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PARKER V. DUGGER 111 S. Ct. 731 (1991)

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cifically been addressed in the federal courts. But, after *Shell*, those narrowing constructions may not be sufficient. Finally, the defendant has a due process right to notice and opportunity to defend against every aggravating factor and every narrowing construction on which the Commonwealth intends to offer evidence.

Properly raising and preserving challenges to the application of the vileness factors is even more critical after *Shell*. Please contact the

Virginia Capital Case Clearinghouse for assistance on how to raise and preserve this claim.

Summary and analysis by:
Ginger M. Jonas

PARKER V. DUGGER

111 S. Ct. 731 (1991)
United States Supreme Court

FACTS

A Florida jury convicted the petitioner Robert Parker of two first degree drug related murders and recommended a life sentence for both killings. The trial court judge accepted the jury's life recommendation for one murder but overrode its findings on the second and sentenced Parker to death. In the latter crime, the judge found six aggravating factors and no statutory mitigating factors, but did not discuss non-statutory mitigating evidence. Under Florida law, if a judge finds clear and convincing evidence that supports the death sentence, and further determines that no reasonable person could differ in this assessment, the judge may override the jury's life recommendation and impose the death sentence. See *Tedder v. State*, 322 So.2d 908 (Fla. 1975).

On direct appeal, the Florida Supreme Court found that evidence of the second murder did not support two of the six aggravating factors found by the trial court judge. The reviewing court did not vacate the death sentence because it determined that the trial court found no mitigating factors to weigh against the four remaining, valid aggravating factors. In the penalty phase, defense counsel offered no mitigating factors enumerated by the Florida death penalty statute, but did present evidence that the defendant was under the influence of large amounts of alcohol and drugs during the murders, that he suffered a difficult childhood, that none of his accomplices received a death sentence, and that defendant maintained a positive adult relationship with his family and neighbors. The Florida Supreme Court did not consider these non-statutory mitigating factors and affirmed the death sentence.

HOLDING

The United States Supreme Court concluded that the trial court judge found non-statutory mitigating factors. The Court based its holding on the fact that the judge overrode the jury's sentencing recommendation for only one of the two murders. Because the trial court judge found five aggravating factors in the first killing and accepted the life recommendation, the Court inferred that the judge found non-statutory mitigating evidence. Considering that the non-statutory mitigating evidence applied to both killings the Court further held that the judge also weighed the non-statutory evidence for the second killing, but found that evidence supporting the death sentence was so clear and convincing that no reasonable juror could find otherwise. The U.S. Supreme Court held that the defendant was denied meaningful appellate review when the Florida Supreme Court failed to acknowledge the availability of non-statutory mitigating evidence. The Court remanded the case to the Florida Supreme Court under the authority of *Clemons v. Mississippi*, 110 S. Ct. 1441 (1990),

which permits either appellate reweighing of aggravating and mitigating factors or harmless error analysis on the correct record.

ANALYSIS/APPLICATION IN VIRGINIA

Florida is a "weighing" state, whose statutory sentencing scheme differs from that of Virginia. The Florida statute defines certain aggravating and mitigating factors relevant to the imposition of the death penalty. See Fla. Stat. §§ 921.141(5) and 921.141(6) (1985 and Supp. 1990). The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances. Fla. Stat. § 921.141(3) (1985). A jury makes the initial sentencing recommendation to the judge and the judge imposes the sentence. Fla. Stat. §§ 921.141(2) and 921.141(3). The jury considers only those aggravating circumstances enumerated, but may weigh any mitigating evidence.

The Virginia death penalty scheme requires the jury to consider only the "vileness" and "future dangerousness" aggravating factors, and further directs the jury to consider both statutory and non-statutory mitigating factors. However, after reviewing aggravating and mitigating evidence, the Virginia jury has the option of imposing a life sentence even if it finds both aggravating factors. Therefore, there is a strong argument that Virginia is a *de facto* "weighing" state and meaningful appellate review must take that into account if one of the two Virginia aggravating factors is found to be constitutionally infirm. See case summary of *Clemons v. Mississippi*, Capital Defense Digest, Vol. 3, No. 1, p. 8 (1989).

In any event, the importance of *Parker v. Dugger* does not depend on whether state review is in a "weighing" state. This case shows that it is proper for a federal habeas court to monitor whether a state court truly affords meaningful appellate review of a state sentencing scheme. This is a different message than that sent by the Court just last term in *Lewis v. Jeffers*, 111 S. Ct. 111 (1990). See case summary of *Lewis v. Jeffers*, Capital Defense Digest, Vol. 3, No. 1, p.7 (1990). In *Lewis*, the Court assessed the application of an aggravating factor and held that if any rational fact finder could have found the aggravating factor, an irrational or inconsistent application by state courts was not a federal concern. The *Parker* court went to great lengths to reconstruct the trial record in support of its conclusion that the state court behaved arbitrarily. In doing so, the Court rejected the dissenters' position that a state supreme court's findings were "mere errors of state law."

Summary and analysis by:
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