IN THE SUPREME COURT OF FLORIDA

Case No. 74,749

J.B. PARKER,

Petitioner,

v.

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

and

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

Respondents.

REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR A WRIT OF HABEAS CORPUS AND REQUEST FOR STAY OF EXECUTION

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Petitioner J.B. Parker, by his undersigned counsel, respectfully submits this reply memorandum in support of his petition for a writ of habeas corpus and his request for a stay of execution. This memorandum replies to the Response in Opposition to Petition for Writ of Habeas Corpus & Motion for Stay of Execution, filed by the Attorney General on October 6, 1989. Mr. Parker's execution is presently scheduled for October 27, 1989. Mr. Parker's claims and the State's responses thereto are addressed seriatim.

ARGUMENT

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 Trial Court Violated Mr. Parker's Statutory and Constitutional Rights By Permitting the State Attorney to Prepare the 1984 Sentencing Order

In violation of its fundamental duty to make findings of fact and to conduct an independent weighing of the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed on Mr. Parker, the trial court improperly permitted the State Attorney to prepare the 1984 Sentencing Order. The trial court's abdication of this exclusively judicial function, in the absence of any evidence in the record that the trial judge actually made the requisite findings in support of the order, violated the requirements of section 921.141 of the Florida Statutes and deprived this Court of the opportunity to conduct the meaningful review of Mr. Parker's death sentence to which he is entitled under the Eighth and Fourteenth Amendments and the laws of Florida.

The State's response to Mr. Parker's petition confirms what his present attorneys had suspected: the State Attorney--assisted by the State Attorney General--prepared

the 1984 Sentencing Order, and Judge Nourse, after deleting an aggravating circumstance that the State itself admitted was improper, merely affixed his signature to that Order. Response in Opposition at 10-11. The State admits that the proposed order prepared by Assistant Attorney General Lydia M. Valenti (Respondent's Exhibit B) contained aggravating factors which were "supported by references to the evidence which [Ms. Valenti] extracted from the record." (Respondent's Ex. C, letter from Assistant Attorney General Lydia M. Valenti to Assistant State Attorney James W. Midelis).

Thus, the record reflects that only the Attorney General's office--the State's advocate--and not the trial judge, searched the record and made the findings which purportedly supported the imposition of the death sentence. The lack of effective judicial participation in the sentencing process is underscored by the fact that the only difference between the State's proposed findings and the findings signed by the trial judge is the deletion of the improper aggravating circumstance of a prior delinquent act. Otherwise, the documents are identical. Compare Respondent's Ex. B with Petitioner's Ex. G.

The decisions of this Court make clear that the 1984 Sentencing Order cannot stand. In State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), the

Court recognized the essential protection against arbitrary and capricious action afforded by section **921.141:**

> The fourth step required by Fla. Stat. § **921.141,** F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute.

Id. at *8* (emphases added). Just as judicial reason is essential to protect a capital defendant from the "inflamed emotions of jurors," id., independent judicial identification and explanation of applicable aggravating and mitigating factors is necessary to prevent the sentencing procedure from becoming nothing more than a routine endorsement of the State's views as to the appropriate punishment.

This Court's decision in Patterson v. State, 513 So. 2d **1257** (Fla. **1987),** dictates that Mr. Parker's death sentence be vacated. In Patterson, this Court held that the trial judge

> improperly delegated to the state attorney the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating circumstances that applied in the case.

Id. at **1261.** The Court noted further:

> [T]he trial judge's action in 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. . . . It is our view that the judge must specifically identify and explain the applicable aggravating and mitigating circumstances.

Id. at **1262-63** (emphases added).

This case falls squarely within the rule of Patterson. No part of the record in this case reflects that the findings which purportedly supported the imposition of the death penalty were independently determined by the trial judge. To the contrary, the record on this petition now reveals that the findings were conceived and presented by the prosecutor, and the trial judge merely gave his imprimatur to them. That sequence of events is both statutorily and constitutionally deficient.

In defense of this aberrant approach to sentencing, the State now argues that it was acceptable because Mr. Parker's counsel had an opportunity to submit a proposed order. Response in Opposition at **11**. This argument simply misses the point that it is the judge, and not the attorneys, who must engage in a review of the evidence and in the requisite identification, explanation and weighing of aggravating and mitigating factors. Whether Mr. Parker's attorneys could, would, wanted to, or tried to submit a

proposed order is simply irrelevant to the question of judicial adherence vel non to the requirements of section 921.141.

The trial court's total failure to make any requisite findings of fact--oral or written--mandates that Mr. Parker be sentenced to life imprisonment. Section 921.141(3) provides in 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 sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082. (emphasis added).

Even assuming the correctness of this Court's relinquishment of jurisdiction to allow the trial judge to enter the necessary written findings--a point that Mr. Parker does not concede, see discussion infra--the trial judge simply did not follow the direction of this Court on that remand. Mr. Parker's consequent statutory entitlement to a life sentence must now be recognized. Accordingly, Mr. Parker's death sentence should be vacated and his case should be remanded to the Circuit Court, with directions to enter a sentence of life imprisonment in accordance with sections 921.141 and 775.082 of the Florida Statutes.

B. This Court's Remand for Preparation Of a Second Sentencing Order Was Error

Even if the trial judge had not improperly permitted the State Attorney to prepare the 1984 Sentencing Order, this Court's relinquishment of jurisdiction on direct appeal and remand for findings of fact was error. Under Van Roval v. State, 497 So. 2d 625 (Fla. 1986) and its progeny, the circumstances of this case--including the lack of any written findings of fact made prior to the certification of the record on appeal, the failure of the trial judge to dictate any findings of fact into the record, and the lapse of nearly one year between oral pronouncement of sentence and the entry of written findings--compel the conclusion that the State's motion for relinquishment and remand was improvidently granted. See Stewart v. State, 14 FLW 430, 432 n.4 (Fla. August 31, 1989) and cases cited therein.

The State now argues that the Court's decision to remand is "law of the case." Response in Opposition at 10. However, the issue of the propriety of that remand was never raised by Mr. Parker's appellate counsel, and thus has never been addressed or necessarily determined by this Court. Therefore, there is no "law of the case" as to whether the remand was appropriate under section 921.141 and the decisions of this Court. See Greene V. Massey, 384 So. 2d 24, 27 (Fla. 1980).

Even if the remand itself constitutes "law of the case" on the issue of whether the remand should have bee made, this Court has made clear that it will make exceptions to the general rule binding the parties to the "law of the case" where '"manifest injustice' will result from a strict and rigid adherence to the rule." Strazzulla v. Hendrick, 177 So. 2d. 1, 4 (Fla. 1965). The Strazzulla decision recognized that "the administration of justice requires some flexibility in the rule," id. at 4, and acknowledged the Court's power to reconsider and correct an erroneous ruling that has become "law of the case," id. at 5. See also Preston v. State, 444 So. 2d 939, 942 (Fla. 1984).

The palpable failure of the trial court in the first instance to comply with its statutory and constitutional obligation to make timely findings of fact in support of the death sentence has worked a manifest injustice on Mr. Parker, and the relinquishment and remand was improper under the decisions of this Court. Strict and rigid adherence to the Court's prior ruling would perpetuate that injustice. Therefore, this Court may and should revisit its decision to relinquish and remand, and should determine that the 1983 Sentencing Order was inadequate and that a resentencing to life imprisonment is mandated.

The State also argues that the 1983 Sentencing Order was merely "incomplete" because it listed the

aggravating and mitigating circumstances purportedly found by the trial court. Response in Opposition at 8. The argument is not well-founded. Section 921.141 requires the trial court to make "specific . . . findings of fact" and not merely to list its conclusions by parroting the words of the statute. In its November 1983 motion to this Court to relinquish jurisdiction, the State admits that the 1983 Sentencing Order "does nothing more than list the factors upon which the trial court relied without stating the evidence to support the findings." Petitioner's Ex. D. It is thus apparent that the 1983 Sentencing Order makes none of the requisite findings and thus is inadequate, not merely incomplete.

The State also misreads Rhodes v. State, 14 FLW 343 (Fla. July 6, 1989), when it argues that in Rhodes "the sentencing order merely stated which aggravating and mitigating factors applied." In fact, in Rhodes this Court found the sentencing order to be just barely sufficient because the findings of fact did contain some "little analysis" and some "very little application of the specific facts of Rhodes' case." Id. at 346. For example, the trial judge in Rhodes made the following finding of fact with respect to the heinous, atrocious and cruel nature of the crime:

> "That the murder of Karen Nieradka was especially heinous, atrocious and cruel in that the victim was manually

> strangled and the clumps of her own hair found in her clenched hands indicates the pain and mental anguish that she must have suffered in the process."

Id. In contrast, the **1983** Sentencing Order simply recites, in addition to the improper circumstance of a prior delinquent act, the statutory language of four aggravating circumstances, with no analysis and no application to the facts of this case. The State's argument that the **1983** Sentencing Order was merely "incomplete" should be rejected. Instead, the Court should hold that order to be statutorily, constitutionally and incurably inadequate.

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

In its opinion on Mr. Parker's direct appeal, this Court made the following statement:

> In accordance with the jury's recommendation, the trial judge imposed the death penalty. In so ruling, the trial judge found five aggravating circumstances: **(1)** the defendant was previously convicted of a delinquent act involving the use or threat of violence to a person . . . .

Parker v. State, **476** So. 2d **134, 136** (Fla. **1985).** That opinion made no reference to the subsequent sentencing order. Thus, as Mr. Parker has claimed in his Petition at pages **28-32,** it is apparent that this Court based its review of his

death sentence on the inadequate--or at least concededly incomplete--1983 Sentencing Order. The State argues, however, that because the opinion on the direct appeal makes no further mention of the improper aggravating circumstance, "there is no evidence to support [the] fantastic theory" that this Court relied on the wrong order. Response in Opposition at 12.

The State's argument is the only thing that is "fantastic" concerning this claim. The incontrovertible evidence that this Court considered and relied on the wrong order is the Court's own recitation of what it believed to be the trial judge's findings with respect to aggravating circumstances. Indeed, there is **no** evidence that the Court relied on the 1984 Sentencing Order. Therefore, the State may not rely--and the federal courts in any future proceedings will not permit reliance--on the "gross speculation" that this Court might have relied on the 1984 Sentencing Order in performing its constitutional duty to provide meaningful review of the sentence. See Bransford v. Brown, 806 F.2d 83, 86 (6th Cir. 1986), cert. denied, 481 U.S. 1056 (1987).

The State also argues that this Court did not rely on the wrong sentencing order on direct appeal because the parties made reference to the 1984 Sentencing Order on appeal of Mr. Parker's first Rule 3.850 motion and on his first

habeas proceeding in this Court. Response in Opposition at 12-13; Respondent's Exs. G-J. Those proceedings, however, simply did not address the issue of whether the trial court properly identified, explained and weighed the aggravating and mitigating circumstances in determining the sentence. It is absurd for the State now to assert that the Court's determinations in those proceedings somehow cured its failure to consider the "correct" sentencing order on direct appeal and provided meaningful review of this issue.

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

Unable to rebut Mr. Parker's argument that his appellate counsel was ineffective because Cave V. State, 445 So. 2d 341 (Fla. 1984), should have educated counsel that the 1983 Sentencing Order was incurably inadequate and that this Court's remand was improper (Petition at 33-37), the State is reduced to responding with the paralogism that "[i]n actuality what Petitioner is raising is a Van Roval claim," and that Mr. Parker's appellate counsel cannot be faulted because Van Royal had not yet been decided at the time of the appeal. Response in Opposition at 13. Mr. Parker's claim of ineffective assistance is grounded on Cave and the plain meaning of the provisions of section 921.141 of the Florida

Statutes, notwithstanding the State's wish that this were not so. To understand the overwhelming merit of the challenge available to Mr. Parker based on the 1983 Sentencing Order did not require that his appellate counsel anticipate this Court's decision in Van Royal. He need only have read the statute and the opinion in Cave: apparently he did neither.

Moreover, the State's attempt to reconcile Cave with Mr. Parker's case by noting that "remand was granted [in Cave] as well," Response in Opposition at 14, ignores the crucial distinction that in Cave, "the trial judge did dictate his findings in support of the sentence of death into the record at the time of sentencing." 445 So. 2d at 342. A review of the record in Cave demonstrates, in sharp contrast to the record here, that because the trial court dictated findings into the record, the Cave sentencing order was merely incomplete. Here, appellate counsel's failure to oppose the remand based on the lack of any findings by the trial judge, and his failure to address this Court's improper reliance on a non-statutory aggravating factor and a facially inadequate sentencing order, constitutes prejudicial ineffective assistance of counsel and mandates that Mr. Parker's death sentence be set aside and that he be resentenced to life imprisonment.

CLAIM IV

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

The State argues that Mr. Parker's claim based on improper prosecutorial statements about the victim's personal characteristics and the impact of the crime upon the victim's family, is not properly before this Court. However, where, as in this case, "all the pertinent facts are contained in the original record on appeal . . . the issue may be appropriately considered in the petition for writ of habeas corpus." Jackson v. Dusser, 14 FLW 355, 357 n.2 (Fla. July 6, 1989). If the Court determines that this claim should first be raised in a motion for post-conviction relief under Rule 3.850, it should remand the issue to the Circuit Court and stay Mr. Parker's execution pending determination in that court.

The State relies on Grossman v. State, 525 So. 2d 833 (Fla. 1989), cert. denied, 109 S. Ct. 1354 (1989), to argue that Mr. Parker's claim is procedurally barred because his trial counsel failed to object to the prosecutor's comments. Jackson v. Dusger established, however, that claims based on Booth v. Maryland, 482 U.S. 496 (1987), should be given retroactive application because of the fundamental change in the constitutional law of capital

sentencing effected by Booth. 14 FLW at 355. It is simply illogical to say that the constitutional change is fundamental, but yet to require counsel in pre-change proceedings to preserve the issue by objection. However, if Mr. Parker's trial counsel should have made the objection to preserve the claim under state law, then counsel provided ineffective assistance in failing to do so, and Mr. Parker's Sixth and Fourteenth Amendment rights were thereby violated.

On the merits, it is clear that the prosecutor's comments violated Booth by improperly diverting the jurors' attention to the character of the victim and the effect of her death on her family. See Jackson v. Dugger, 14 FLW at 356. The prosecutor went so far as to raise before the jury the specter of the victim's potential children and the joy such children might have brought to their family during the holiday season and at other family celebrations:

> 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. Continuing in his plain attempts to procure the jurors' sympathy for the victim's family, the prosecutor then stated:

> 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 (emphasis added).

In addition to the fact that the last-quoted remarks improperly conveyed to the jury the prosecutor's personal views as to where the jurors' sympathies should lie, the above comments had absolutely no bearing on Mr. Parker's **"** 'personal responsibility and moral guilt,'**"** and thus violated Booth. **482** U.S. at **502** (quoting Enmund v. Florida, **458** U.S. **782, 801 (1982)).** These remarks were calculated to, and may well have, diverted the jury's attention away from Mr. Parker's background and record and the circumstances of the crime, and may have caused the jury to impose the death sentence "because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill." Booth v. Maryland, **482** U.S. at **505.**

Not content to dwell only on family bereavement, the prosecutor invoked the victim's personal characteristics in a further attempt to distract the jury from relevant factors:

> 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. The State argues that this statement did not tell the jury anything that it did not already know--i.e., that the victim was working when she was killed--but it says much more than that. The jury did not need to know, for purposes of considering whether Mr. Parker should live or die, that the victim was trying to make her own way in life.[1] Likewise, the prosecutor's statement that the victim was gainfully employed had no place in a capital sentencing. "We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such discriminations." Booth v. Maryland, **482** U.S. **506** n.8.

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1 Indeed, there is no evidence in the record to support the prosecutor's assertion that the victim was trying to make her own way in life. There may well have been other factors impacting on the victim's life circumstances. Of course, such guesswork is inappropriate and points up the fundamental problem that victim impact material "is not easily susceptible to rebuttal," Booth v. Maryland , 482 U.S. at **506**, which is especially true when the material comes in the form of statements from the prosecutor, a figure of authority before the jury. Booth obviates such problems by explicitly stating that such issues are not relevant to capital sentencing:

> The prospect of a **"mini-trial"** on the victim's character is more than simply unappealing; it could well distract the sentencing jury from its constitutionally required task--determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime.

Id. at **507.**

Contrary to the State's assertion, **see** Response in Opposition at **18**, the prosecutor's statement about the victim's gainful employment was also a direct attempt "to compare the victim's worth to that of the Petitioner." In his closing statement at the guilt phase, the prosecutor made the following remarks:

> If there is any person that is streetwise, based upon the evidence, it is J. B. Parker. J. B. Parker. That was a ploy for sympathy. Working? Where was he working? He wasn't even working when he was nineteen years of age on Monday, April the 26th [the night of the crime]. His girlfriend, Charlene Dickerson, is gainfully employed. Was there any evidence regarding "Pig" Parker being employed? Absolutely not.

R 1163. Clearly, in later emphasizing to the jury that the victim was "gainfully employed," the prosecutor improperly attempted to denigrate the worth of Mr. Parker as an asset to society in comparison to the worth of the victim.

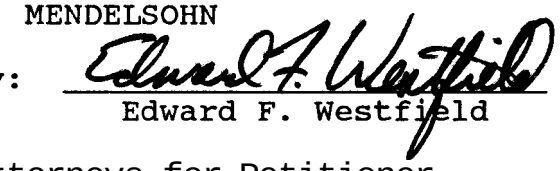
In Booth, the United States Supreme Court unequivocally "reject[ed] the contention that the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics, are proper sentencing considerations in a capital case." Id. at 507. The rule of Booth was reaffirmed last term in South Carolina v. Gathers, **109 S.** Ct. 2207 **(1989)**. Accordingly, this Court must condemn the prosecutorial remarks made in this case, vacate the sentence of death, and remand for a sentencing hearing before a jury.

CONCLUSION

For the above reasons, and for the reasons set forth in Mr. Parker's Petition for a Writ of Habeas Corpus and Request for Stay of Execution, this Court should stay Mr. Parker's imminent execution to afford full and fair consideration of his claims, and upon such consideration, should 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 & MENDELSOHN

By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Reply Memorandum of Law in Support of Petition for a Writ of Habeas Corpus and Request for Stay of Execution have been furnished by Federal Express to the office of Celia Terenzio, Assistant Attorney General, **111** Georgia Avenue - Suite **204**, West Palm Beach, FL **33401** and to the office of Richard G. Bartmon, Assistant State Attorney, **120** East Ocean Boulevard, Stuart, Florida **34994**, this 17th day of October, **1989**.

Edward H. Wentzel
Of Counsel