arbitrariness, the decision of whether to sentence a defendant to death must be based exclusively on the defendant's "personal responsibility and moral **guilt.**" 482 U.S. at 502 (quoting from Enmund v. Florida, 458 U.S. 782 (1982)). In fulfilling its awesome responsibility, a jury must view the defendant as a "uniquely individual human bein[g]," 482 U.S. at 504 (quoting from Woodson v. North Carolina, 428 U.S. 280 (1976)), and should therefore restrict its deliberations to the defendant's character and the circumstances of the crime. 482 U.S. at 502.

In Booth, the Supreme Court held that victim impact statements could not be condoned under the Eighth Amendment because they focused the sentencer's attention on the victim and the victim's family, rather than the defendant, and thus created "an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." 482 U.S. at 505. The Supreme Court also emphasized that, although the jury would generally be aware of the impact of the crime on the victim's family, comments to that effect were not permitted because they "serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant.'" 482 U.S. at 508.

In South Carolina v. Gathers, 109 S. Ct. 2207 (1989), the Supreme Court recently reemphasized and expanded upon its holding in Booth. In Gathers, the prosecutor made statements to the jury regarding the victim's positive qualities. The Supreme Court held that, although these statements were made by the prosecutor, rather than members of the victim's family as in Booth, they were impermissible under the Eighth Amendment because they were not relevant to the defendant's "moral culpability." 108 S. Ct. at 2211.

Like the victim impact statement in Booth and the prosecutor's comments in Gathers the State Attorney's closing argument at Parker's trial contained highly inflammatory comments which were totally irrelevant to the personal culpability of Parker. Specifically, the State Attorney commented:

Ask yourself, by what authority did J.B. Parker have to take this girl's life. By what authority did he have to prevent her from leading a normal life of having children, of having the parents enjoy the events of Christmas, watching their grandchildren playing with the Christmas trees, opening the presents. BY what right did he have to deprive them of seeing their grandchildren blow out the birthday candles on their cake.

R 1450 (emphasis added). Likewise, the State Attorney declared:

Based upon the evidence, there is no sympathy for J.B. Parker. The only sympathy I have is for the Campbell family. Because there will always be an empty chair at their house due to the act of one person, J.B. Parker, okay?

R 1463-64.

As the Supreme Court emphasized in Booth, such statements concerning the impact of the crime on the victim's family "could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime." 482 U.S. at 505. As the Supreme Court found in both Booth and Gathers, such a diversion from the proper focus of a sentencing determination violates a capital defendant's Eighth Amendment rights. As the State Attorney at Parker's trial practically admitted in his closing argument, the only purpose of these comments was to inflame the jury by creating sympathy for the victim's family. R 1463-64.

Futhermore, the State Attorney at Parker's trial, like the prosecutor in Gathers, attempted to procure the death penalty by invoking the victim's personal traits. Thus, the State Attorney harangued:

What did Frances Julia Slater ever do to J.B. Parker? Absolutely nothing. Nothing. Frances Julia Slater, an eighteen year old girl, tries to make her own way of [sic] life. She was gainfully employed.

R 1449-50.

Finally, the State Attorney concluded by making an emotionally-charged statement aimed at emphasizing the impact of the crime on the victim:

Difficult, extremely difficult for me to stand here because I keep thinking of what I have left out. Have I left anything out? If I have, while you are in the jury room deliberating, will you please hear Frances Julia Slater's voice while you are deliberating about what penalty you should bring in.

R 1465. These inflammatory statements by the State Attorney created an unacceptable risk that the jury's sentencing decision would be made arbitrarily on the basis of irrelevant factors unrelated to Parker's personal culpability, in violation of Parker's Eighth and Fourteenth Amendment rights.

In Jackson v. State, 14 FLW 355 (July 14, 1989), this Court held that Booth represented a fundamental change in constitutional law under the standards governing the retroactivity set forth in Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), thus justifying the failure to raise this claim earlier. Further, the comments of the State Attorney were made in spite of a motion by Parker's trial counsel to preclude such comments which was granted by the trial court.

\* \* \*

The comments by the State Attorney in his closing argument at the penalty phase of Parker's trial, which described the impact of the crime on the victim and her family, were patently irrelevant, inflammatory and inappropriate under the Eighth and Fourteenth Amendments as interpreted by the United States Supreme Court in Booth and Gathers, and most recently by

this Court in Jackson. Because the constitutional violations resulting from those comments cannot be deemed harmless error, Parker is entitled to a new sentencing proceeding before a jury.

V. CONCLUSION

For the foregoing reasons, Petitioner requests this Court to issue a writ of habeas corpus, vacating his sentence of death and imposing a life sentence or, in the alternative, ordering a new sentencing hearing before a jury or a new direct appeal to this Court.

Respectfully submitted,

PROSKAUER ROSE GOETZ &  
MENDELSON

By   
Francis D. Landrey

Attorneys for Petitioner  
300 Park Avenue  
New York, New York 10022  
(212) 909-7000

Of Counsel:

Francis D. Landrey  
Edward F. Westfield  
Michael P. Aaron



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Habeas Corpus and Request for Stay of Execution was furnished by Federal Express to Celia Terenzio, Esq., Assistant Attorney General, 111 Georgia Avenue - Suite 204, West Palm Beach, FL 33401 this 20<sup>th</sup> day of September, 1989.

Michael P. Aaron  
Of Counsel