OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ROBERT LACY PARKER, Petitioner

v. RICHARD L. DUGGER, SECRETARY,

FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.

CASE NO: 89-5961

PLACE: Washington, D.C.

DATE: November 7, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT LACY PARKER, :

Petitioner :

v. : No. 89-5961

RICHARD L. DUGGER, SECRETARY, :

FLORIDA DEPARTMENT OF :

CORRECTIONS, ET AL. :

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Washington, D.C.

Wednesday, November 7, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

ROBERT J. LINK, ESQ., Jacksonville, Florida; on behalf of the Petitioner.

CAROLYN M. SNURKOWSKI, ESQ., Assistant Attorney General of Florida, Tallahassee, Florida; on behalf of the Respondents.

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PROCEEDINGS

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 89-5961, Robert Lacy Parker v. Richard L. Dugger.

Mr. Link.

ORAL ARGUMENT OF ROBERT J. LINK

ON BEHALF OF THE PETITIONER

MR. LINK: Thank you, Mr. Chief Justice, and may it please the Court:

There are four issues before the Court in our briefs. If we don't get to talk about all of them, we will rely upon the arguments that are in the briefs.

The first issue involves the death penalty, the death sentence that was imposed. Mr. Parker was charged with three counts of first-degree murder in Jacksonville in Florida. The jury at his trial found him guilty as charged of two of the three counts of first-degree murder.

After receiving additional mitigating evidence in a penalty phase trial, they recommended life sentences for both murders. They filled out a specific verdict form in which they found that mitigating circumstances outweighed aggravating circumstances.

The trial judge overruled their recommendation as to one of the murders and sentenced Mr. Parker to

death. He found that there were six aggravating circumstances, no mitigating circumstances, despite the jury finding that mitigation outweighed aggravation and despite uncontroverted mitigating evidence that was in the record. The Florida supreme court --

QUESTION: What did he have to say?

MR. LINK: He stated that there were no mitigating circumstances that outweighed the aggravating circumstances.

QUESTION: Well, that doesn't mean there aren't -- isn't -- aren't any mitigating circumstances.

MR. LINK: The trial court judge and the Florida supreme court so found that his -- found that there were no mitigating circumstances. The --

QUESTION: Well, what -- but what did the -- the trial judge said there are no mitigating circumstances that outweigh the aggravating?

MR. LINK: Yes, sir, and he found no mitigating circumstances at all in his sentencing order. The sentencing order tracks the statutory mitigating circumstances under Florida law. There are seven of them. The trial court judge however, during argument -- excuse me -- during the penalty phase trial, provided the jury with an instruction that there were additional mitigating circumstances; that is, he told the jury that they could

consider any aspect of the defendant's character or record or any other aspect of or circumstances of the offense.

QUESTION: Well, do you think the, the trial judge didn't consider all the evidence? I thought the trial judge expressly found that all the evidence was considered.

MR. LINK: The trial judge --

QUESTION: I mean it, it would appear from the language used by the trial judge that indeed all this other mitigating evidence was, was received. It was considered. It was weighed, but not found to outweigh the aggravating circumstances.

MR. LINK: I don't think we could say that because of the fact that he went through the statutory mitigating circumstances and discussed them at great length and made absolutely no mention of the mitigating circumstances even though he had instructed the jury on the mitigating circumstances as, as an eighth mitigating -- statutory mitigating circumstance.

QUESTION: Well, didn't he just instruct the jury that they could find these were mitigating circumstances, not that they had to?

MR. LINK: Yes, sir, that is correct. But he made no mention of any analysis of those mitigating circumstances in his sentencing order, while he did as to

the statutory mitigators. In the Florida supreme court's analysis such as it was, was that there were no mitigating circumstances found by the trial court judge. That was the Florida supreme court's interpretation of the trial judge's order and that is -- was also the United States district court judge's interpretation of the trial judge's order. That's what the Florida supreme court said. He found no mitigating circumstances. I think that's pretty much dispositive as to what occurred there.

QUESTION: Well, under, under Florida law, he's required to, to weigh the statutory mitigating circumstances against aggravating as I understand it. Is that correct?

MR. LINK: Yes, sir.

QUESTION: Is he required to weigh nonstatutory mitigating circumstances against the aggravating circumstances?

MR. LINK: Yes, Your Honor, he is. However, at the time that this case was decided by the Florida supreme court, as the Florida supreme court later said, they were not requiring State court judges or juries to consider nonstatutory mitigating circumstances. They were using a mere presentation standard which meant that as long as we let them hear about it, there's no problem. They don't have to really consider it. After this Court's decision

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in Hitchcock in 1987, the Florida supreme court has acted to correct that problem.

QUESTION: Well, may I interrupt you, Mr. Link? You said that and, and in answer to Justice Souter's question that Florida law required a weighing of nonstatutory mitigating circumstances against aggravating circumstances. Now the statute has since 1985 required that, but at the time of this trial, it required just the opposite, didn't it? It merely required that the statutory mitigating circumstances be weighed.

MR. LINK: I stand corrected. The statute did not require it. The law required it as interpreted under, under Lockett --

QUESTION: Under Lockett, but the Florida statute, one just reading the Florida statute and not paying attention to Lockett might not have done it that way.

MR. LINK: Yes, sir, that is correct. The issue as to the death sentence in this case is whether the standards used by the Florida supreme court to approve jury overrides are subject to Eighth Amendment review.

The State's position is and has been that once an override is affirmed by the Florida supreme court, that becomes a matter of State law and that it is insulated from Federal review. That's the be all and end all. Our

position is that the State cannot develop a constitutional procedure to safeguard against the arbitrary application of the death penalty and then refuse to use it in an individual case.

QUESTION: Even though it didn't have to develop it in the first place?

MR. LINK: Yes, sir. In other words, just because they did not have to give a jury recommendation any weight at all, once the -- once it is established, that is, they have established a constitutional procedure which this Court has approved --

QUESTION: Well, you say they've established a constitutional procedure, what do you mean by a constitutional procedure? One that is permitted by the Constitution or one that is required by the Federal Constitution?

MR. LINK: I would say a constitutional procedure in death penalty parlance is one that has been approved by this Court.

QUESTION: Well, but you don't answer my question. I asked you whether you mean required or permitted by the Constitution?

MR. LINK: It is -- we do not say that it is required. It is permitted by the Constitution. Yes, sir. But once the State establishes that procedure, they have

to follow it. In other words, they can't develop one set of rules for everybody else in jury overrides and distinguish against Robert Parker.

QUESTION: Well, then what's your basis -- what is the constitutional basis for that statement?

MR. LINK: That is exactly what this Court found in Godfrey v. Georgia. We feel that that is exactly the principle that Godfrey stands for. In other words, once the State establishes a constitutional -- or a construction of a standard for imposing the death penalty, they cannot then refuse to apply it in an individual case. That's what happened in Godfrey v. Georgia. The State had developed a constitutional construction of a statutory aggravating circumstance. But in Godfrey's case they did not utilize that statutory construction, that constitutional construction, in judging his case. And that was the error that permitted the arbitrary application of the death penalty in that instance. So we feel that that is exactly what happened here.

The Tedder standard under Florida law is that a trial judge must give a jury recommendation great weight and can overrule it only if the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ.

QUESTION: Well, didn't both the trial court and

the Florida supreme court in this case find or conclude that no reasonable person could have failed to impose the death sentence in this case?

MR. LINK: Yes, Your Honor. But the Florida supreme court did not apply their construction or standard of review for reviewing overrides in this case. Their standard for reviewing overrides is the reasonable basis test which was developed in the case of Malloy, Richardson and numerous other cases cited in the briefs. The reasonable basis test for reviewing jury overrides requires a, an appellate court to review the record and examine the record even if the judge finds no mitigating circumstances to see if there are any factors that could have formed a reasonable basis for the juries recommendation. There is no presumption that death is appropriate even if the judge finds numerous aggravating factors and no mitigating factors. When there's a life recommendation, there's no presumption that death is appropriate. The job of the appellate court, according to Florida supreme court decisions, is to look for a reasonable basis for the recommendation. If there is one, then the life recommendation should stand. This is the standard that was not applied here.

QUESTION: You're in, in essence asking us to review that factual determination of the, of the supreme

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court of the State?

MR. LINK: No, Your Honor, we're not.

QUESTION: Why aren't you?

MR. LINK: We are asking this Court to require the Florida supreme court to apply that standard. We're not asking this Court to second-guess it or to say that --

QUESTION: Well, we, we can't tell that they haven't applied it without, without entering into the factual inquiry and, and concluding that they were wrong. I mean, you're telling us that there's no basis in the record for, for their conclusion, right? And that therefore they couldn't have been acting the way they're supposed to.

MR. LINK: No, sir, because the, the court told us what it did here. They told us in the opinion that they did not use a reasonable basis test. They told us what the basis of affirming the override was. Their entire discussion relating to the override was that the trial court found no mitigating circumstances to balance against the aggravating circumstances, of which four were properly applied. In light of these findings, the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ.

They based their entire decision in this case on

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the fact that the trial judge found no mitigating circumstances. That's it. They didn't go beyond that. There was no reasonable basis analysis performed in this case. They -- we know that because they tell us. They tell us right in the body of the opinion what they based their decision on and it is a basis that was virtually unprecedented and it certainly is contrary to what they've done in virtually every other case involving jury overrides.

QUESTION: Mr., Mr. Link, how do you distinguish the claim you're making from the claim that the capital defendant in Lewis against Jeffers last term made, claiming that the Arizona supreme court had not consistently applied its own capital sentencing decisions. And we rejected that claim. We said that's not a matter of Federal law.

MR. LINK: In -- yes, sir -- thank you. In the Lewis v. Jeffers case, it involved a standard of review that was constitutional on its face and the State court said that it applied that standard within the body of its opinion. The mere fact that this Court might disagree with the application of that standard is not a matter of Federal law and we would agree with that decision. The situation here is that the court, that is, the Florida supreme court, has created a standard for reviewing jury

overrides but did not apply it in this case. They don't say they don't apply it. In other words, they said we have performed a reasonable basis analysis. We have examined the record. We have found no reasonable basis for determining that the jury -- that there was a -- no reasonable basis for the jury override. If that was what they found in the body of the opinion, then we would be in the Lewis v. Jeffers category. We are not. We are more -- we are in the Godfrey v. Georgia category where the court has a standard but refuses to apply it to this case.

QUESTION: Mr. Link, isn't the, isn't the portion of the standard that you claim they didn't apply, the standard that requires them to make some kind of an independent review of the record to determine whether they believe there are mitigating circumstances?

MR. LINK: Yes, Your Honor.

QUESTION: So if they had said not merely that the trial court found none, but had said we have independently reviewed the record and we find no basis for concluding that mitigating circumstances were present, you would not have an argument?

MR. LINK: That is correct. We would be -- the only argument that we would have would be that there would be the Jackson v. Virginia rational tryer effect argument

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that was presented in Lewis v. Jeffers. Yes, sir.

QUESTION: Are we entitled to assume that the Florida court followed its own law even though it did not expressly say so?

MR. LINK: I think we have to assume they did not where in this case they said they did not. They told us -- they tell us the basis for their decision --

QUESTION: Well, they didn't tell us that they did not do it. They simply spoke of the appropriateness of what the trial court did and they didn't specifically say, we have gone through this independent analysis. It's silence on their part, isn't it, rather than a confession of error?

MR. LINK: I don't believe so, because they say in light of these findings, referring to the trial court's findings.

QUESTION: Mr. Link, you're, you're quoting from page 71 of the Joint Appendix, but if you will look on page 70, the Florida supreme court before saying, the trial court found no mitigating circumstances; in light of these findings, we think it's correct -- on page 70, the first full paragraph, the court says, in addition to considering all other issues raised on appeal, we have conducted an independent review of the record on trial and find no reason to award a new trial.

MR. LINK: Yes, sir, that, that was --

QUESTION: So apparently they did conduct an independent review of the record.

MR. LINK: Yes, sir.

QUESTION: They have said that.

MR. LINK: Yes, sir, they did do that in reference to any issues to award a new trial. That was as to the guilt phase. They present no discussion or no indication that they have evaluated the record to see if there is any -- there are any mitigating circumstances --

QUESTION: You think that does not go to the sentencing phase, that statement?

MR. LINK: Yes, sir. There's nothing in the opinion that says it goes to the sentencing phase. It simply says, accordingly, after having done this review, the convictions are affirmed.

QUESTION: May I ask you, Mr. Link, if the Florida supreme court's practice changed at all in the period right after 1984 and 1985 in what they did in these cases?

MR. LINK: Yes, Your Honor, it did. The Florida supreme court recognized that its application of the Tedder standard was -- I described as aberrational. I think they recognize it as just, as being just that. During 1984 and 1985, they were affirming overrides at a

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rate of 73 percent during that time. The following years the affirmant's rate has been in the vicinity of 20 percent.

QUESTION: But not just on statistics in view of their legal approach. Is it not correct that prior to this -- the change in time, they were not relying at all on nonmitigating, nonstatutory mitigating circumstances in, in reviewing overrides, whereas after that period they did it rather regularly?

MR. LINK: I think for any -- every general principle one can say about the Florida supreme court one can find exceptions and I, I think that there are a number of cases where the Florida supreme court did rely on nonstatutory mitigating circumstances prior to 1984 and 1985.

However, the court subsequently admitted that they were not giving considerations necessarily to nonstatutory mitigation in the case of Downs v. Dugger which is cited in the brief. So during this time frame, it was certainly a skewed type of analysis that was being performed by the Florida supreme court. It seemed that they occasionally did give weight to nonstatutory mitigating circumstances and in other instances did not.

For example, we can find in prior Florida precedent authority for the propositions that virtually

all of the nonstatutory mitigating evidence that was present in this case was in other cases a sufficient basis for a reasonable -- a sufficiently reasonable basis for a jury life recommendation. Intoxication was recognized as a nonstatutory mitigating factor that could support a jury life recommendation before this case and after this case.

Sentences of codefendants was recognized --

QUESTION: May I ask you another question? I'm not sure you answered it.

MR. LINK: Yes.

QUESTION: How often are jury's, jury recommendations overridden in Florida? What's the history down there? You said there's been a change in the percentage, but how often do the jury recommendations of, of life get overridden?

MR. LINK: They get overridden -- I think it depends on -- it goes from jurisdiction to jurisdiction but with some frequency. About one third of the death sentences imposed in Florida have been jury overrides. The vast majority have been set aside by the Florida supreme court using the reasonable basis analysis.

QUESTION: I see. And you make some point in your brief about this same judge was overridden a number -- he's overridden a number of jury verdicts. Is that correct?

MR. LINK: Yes, sir. This, this Court has already reviewed two prior overrides, by this same judge as a matter of fact, in Barclay and Dobbert v. Florida.

QUESTION: And Spaziano, too, or was that --

MR. LINK: Spaziano was, was not this judge.

QUESTION: I see.

MR. LINK: No, sir. Our contention very briefly there is that the Florida supreme court did in this case what Godfrey says that it can't do. The State can't develop a procedure that safeguards against arbitrary application of the death penalty, then refuse to follow it. Our contention very simply is that Robert Parker is entitled to the same procedural protections that -- as other defendants in jury override cases, and he didn't get it in this case. We're simply asking -- we're not asking this Court to second-guess the Florida supreme court. There is no necessity for this Court to substitute your judgment for theirs. We know based on the opinion that they didn't do what they say they do in other cases. We're not -- we are asking the Court to send this case back to the Florida supreme court, asking --

QUESTION: So is this an Eighth Amendment question or equal protection?

MR. LINK: I think the, the question somewhat melds here when one talks about -- in terms of Eighth

Amendment arbitrariness. But it is the, the aberrational application or failure to apply that standard that I think results in the arbitrariness in this case.

QUESTION: The conclusion of the Godfrey court -- that was where the court in Georgia appeared not to follow its rule that the victim had to be tortured or, or severely abused. But the conclusion of the Georgia court or rather the Supreme Court, was thus the validity of the petitioner's death sentence terms on whether, in light of the circumstances of the murders, the Georgia supreme court can be said to have applied a constitutional construction of the phrase. Then it quotes the phrase. And we conclude the answer must be no. So I, I don't see how that supports your view that we, we can parse the record here to determine whether or not State law was properly applied. The whole conclusion of Godfrey is there was an unconstitutional construction of the phrase.

MR. LINK: Yes, Your Honor. It was because the phrase on its face was unconstitutional; as construed by the State supreme court it was constitutional. I think that if one looks at the Tedder standard, it in fact is unconstitutional on its face; that is, the standard of facts suggesting a sentence of death must be so clear and convincing that no reasonable person could differ. That could mean on its face virtually anything. It is a sort

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of a stand back and react type of test that this Court condemned in Maynard v. Cartwright.

QUESTION: Well, didn't we kind of approve it in Spaziano?

MR. LINK: When this Court -- I don't think so and maybe I'm wrong, but I don't think so. This Court cited the Richardson case, which talks about the way the Supreme Court reviews and has construed the Tedder standard. And we feel that the Richardson construction is a constitutional construction of the Tedder standard. In other words, as construed by the Florida supreme court, their reasonable basis analysis is a constitutional construction, because --

QUESTION: Well, I thought in Spaziano we held that the Tedder standard was constitutional.

MR. LINK: My understanding was that it was constitutional as applied, as construed by the Florida supreme court. The Tedder standard on its face doesn't do anything to channel discretion. It is -- appears to be a gut reaction type of test where one looks at everything, the overall facts and circumstances and says, we don't like it, let's kill it. That's what -- it's the open-ended, unchannelled discretion that this Court said it was improper in Furman and Maynard and virtually every case since then. With a -- we have a constitutional

construction of the Tedder standard is the reasonable basis analysis that requires some analysis of mitigating circumstances and channels the discretion.

The Tedder standard on its face also makes no allowance for mitigating circumstances, in fact. It simply states that the facts suggesting a sentence of death must be so clear and convincing that no reasonable person could differ -- or about mitigation.

QUESTION: Is this -- is this your strongest argument, do you think? But you have another one I suppose.

MR. LINK: Yes, sir, we have several others. There were jury instructions in this case that the judge instructed the jury that they could find the defendant guilty under one of two theories, that is, felony murder or premeditated murder, the underlying felony being robbery. The evidence of robbery was held to be insufficient as a matter of law by the Florida supreme court subsequently. So the jury was instructed on theory of liability that was not supported by the evidence. But not only were they instructed on a theory of liability that was not supported by the evidence, they were also told that Mr. Parker's defense to that theory of liability, which was supported by the evidence, was not a defense at all.

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Mr. Parker testified on his own behalf and explained to the jury that he was present at the scene of the Sheppard homicide but that he did not participate voluntarily, that he was threatened by Tommy Groover, who was armed and he was not, and his wife had been threatened, and that explained his presence there. Duress was the defense to the Sheppard homicide.

The trial court judge instructed the jury that duress was not a defense to murder, period. This allowed the State to argue that Robert Parker was guilty even by his own testimony, even if his own testimony was true. The evidence that had been presented of fear and coercion was essentially -- became incriminating and not exculpatory.

QUESTION: Well, what's the constitutional principle here?

MR. LINK: The constitutional principle is that it denies due process to preventing him from presenting his defense. In other words, every man has a right to be heard and Mr. Parker was not heard. He was not given the right to be heard in this case. His defense was taken away from him. The judge essentially directed a verdict of guilt by telling the jury his defense wasn't a defense.

QUESTION: So this is a guilt or innocence argument?

MR. LINK: Yes, sir.

QUESTION: Your contention is that, that under the State law, coercion or duress is a defense to, to homicide?

MR. LINK: It is a defense to felony murder.

QUESTION: It is a defense to felony murder?

MR. LINK: Yes, Your Honor. It is a defense to the underlying felon -- whereas a defense to the underlying felony. It's well established --

QUESTION: As I understood that to mean that if, that if you are coerced into a bank robbery, into participating in a bank robbery and one of the other participants kills a bank guard, duress is a defense, but is there any State case that says if you're the one that kills the bank guard?

MR. LINK: No, sir, and that is -- but Your Honors' statement of facts is exactly what we have here. It is precisely what we have here. The evidence is undisputed that Robert Parker killed no one. He was an aider and abetter at all times and that was the evidence that was presented at trial. The basis of his liability in the Sheppard murder was based on the taking of a necklace and ring from the Sheppard girl after --

QUESTION: An aider or abettor in the murder itself, not just in the bank robbery though, not just in

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the robbery.

MR. LINK: Yes.

QUESTION: He was aiding and abetting in the murder. I mean, that was the crime that he walked into, wasn't it? It wasn't that he participated because of coercion and bank robbery and then somebody happened to get killed. He didn't pull the trigger but he was a participant in the, in the act of killing someone.

MR. LINK: The evidence under his own testimony was that he was present, did nothing to assist in the murder but was told to take the ring and necklace afterwards. So under those circumstances, the jury very well could have considered that he was an involuntary participant in the robbery. So we think that --

QUESTION: Can --

MR. LINK: -- that would fit within the ambient of the court's analogy there.

QUESTION: Leaving, leaving aside the question of whether he was a voluntary participant or not, as I understand it, you're also making the claim that based on the court's own -- from the trial court's own finding, there are the -- I'm sorry, the appellate court's own finding, there was insufficient evidence from which a robbery could have been found, is that correct?

MR. LINK: Yes, Your Honor.

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QUESTION: All right, now, as I understand it -- I went to the appendix, and as I understand it sufficiency of the evidence was raised prior to the submission of the case to the jury and I'll, I'll accept your position on that. Was this issue raised on the first habeas?

MR. LINK: On the -- Your Honor means on the direct appeal to the Florida supreme court?

QUESTION: Well, I, I didn't, I didn't mean that, but I will ask that, too.

MR. LINK: As to the direct appeal, the issue was raised in response to the Florida supreme court's finding that the evidence to support the robbery aggravating circumstance was insufficient. It was raised --

QUESTION: That's when you moved for rehearing, that's how you raised that.

MR. LINK: Yes.

QUESTION: Now on first habeas was it raised?

MR. LINK: In State court, no, sir, it was not.

QUESTION: What then is your answer to the question that you have waived it for collateral review?

MR. LINK: The answer is that we felt that we had, we had raised it in both the trial court and in the State supreme court during the direct appeal and that the,

there was no point and in fact we would precluded from raising it in State postconviction proceedings. There is a rule of Florida law that if you raise something in State postconviction that has been raised in the trial court, it's automatically dismissed. It's not proper. It's not valid.

QUESTION: So you defend on Florida procedure then?

MR. LINK: Yes, sir, and I'd like to reserve the remaining time for rebuttal.

QUESTION: Very well, Mr. Link.

Ms. Snurkowski, we'll hear from you.

ORAL ARGUMENT OF CAROLYN M. SNURKOWSKI

ON BEHALF OF THE RESPONDENTS

MS. SNURKOWSKI: Mr. Chief Justice, and may it please the Court:

There were five issues. We have four issues presently before the Court today. Most of the time was spent with regard to the first issue, but I would like to first address the second issue which was the latter issue that was just brought to the Court's attention with regard to whether in fact Mr. Link and Mr. Parker in particular preserve the claim for which he now asserts that review should be granted or review should be considered.

First and foremost, with regard to the

sufficiency of the evidence, there were 22 issues raised on direct appeal, two of which impact with regard to this particular claim. One of which was -- had to do with the guilt portion of the trial and if you recall in the facts of this case I have to digress for a moment, there were three murders. The first murder was charged premeditated murder but there was also a charge -- well, not a charge but the evidence went to a kidnapping and Mr. Link, on direct appeal, argued that the evidence was insufficient with regard to the Padgett murder to show the underlying felony of kidnapping. There was no, and I repeat, there was no argument presented on direct appeal with regard to the sufficiency of the evidence to raise the guilt as to the Nancy Sheppard murder, which was the underlying felony of robbery. So robbery --

QUESTION: Did they raise it at the trial court?

MS. SNURKOWSKI: Yes, they did.

QUESTION: Okay.

MS. SNURKOWSKI: There were arguments not so much as to the sufficiency. It was more to the idea that the -- an instruction -- there should not be instruction with regard to that. It wasn't per se the underlying felony.

The second impacted issue on this which brings us to the attention of the robbery had to do with the

penalty phase. At the penalty phase Mr. Link argued that the death penalty override was improper because an aggravating factor had been improperly found, to wit, that the murder occurred during the course of the robbery and that's how the robbery became an issue before the Florida supreme court.

The Florida supreme court in resolving this claim found that, yes, indeed, it concurred that the aggravating factor was not appropriate. And I would submit to the Court a reading of the Florida supreme court's opinion reflects that it was not because the robbery was not proven but rather there was not a sufficient nexus for that underlying felony to support the aggravating factor.

In Florida with regard to finding aggravating factors, in particular the underlying felony, the Florida supreme court has indicated that you have to have a nexus between a robbery that occurs and applying that aggravating factor to the case. I would submit to you that technically robbery -- there was robbery in this case -- it was sufficient to go to the jury with regard to an alternative theory. In fact, though, the record also reflects that the State prosecuted on premediated murder and very little reliance was made with regard to the underlying felony of robbery for the Nancy Sheppard

murder.

The first time this claim came up, and it was not raised in terms of Stromberg but rather as to the sufficiency of the evidence, is in a rehearing petition after the Florida supreme court found and concurred that the aggravating factor was not appropriate. And that argument now became a greater argument that in fact the sufficiency of the evidence was not there, therefore a theory of liability for which the defendant may have been convicted was not supported by the record.

I would submit to you first and foremost that the opinion does not support that, but more importantly raising something for the first time before the Florida supreme court on rehearing does not preserve nor raise fairly the issue before the State's highest court.

The record also reflects that collaterally this issue was not renewed or raised to make sure it had been preserved. It was not raised on appeal from the denial of a State court trial relief collaterally. And the first time it again arose was when the first habeas corpus petition was filed in Federal court. And it was put in the posture of sufficiency of the evidence.

The Federal district court in reviewing this claim found that there may have been confusion with regard to the Eleventh Circuit as to how it aired or looked at

issues that were preserved via a rehearing petition before an appellate court on direct appeal and came down on the side that the issue was not preserved. The court did make some discussion with regard to Stromberg and why in fact, even if we got to the issue, it was not a violation of -- a constitutional violation with regard to Mr. Parker.

The State stands before this Court as the Eleventh Circuit found that this particular claim was procedurally barred because the highest State court had not aired it. And they found that this claim was different -- the posture in this claim --

QUESTION: Ms. Snurkowski, when you say aired it, do you mean considered it?

MS. SNURKOWSKI: Yes. Yes. I guess I should use a better word than that, not air, Your Honor.

The Eleventh Circuit concluded that in fact that the case was -- the issue was procedurally barred because in fact under Harris v. Reed three members of this Court found that when a State court has not been fairly given an opportunity to look at a claim that that issue can -- you can't impose a plain statement of the court. If they don't have an opportunity you can't presume they're going to know how they're going to rule on this claim.

It -- Harris v. Reed concerns claims that are

fairly presented to the court and there is ambiguity with regard to whether an appellate court has applied procedural bar or has in fact addressed the merits.

QUESTION: Would the Florida court have been entitled in its discretion to hear this claim on rehearing?

MS. SNURKOWSKI: If it had found that there was sufficient merit to pique its interest, yes, it could have. And that is the whole purpose of what 3 -- what the rule 9.330 is all about. Like any court that has the ability to rehear, the State would submit that when you tender an argument every appellate court would be held hostage if a defendant could in fact raise a new claim on rehearing that had not been fairly and properly raised on direct appeal. They would always be in a posture of being blindsided by those claims if the court just merely said, denied.

And in fact, I believe I would submit to you that the court rule which is cited in our --

QUESTION: Well, suppose the court just says denied for failure -- because of failure to comply with our rules that the claim must be presented?

MS. SNURKOWSKI: That could have been done and, and in a perfect world I would be very happy if that had occurred, but the point of the matter is the most --

QUESTION: Well, you say held hostage, that's all they need to add.

MS. SNURKOWSKI: That's true, but I think that as arguments have been presented to this Court with regard to a case that -- just accept the argument hasn't been prepared but the lower court discussed it, that to require a court to say that might necessarily require a detailed opinion with regard to how many justices might view that particular claim. It all might not be on the same basis.

And in fact, we have a routine procedure and most, most rehearing -- courts that have rehearing procedures or have the ability to file rehearings assume that if there's something that has piqued the court's interest, they will address it and either clarify it or modify it. And in fact our rehearing rule is a rule that says you cannot argue something -- you can't argue something new, you can't raise things that have been already argued, and it's to allow for any misapprehension or misapplication of law.

I would submit to you that the argument that has been preserved or allegedly preserved did not fall into that category and were improper with regard to the filing of rehearing.

The State's argument is that this claim has never fairly been presented to a State court and certainly

we should not be bound by Harris v. Reed's plain statement and the fact that the Eleventh Circuit was correct in making that analysis that that issue is not before the Court.

With regard to the first issue and the jury override that took place -- as I understood the issue before the Court, it was whether the left open question in Spaziano was before this Court -- what standard should be applied in individual cases? Should it be an analysis that has been discussed by this Court with regard to Walton and Lewis v. Jeffers and in fact Godfrey v. Georgia, or in fact is there an independent State basis because Tedder is a State standard and therefore there is nothing beyond a determination that the standard is appropriate, the court does routinely apply --

QUESTION: May I ask you a -- may I ask you a couple of preliminary questions --

MS. SNURKOWSKI: Yes.

QUESTION: -- on this, because I have the feeling as I read through the papers that the -- all the reference to Tedder just confuses the issue and that what the district court found in this case was Hitchcock error, that there were nonstatutory mitigating circumstances that the record does not indicate that the trial judge even considered.

Now would you agree there are nonstatutory mitigating circumstances established by the evidence here?

MS. SNURKOWSKI: I would say there were nonstatutory evidence submitted. Whether it was established or not --

QUESTION: Well, for example, the district court relied on the fact the defendant was intoxicated at the time of the offense and that the Florida court has repeatedly said that's a nonstatutory mitigating circumstance. Do you think that was not established by the evidence?

MS. SNURKOWSKI: I don't believe that there was sufficient evidence to show that he was intoxicated. There was evidence during the course of the record to reflect that they had ingested drugs and had been drinking or had drinks during the day. There was no evidence that he was intoxicated, did not appreciate --

QUESTION: So you would view the trial judge as having rejected as a matter of fact the evidence that he was intoxicated?

MS. SNURKOWSKI: Based on this particular record, that is correct.

QUESTION: And how about the second nonstatutory mitigating circumstance the district judge relied on, namely the disparity in the sentencing?

MS. SNURKOWSKI: Well, in fact the disparity in the sentencing is a very good point, because in fact the person -- the ah, Elaine Parker, who was his ex-wife, turned witness and got second-degree murder. Billy Long who actually did the shooting and who was impugned to do the shooting by both Parker and in fact Tommy Groover got a life sentence. Mr. Groover, who was part and parcel to this drug collection day with, which it resulted in three deaths got the death penalty for the Padgett murder and the Jody Dalton murder and got life for the Nancy Sheppard murder. He in fact did not participate in the Nancy Sheppard murder to the extent that Mr. Parker did nor --

QUESTION: Well, without getting into the detail, you then agree with the district judge in this case that the petitioner's accomplices and codefendants receive lesser sentences for their parts in the Sheppard murder.

MS. SNURKOWSKI: I am suggesting that there were other sentences -- there were other sentences other than --

QUESTION: But if that is true and if, as he says by citing a bunch of Florida cases, that is regarded as a nonstatutory mitigating circumstance, how do we know the judge gave consideration to it or didn't give consideration to it?

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MS. SNURKOWSKI: This trial judge was also the trial judge in the Tommy Groover case and knew the facts and circumstances and the sentence of death imposed in those cases --

QUESTION: Are you saying that it was not a nonstatutory mitigating circumstance -- there was no such nonstatutory mitigating circumstance or that he took it into account and weighed it against the aggravating circumstances?

MS. SNURKOWSKI: The trial judge in this case -- I think he took it into account and found that it was not a valid nonstatutory mitigating circumstance based on the facts and Mr. Parker's participation in the Nancy Sheppard murder.

QUESTION: Of course, he doesn't explain any of that, does he?

MS. SNURKOWSKI: He, he does not explain, he doesn't go into graphic detail. He explains --

QUESTION: He doesn't say a word. He doesn't say a word about the nonstatutory mitigating circumstances, does he?

MS. SNURKOWSKI: That's absolutely true, but he in fact --

QUESTION: One other question -- would you agree that if he did not give consideration to nonstatutory

mitigation circumstances, that he committed constitutional error under Lockett and Hitchcock?

MS. SNURKOWSKI: He -- I would agree that if there was evidence that he did not do that, that would be --

QUESTION: Well, if --

MS. SNURKOWSKI: But there is no evidence in this record.

QUESTION: Now who has the burden of establishing whether or not he gave consideration to these nonstatutory circumstances that the district court found to have been established by the evidence?

MS. SNURKOWSKI: I think that the State has to come forward on an appellate review before the Florida supreme court and make an assessment as to whether in fact he properly followed the law as it is applied in Florida.

QUESTION: And they interpreted -- they said he had found no nonstatutory -- no mitigating circumstances.

MS. SNURKOWSKI: What they found was the trial --

QUESTION: No circumstances that needed to be balanced.

MS. SNURKOWSKI: Absolutely. But after that --what's important --

QUESTION: But if there were any that needed to

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be -- if there were any, they had to be balanced, didn't they?

MS. SNURKOWSKI: They had to be balanced, but important as to what was quoted to the court right after the phrase about how there were four properly applied. In light of these findings of facts suggesting the sentence of death are so clear and convincing that virtually no reasonable person could differ. They cited Tedder v. State, their own standard with regard to jury overrides and then they say --

QUESTION: And what does that establish?

MS. SNURKOWSKI: That in fact they were applying an appropriate standard. They were doing their analysis as they had done in every case before.

QUESTION: Does that mean that they -- does that mean that they agreed there were nonstatutory mitigating circumstances, but they were clearly outweighed, or were they agreeing with what they said that there were no such circumstances?

MS. SNURKOWSKI: They were making their independent determination because the next line says, the jury override was proper and the facts of this case clearly place it within the class of homicides for which the death penalty --

QUESTION: I see.

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MS. SNURKOWSKI: -- has been found appropriate. Spaziano v. Florida. I would submit to you that in perhaps shortened language --

QUESTION: Of course they did just the same thing in Hitchcock against Dugger, did they? They thought that was proper, too.

MS. SNURKOWSKI: In the sense, in the sense --

QUESTION: But they had -- but the opinion -- neither the opinion of the trial judge nor the opinion of the supreme court of Florida explains what weight if any was given to the evidence of nonstatutory mitigating circumstances. The ultimate conclusion is set forth. You're absolutely right. But is that sufficient?

MS. SNURKOWSKI: Yes, it is. I think they have, they have applied the standard that is set forth and to reach that standard you -- this Court in Spaziano had to review that which the Florida supreme court has done and in fact there is nothing in this case nor any other case since Spaziano to reflect that Spaziano was in fact wrong or that there's been any change with regard to the Florida supreme court's assessment of jury overrides and in fact the statistics that are being presented in the pleadings bear out what the State says more than what the defendant says, because in fact the history of the Tedder standard as applied in Florida has been a very careful one. It's

one of the most difficult things for the State to sustain in the Florida supreme court is a jury override. In fact, less than 30 percent of the overrides that have gone before the court have been sustained and I would submit to you that what is really being asked of the Court today is for you to make --

QUESTION: That 30 percent figure wasn't true during the period 1982 to 1984?

MS. SNURKOWSKI: Right. That's absolutely correct. It was a higher number, but I think we have to remember what has occurred during that period of time. This Court had just decided Spaziano, and to suggest that the Court was not aware of what was occurring in Spaziano and also not -- probably holding cases back that were of the genre would be misreading what courts do and that is they may very well have those cases that are important to them and they're waiting for a decision to resolve it. Not all those cases were in fact affirmed. And -- but I think we have to look at this through the period of time, that is, the existence of the Tedder standard and throughout the application of the Tedder standard, it's been very difficult and the Florida supreme court has not been rubber stamping, in essence, jury overrides.

And in fact the statements that are suggested that the court has now made pronouncements that there

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is -- we mean what we say -- we intend what we mean with regard to, to Tedder was not a reinvesting of a procedure in the Florida supreme court but it was warning and fair warning to the trial courts of the State of Florida that we intend to abide and we will continue to abide by the Tedder standard.

The State would submit that at best this Court's decision in Lewis v. Jeffers controls -- no relation be forthcoming. The State is not willing at this point to absolutely give up that in fact Spaziano ended the inquiry and that there should not be a -- there should be some further inquiry to make on a case-by-case basis. That certainly is what the Federal district court judge did --

QUESTION: May I ask you one other question?

MS. SNURKOWSKI: Yes, Your Honor.

QUESTION: Do -- can you reconcile the court of appeals' statement in this case that the Florida -- that the Federal court of appeals' statement in their opinion that referring to the Florida supreme court's opinion as saying that that court had concluded that the four statutory aggravating circumstances sufficiently outweighed the mitigating circumstances to justify the sentence. Do you think that's what the correct statement of the Florida supreme court held?

MS. SNURKOWSKI: I think the Florida

supreme -- yes, and I think the Florida supreme court had six statutory aggravating factors that was before it with regard to what the trial court found. They, they determined after consideration of this whole record that those -- there were two statutory aggravating factors that were not appropriate. They then reviewed those, the availability of those aggravating factors based on the statutory and nonstatutory mitigation that was tendered. And this, this is borne out by the arguments --

QUESTION: Let me, let me be sure I understand, because there are two quite different theories of what happened in the State's -- one is that they found no nonstatutory mitigating circumstances, so obviously they would outweigh. Alternatively they found that there were some nonstatutory mitigating circumstances, but that they were outweighed by the aggravating circumstances. And the court of appeals seems to say it was the latter and I would read the Florida supreme court as saying that it was the former. Which do you think if the correct view of the record?

MS. SNURKOWSKI: I think that -- I think that they took into consideration both statutory and nonstatutory. It -- they did not speak to that nor -- but they're not required to speak to that. And we have to presume that they follow the law.

QUESTION: So you presume that they found some nonstatutory circumstances -- mitigating circumstances but found that they were outweighed by the aggravating?

MS. SNURKOWSKI: I think what they did was they considered what the statutory -- nonstatutory mitigating circumstances were tendered and they did the requisite determination as to what was presented and found it did not rise to the level that satisfied that the mitigation outweighed the aggravation in this case. I don't think there has to be a per se finding --

QUESTION: But is that because four outweighs -- is greater than zero or because four is greater than two?

MS. SNURKOWSKI: No, the numbers don't matter. The numbers do not matter in Florida.

QUESTION: But is it -- but I still can't understand from your answer whether you think there were no nonstatutory mitigating circumstances found by the trial court or that they were found and found to be outweighed.

MS. SNURKOWSKI: I think what -- but again you're asking me something that I can't tell you --

QUESTION: You can't tell from the record.

MS. SNURKOWSKI: -- because it doesn't specifically speak to it, but I can tell -- I can suggest

to you that based on the instructions given, based on the evidence presented, we presume the trial court follows the law. He knew that evidence of nonstatutory mitigating evidence was to be considered by the jury. He in -- he'd so instruct the jury. The Florida supreme court reviewed this record, found that he was correct and we have to presume that they make a proper analysis. They're not really under attack with regard to their analysis. But the bottom line is that (a) he's not required to list the nonstatutory mitigating factors he may or may not have found.

QUESTION: There is no requirement that the record disclosed whether or not he considered it, we just presume he did.

MS. SNURKOWSKI: Absolutely, but we know -- but the record requires and the -- excuse me -- the statutes and the case law requires you consider it and that's what we have to be concerned with. Did he consider it? The fact that you and I may say, yes, in this particular case, we find this is a valid mitigating factor, is not for us to do. It's whether --

QUESTION: No, it's not that you and I say yes or no, it's what -- it's the fact that the Florida supreme court said one thing and the Federal court of appeals said they said something quite different as a basis for

reversing the district court. That's what troubles me.

MS. SNURKOWSKI: But I think that they're getting at the same thing. It's just that we have -- in many of these cases, it's not artfully presented with regard to exactly what the factors were that were balanced, whether they were mitigating factors of a statutory nature. We have the statute basically requires you make written findings of those and those are more, more important because under the statute -- but we cannot avoid nor do we require that the State trial court list with particularity the nonstatutory mitigating factors that are presented and that he finds. But I think Hitchcock, Lockett require the consideration. It does not mandate that he find those statutory mitigating factors.

QUESTION: But isn't it strange that when you read his opinion, the trial judge's opinion, he's in great detail about each one of the statutory mitigating circumstances with great elaboration of what the fact is. He gets to the nonstatutory, nonstatutory, he doesn't say a word about it.

MS. SNURKOWSKI: That's absolutely correct.

QUESTION: It's a rather dramatic great contrast.

MS. SNURKOWSKI: But I think that is indicative of the period of time we're talking about also, because

the statutes --

QUESTION: Which is the period when some judges didn't think they had to even look at the nonstatutory.

MS. SNURKOWSKI: Yeah, no, what, what I was going to point to was the statute provide that you make written findings and the emphasis was at that point in time on the statutory mitigating factors. But I don't think we can read into any of these cases that, and in particular this particular case with regard to the override, that the trial court did not consider that, that which was submitted to him, and I mean we're making this quantum leap from what in fact was presented because there was a wealth of evidence that one might consider nonstatutory mitigating factors. The jury was so instructed to that. The problem with this case is that we have an opinion by the trial court or an order by the trial court that does not fully explain what in fact he considered, not that he had to find, but what he considered. But I would submit to you that he has presumed to have followed the law.

The State would urge, and if there are no further questions, that the Eleventh Circuit's opinion be affirmed that it is correct with regard to the procedural bar claim as to the Stromberg issue and that they were absolutely correct in applying Spaziano with regard to

whether the Florida supreme court in this particular case properly overrode the jury's recommendation of life. The standard to be applied is properly set out by the Eleventh Circuit, that we are not here as the Federal district court did to reinvestigate and present our change or our view of how the facts come out -- should come out but rather to ascertain whether in fact the appellate court properly conducted its role. In this instance I would say it has. We ask that you affirm. Thank you.

QUESTION: Thank you, Ms. Snurkowski.

Mr. Link, do you have rebuttal?

REBUTTAL ARGUMENT OF ROBERT J. LINK

ON BEHALF OF THE PETITIONER

MR. LINK: Please the Court.

The -- just so it's clear, the evidence of intoxication that was presented at the trial court level was uncontroverted and it came primarily from State witnesses who all said the defendant was high, flying, under the influence, drunk, stoned, what have you. So that was uncontroverted. He took LSD, PCP, and drank 3 or 4 cases of beer in a 4-hour period, so the evidence is pretty strong about intoxication.

QUESTION: Yes, but the law doesn't require the judge to believe it.

MR. LINK: That is correct; however, the

judge -- the law requires the judge to consider it and there's no evidence that he did. Particularly he knew enough to tell the jury about the nonstatutory mitigating circumstances. He gave an instruction about it that didn't include any language that he had considered any of those factors in his, in his decision even though he considered virtually all of the nonstatutory mitigating circumstances. Even ones that were not argued were presented to the jury.

I also wanted to correct one thing. Billy Long, the actual trigger man, the one who killed the Sheppard girl, was given a plea bargain to second-degree murder. He's already been paroled. He was not given a life sentence.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Link. The case is submitted.

(Whereupon, at 10:53 a.m., the case in the above-entitled matter was submitted.)

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