IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,374

J.B. PARKER,

Appellant,

-v-

STATE OF FLORIDA,

Appellee.

On Appeal from Denial of Motion to Vacate Judgments and Sentences by the Circuit Court of the Nineteenth Judicial Circuit of Florida, in and for Martin County

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, J.B. Parker, respectfully submits his Initial Brief on appeal from the denial of his Rule 3.850 petition to vacate his conviction for murder and sentence of death. Largely through the erroneous introduction into evidence of a taped statement obtained from Parker in violation of his constitutional rights, Parker was convicted of first degree murder in connection with a highly publicized convenience store robbery, which culminated in the abduction and killing of Frances Julia Slater in April 1982.

In the early morning hours of May 5, 1982, Parker was arrested and charged as one of four alleged participants in the Slater case. Within hours of that arrest, the State obtained Parker's statement without recognizing his repeated requests for counsel of his own choice and in violation of his Sixth Amendment right to representation by conflict-free counsel.

At Parker's trial, the State contended that, on April 27, 1982, Parker and three co-defendants -- John Earl Bush, Alphonso Cave and Terry Wayne Johnson -- were involved in the armed robbery of the Li'l General Store in Stuart, where Slater worked as a cashier. According to the State, the four men kidnapped Slater, driving her to an isolated

stretch of highway. R 1144-46.[1] There, it was charged at Parker's trial, Slater was stabbed by Bush and shot by Parker. Id. At the separate prior trials of Bush and Cave, however, the State contended that each had fired the single shot that killed Slater. At separate trials, each of the defendants was convicted of first degree murder, and three received the death penalty.

Parker's conviction and sentence were chiefly the product of ineffective assistance of trial counsel,[2] who failed to raise critical arguments and neglected to introduce relevant, favorable evidence, and now proffers weak excuses and "strategies" to explain his shortcomings at trial. In particular, trial counsel: (1) failed at the pretrial suppression hearing to raise the fact that the intern from the Public Defender's Office, who purported to represent Parker

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1 References to record on the direct appeal of Parker's conviction and sentences are indicated by the initial "R" followed by the clerk's stamped page number.

2 This Court's affirmance of Parker's conviction and sentence of death also was the result of the ineffectiveness of appellate counsel. A petition for writ of habeas corpus on the basis of appellate counsel's ineffective representation is being filed concurrently with this appeal.

in connection with the giving of his taped statement, had a conflict of interest by virtue of his office's representation of a co-defendant that disqualified him from acting as Parker's attorney, and further failed to introduce evidence concerning Parker's requests, prior to making his statement, to obtain counsel of his own choosing (Point I); and (2) failed to make any efforts to conduct a reasonable investigation into Parker's background, or introduce evidence of Parker's character during the penalty phase of the trial (Point II).

Compounding the effects of these errors by trial counsel, was the decision by the court below to permit Parker's trial prosecutors to testify as "experts" on the effectiveness of defense counsel's representation at trial (Point IV). Indeed, those very prosecutors had contributed to Parker's wrongful conviction and sentence by withholding from the jury the fact that the State had argued, during the preceding trials of Parker's co-defendants, that the defendant then on trial was the triggerman who fired the single shot that killed Slater (Point III).

STATEMENT OF THE CASE

Parker's Taped Statement

A few hours after Parker was incarcerated at the Martin County Jail in Stuart, he asked to speak to County Sheriff James D. Holt. P 201-02, 986, 1109-10.[3] Parker asked Sheriff Holt for permission to call his mother, so that he could determine whether she had retained a lawyer to represent him. P 202, 986. At the hearing on Parker's Rule 3.850 motion, Parker denied that he initiated contact with Sheriff Holt out of a desire to make a statement. P 201-02, 226. Parker testified, instead, that he simply wanted permission to call his mother to determine whether she had retained counsel. P 201-02. Parker was never allowed to make that telephone call.

Shortly after Parker's arrest on May 5, 1982, the office of the Public Defender of the Nineteenth Judicial Circuit, in accordance with its normal procedures, had entered an appearance on behalf of Parker and two of his co-defendants by sending letters to the State Attorney and

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[3] References to the record on the appeal of Parker's post-conviction motion pursuant to Florida Rule of Criminal Procedure 3.850 are indicated by the initial "P" followed by the page number stamped by the court clerk.

police officials, including Sheriff Holt. R 1524-30. The letter advised Sheriff Holt that Parker and his co-defendants were entitled to representation by the Public Defender, and requested that "no contact be made with these individuals with regard to the taking of a statement . . . without first notifying" the Public Defender's Office so that it could "represent them effectively." R 1527.

Following his brief conversation with Parker, Sheriff Holt called Public Defender Elton Schwartz, told him that Parker desired to make a statement, and asked him to send a lawyer to meet with Parker. P 1156-57. Schwartz explained to Holt that members of his legal staff had already spoken with one of Parker's co-defendants, Alphonso Cave, about the underlying events. Id. Schwartz further explained that, on the basis of his staff's discussions with Cave, it was clear that a conflict of interest existed among the four co-defendants which prevented the Public Defender's Office from ethically representing Parker. Id.

Schwartz, recognizing his ethical responsibilities, at first declined to allow a lawyer from the Public Defender's Office to meet with Parker. P 1157. But Holt insisted. Id. Schwartz agreed to send Steven T. Greene, an intern working in the Public Defender's Office, to speak with Parker. However, due to the apparent conflict of interest, and his

desire to avoid being disqualified from representing any of the defendants, Schwartz instructed Greene not to discuss the facts of the case with Parker, and told Greene simply to advise Parker not to make a statement. See P 110-11, 1157. This critical limitation placed on Greene's ability to counsel Parker resulted directly from Schwartz's determination, made before he dispatched Greene to meet with and "represent" Parker, that his office was precluded from providing such representation.

Upon his arrival at the Martin County Jail, Greene met privately with Parker. P 111-12, 203-06, 990. Parker told Greene that he wanted to call his mother to determine whether she had retained the lawyer he wanted to represent him. P 117-18, 204, 987, 990. Greene did nothing other than suggest to Parker that he not make any statements. P 112, 204-06, 986-87. Consistent with the instructions he had received, Greene did not discuss the facts of the case with Parker. Id. Greene never disclosed to Parker the Public Defender's conflict of interest or the decision not to represent him. See id.; P 1169-71.

The encounter among Parker, Sheriff Holt, two detectives and Greene, was taped. The transcript reveals that Parker repeatedly expressed his wish to contact his mother to determine whether she had hired a lawyer to represent him. P 1199-1201. Parker repeatedly stated that he wanted

that lawyer to represent him. Id. Greene and Holt ignored Parker's requests and told Parker that Greene had been appointed as his lawyer. P 990-91, 1199-1201. Parker was never permitted to call his mother, and ceased asking to contact her because his requests consistently had been ignored. P 208-09, 987-88. Parker, who had previously heard a tape of a statement by Bush implicating Parker as the triggerman, P 197, 984, proceeded to make a statement concerning the circumstances of the crime. The statement proved to be the centerpiece of the State's evidence against Parker.

Several weeks later, Robert R. Makemson, a private attorney, was appointed to serve as Parker's trial counsel. R 1543. In September 1982, Makemson moved to suppress Parker's statement. Prior to the suppression hearing, however, Makemson made no effort to determine what had prompted Parker to abandon his reiterated request to call his mother in order to obtain a lawyer, and ultimately to make a statement. P 988. Nor did Makemson permit Parker to testify at the hearing. Id. In support of the motion to suppress, Makemson did not even mention to the court the fact that Greene could not ethically represent Parker and that, as a result of this conflict, could not provide the effective assistance of counsel guaranteed by the Sixth Amendment. The motion to suppress was denied. P 1187-90.

Parker's trial commenced on January 3, 1983. The State introduced Parker's taped statement into evidence as part of its case-in-chief, R 761, and also used it to impeach Parker's trial testimony. See P 1258-1331. The prejudicial use to which the State put Parker's statement was compounded by repeated references to the allegedly inculpatory nature of the statement in the State's summation. See P 1333-77. Parker was convicted of first degree murder on January 7, 1983. R 1201-03.

The Sentencing Phase

Only three witnesses -- Elmira Parker (Parker's mother),[4] Douglas Smith (Elmira Parker's longtime companion), and Dr. Paul Eddy, a psychologist -- testified on Parker's behalf during the sentencing phase of the trial. See R 1220-1386. Makemson waived reliance on the statutory mitigating circumstance of "no significant history of prior criminal activity," in an attempt to preclude the State from introducing evidence of Parker's prior juvenile and criminal record. P 68; R 1205, 1695. Makemson also instructed Smith

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[4] Mrs. Parker was unable to testify at the evidentiary hearing because she had suffered a stroke which left her paralyzed. She has since died.

and Mrs. Parker not to say that Parker was nonviolent or anything else positive about Parker's character, explaining that he wanted to prevent the State from impeaching those witnesses on the basis of Parker's prior record. P 46, 67, 974, 982. Accordingly, Mrs. Parker testified only about the number of children she had, her occupation, her current marital status, Parker's birthplace and date of birth, and whether she had ever seen Parker's alleged co-perpetrators. See R 1224-28. Smith merely testified that, to his knowledge, Parker did not normally associate with any of the co-defendants. R 1220-22.

As planned, Makemson elicited testimony from Dr. Eddy, an expert witness, that the psychological tests he performed on Parker indicated that Parker had a "passive" and "nonaggressive" personality. P 285-86, 1385-86. The door thus having been opened, the State was permitted to impeach Dr. Eddy's testimony with evidence of Parker's prior juvenile and criminal acts, quoting repeatedly from police reports. P 1398, 1404-05, 1478-86. The State also presented police officers who had personal knowledge of those acts as rebuttal witnesses. P 1464-77.

Having failed to understand that the State would be free to impeach Dr. Eddy's conclusion that Parker was "passive" and "nonaggressive" through introduction of evidence

of Parker's juvenile and criminal record, Makemson was wholly unprepared to rehabilitate his client through the introduction of positive character evidence. Makemson made no effort whatsoever to present additional mitigating testimony from any other witnesses. Indeed, Makemson had not even contacted any other potential character witnesses to testify on Parker's behalf in an effort to counteract the State's character attack on Parker. See P 283-85. On January 11, 1983, Parker was sentenced to death by electrocution. R 1507.

Appeal and Post-Trial Proceedings

On August 22, 1985, this Court affirmed the convictions and sentence of death imposed on Parker (reported at 476 So. 2d 134). This Court issued its mandate on December 3, 1985. On December 3, 1987, a Motion to Vacate Judgments and Sentences pursuant to Fla. R. Crim. P. 3.850 was filed in the Nineteenth Judicial Circuit (Martin County). P 455-92. An evidentiary hearing on Parker's motion was held before Chief Circuit Judge Dwight L. Geiger on February 11 and 12, 1988.[5] See P 1-359.

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[5] On February 9, 1988, Parker's counsel learned, for the first time, of the hearing scheduled for February 11 and 12. P 3. The court addressed the notice of hearing to an attorney at the firm representing Parker, without

Footnote continued on next page

Evidence was introduced concerning the circumstances surrounding the making of Parker's taped statement and the mitigation testimony that could have been introduced at the sentencing phase. P 38-41, 47-49, 238-39, 973-83, 1002-33.

The State's witnesses at the evidentiary hearing were Parker's trial attorney, and the former state attorneys who represented the State at Parker's trial, James Midelis, who currently serves as a county court judge, and Robert Stone. Notwithstanding their status as Parker's prosecutors, Stone and Judge Midelis were qualified as "experts" (over objection), P 149-50, 242-44, and gave their "expert opinions" that Makemson had not rendered ineffective assistance. See P 146-64, 240-52.

In a one-page order dated April 5, 1988, Judge Geiger denied the Rule 3.850 Motion. P 1599. A timely notice of appeal was filed on May 2, 1988. P 1608.

Footnote continued. . .

> also adding the firm name. Because that attorney does not practice at the branch office to which the notice was addressed (a fact noted on all of the pleadings), the notice was returned to the court unopened. P 3-8. The court did not thereafter seek to notify Parker's counsel of the hearing date, but simply left the returned envelope unopened. Id. It was only through receipt of a copy of the order to transport Parker that his attorneys were informed of the eviden-tiary hearing. P 10. Parker's counsel thus was provided no opportunity to prepare for the evidentiary hearing.

SUMMARY OF ARGUMENT

I. The Suppression Hearing

Under the standards established in Strickland v. Washington, 466 U.S. 668 (1984), Parker was deprived of his constitutional rights to the effective assistance of counsel at the suppression hearing concerning the taped statement. At the hearing, trial counsel failed to argue that the Public Defender's conflict of interest, which prevented the Public Defender's legal intern from discussing the facts of the case with Parker, deprived Parker of: (1) his right to the effective assistance of counsel; and (2) his right to consult with a lawyer upon invoking the right to an attorney.

Trial counsel also failed to argue that, prior to the time of his statement, Parker was denied a fair opportunity to obtain counsel of his own choosing, and that comments made by Sheriff Holt to Parker exceeded the limits of permissible clarification of arguably ambiguous statements. Additionally, without any reasonable strategic justification, trial counsel failed to introduce Parker's testimony regarding what compelled him first to abandon his desire for a lawyer of his own choosing, and finally to make his statement.

Had the taped statement been excluded, there is a reasonable probability that: (1) the jury would not have found Parker guilty of first degree murder; (2) the jury

would not have voted to recommend the sentence of death; and (3) the trial court would not have imposed the death penalty. Moreover, without the evidence of Parker's involvement in the underlying crimes derived from his taped statement, his death sentence for felony murder violated the constitutional standards for imposition of the death sentence under Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, ___ U.S. ___, 107 S. Ct. 1676 (1987).

II. The Penalty Phase

The actions and omissions of trial counsel at the penalty phase of the trial also deprived Parker of his right to the effective assistance of counsel. It being obvious that the State would be permitted to introduce evidence of Parker's juvenile and criminal history in response to a psychologist's testimony that Parker had a "passive" and "nonaggressive" personality, trial counsel should have conducted a reasonable investigation of Parker's background. See, e.g., Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987); Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986), cert. denied, 107 S. Ct. 1986 (1987). Trial counsel's failure to conduct such an investigation resulted in an inability to introduce substantial, available mitigation evidence.

Absent this evidence, the jury and trial court were presented with a totally negative, one-sided portrait

of Parker, which greatly increased the chances that Parker would receive the death penalty. Parker thus was deprived of his right to be sentenced on the basis of all of his unique qualities and characteristics as a human being. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 112 (1982); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978). Such evidence would have both substantially rehabilitated the psychologist's testimony, and added crucial information regarding Parker's character and background for the consideration of the jury and trial court. See, e.g., Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir.), cert. denied, 474 U.S. 998 (1985); Porter v. Wainwright, 805 F.2d 930, 934-38 (11th Cir. 1986), cert. denied, 107 S. Ct. 3195, 3196 (1987); Thomas v. Kemp, 796 F.2d 1322, 1324-25 (11th Cir.), cert. denied, 107 S. Ct. 602 (1986); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984).

III. Inconsistent Positions

At the trials of co-defendants Bush and Cave, the State contended that sufficient evidence had been presented at each trial for the jury to conclude, beyond a reasonable doubt, that the defendant then on trial was the triggerman. No disclosure of this fact was made to the trial court or the jury at Parker's trial where, once again, the State contended that yet a third person, Parker, could be found, beyond a reasonable doubt, to have fired that single shot.

A prosecutor must seek to do justice. He has a responsibility to guard the rights of the accused as well as those of society at large. Fundamental fairness therefore mandates that the State should have apprised the Parker jury, and Parker's trial counsel, that it had prosecuted two other defendants under theories squarely inconsistent and contradictory to the State's position at Parker's trial. See Green v. Georgia, 442 U.S. 95 (1979); Drake v. Kemp, 762 F.2d 1449, 1478 (11th Cir. 1985) (Clark, J., specially concurring), cert. denied, 106 S. Ct. 3333 (1986); United States v. Powers, 467 F.2d 1089, 1097 (7th Cir. 1972) (Stevens, J., dissenting), cert. denied, 410 U.S. 983 (1973).

The sentence of death recommended by the jury at Parker's trial was thus made under circumstances which render the decision unreliable, arbitrary, and capricious in violation of the Eighth and Fourteenth Amendments. Spaziano v. Florida, 468 U.S. 447 (1984); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976).

This Court's recent decision in Cave v. State, 13 FLW 455 (July 1, 1988), is not to the contrary. The point addressed on that appeal from the denial of Cave's Rule 3.850 Motion was whether the State improperly suggested to the Cave jury that Cave was the triggerman. The basis for this contention was that the prosecution's position was inconsistent with the evidence submitted at Cave's trial and

with the prosecutor's responsibility to provide a fair trial, and was contrary to the position the State had taken at the prior trial of co-defendant Bush.

No claim is made here of prosecutorial misconduct, and Parker does not contend that the inconsistent positions taken by the State precluded contention at Parker's trial that Parker was the triggerman. Rather, the point raised here is that Parker's due process rights were violated by the State's failure to disclose to the trial court and jury the factually inconsistent positions taken at the previous trials. The jury was entitled to know these facts and to take them into account in assessing the evidence against Parker and in determining whether the State -- which itself had demonstrated, through its inconsistent factual contentions, its uncertainty as to the identity of the triggerman -- had established, beyond a reasonable doubt, Parker's responsibility for firing the single fatal shot.

IV. The "Expert" Testimony

The court below erroneously permitted Judge Midelis and Robert Stone, the prosecutors at Parker's trial, to render "expert opinions" that Parker was not denied the effective assistance of counsel. Such testimony was received over defense counsel's objections that an expert opinion cannot be given on a question of law and that Stone and Judge Mide-

lis, as Parker's prosecutors, could not supply the disinterested testimony required of experts. This ruling was erroneous, and requires reversal of the denial of Parker's petition. See Town of Palm Beach v. Palm Beach County, 460 So. 2d 879 (Fla. 1984); Gurganus v. State, 451 So. 2d 817 (Fla. 1984); City of Cooper City v. PCH Corp., 496 So. 2d 843 (Fla. 4th DCA 1986).

ARGUMENT

POINT I

PARKER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL ON HIS MOTION TO SUPPRESS

On Parker's motion to suppress his taped statement, Makemson failed to introduce evidence regarding: (1) what Parker meant and intended to convey when he told Steven T. Greene and Sheriff Holt that he wished to call his mother to determine whether she had retained a lawyer to represent him; (2) whether Parker considered Greene his lawyer, or sought to be represented by another attorney; and (3) exactly what prompted him first to abandon his request to call his mother and then make his statement. Makemson also failed to assert the most fundamental legal arguments, establishing that Greene could not be the "counsel" to which Parker was entitled under the United States Constitution.

Makemson's failures amount to ineffective assistance

of counsel under the standards of Strickland v. Washington, 466 U.S. 668 (1984). Strickland requires a defendant to show that: (1) his counsel's representation "fell below an objective standard of reasonableness," id. at 688; and (2) he was prejudiced, in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," id. at 694. The United States Supreme Court defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Id.

Here there is plainly a reasonable probability that, absent Parker's taped statement and its use by the prosecution, the jury would not have found Parker guilty of first degree murder, or rendered an advisory verdict of the death penalty, and the trial court would not have imposed the death penalty. Without the evidence of Parker's involvement in the crimes derived from the statement, the imposition of the death penalty would have violated the constitutional standards of Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, ___ U.S. ___, 107 S. Ct. 1676 (1987).

A. Trial Counsel Failed to Argue that Parker's "Representation" by Greene Was Constitutionally Deficient

The confidential communications between Cave and staff attorneys of the Public Defender's Office led Public

Defender Schwartz to the conclusion that a conflict of interest existed between Cave and Parker. See P 1156-57, R 1533-35. On the basis of the conflict, Schwartz determined -- prior to any discussion between his office and Parker -- that the Public Defender's Office would not be able to represent Parker. Id. Schwartz also was acutely aware that establishing an attorney-client relationship with Parker, and obtaining, in the course of that relationship, confidential information, could well result in precluding his office from representing any of the defendants. P 1157.

Makemson made no effort to argue that the Public Defender's conflict of interest prevented Greene from satisfying Parker's Sixth Amendment right to effective assistance of counsel. Had he made this fundamental argument, it is reasonably probable that the suppression hearing court would not have found that Greene's presence satisfied Parker's constitutional right to an attorney, or that Parker validly waived his rights by proceeding to give a statement.

At the time of the 1982 suppression hearing, it was well-settled that where an actual conflict of interest impairs an attorney's representation of a defendant, the defendant's Sixth Amendment right to the effective assistance of counsel is violated. See Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60, 76 (1942). In Holloway, the Supreme Court reasoned that: "The mere

physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." 435 U.S. at 490. In Cuyler v. Sullivan, 446 U.S. 335 (1980), the Supreme Court established that an attorney's conflict of interest deprives a defendant of his right to the effective assistance of counsel when the defendant shows that: 1) an actual conflict existed; and 2) the conflict adversely affected the attorney's performance. Actual prejudice need not be shown. Holloway v. Arkansas, 435 U.S. 475, 489-91 (1978). And, as the Holloway Court made clear, this right applies equally to pretrial proceedings. Id. at 490.

1. The Public Defender's Conflict of Interest

It is undisputed that, prior to the time Greene met with Parker at the Martin County jail, Public Defender staff attorneys had spoken with Cave, and heard Cave's version of the events underlying the charges against the defendants. P 1156. These discussions gave rise to an attorney-client relationship between Cave and the Public Defender's Office, and precluded the Public Defender's Office from entering into conflicting representations of the other defendants. Because Cave had implicated Parker as the triggerman, see P 953, the Public Defender's Office could not thereafter ethically represent both Cave and Parker.

On the basis of what his staff attorneys learned from Cave, Public Defender Schwartz determined -- prior to any discussion between his office and Parker -- that a conflict of interest existed among the four defendants such that the Public Defender's Office could not and would not represent Parker. P 1156-57. These facts are clearly evidenced by the Public Defender's motion of May 6, 1982, in which Schwartz sought appointment of private counsel for Parker as a result of the conflict. See R 1533-35.

By the time of Parker's pretrial suppression hearing, both lower federal courts and this Court had also emphasized the importance of non-conflicted counsel to the Sixth Amendment right to counsel. See, e.g., Porter v. United States, 298 F.2d 461, 463 (5th Cir. 1962) (effective representation lacking where "counsel, unknown to the accused and without his knowledgeable consent, is in a duplicitous position where his full talents . . . are hobbled or fettered or restrained by commitments to others"); United States v. Alvarez, 580 F.2d 1251, 1256 (5th Cir. 1978) ("an attorney, whether retained or appointed, laboring under an actual conflict of interest . . . fails to accord him effective assistance of counsel"); Foster v. State, 387 So. 2d 344 (Fla. 1980).

Having made his determination that he could not represent both Cave and Parker due to the conflict, Schwartz

was in fact required by Florida law to seek appointment of other counsel for Parker. See Fla. Stat. Ann. §§ 27.53(3) (West 1974), 925.035(1) (West 1985). See also Babb v. Edwards, 412 So. 2d 859, 862 (Fla. 1982) ("section 27.53(3) clearly and unambiguously requires the trial court to appoint other counsel not affiliated with the public defender's office upon certification by the public defender that adverse defendants cannot be represented by him or his staff without conflict of interest"). Rather than cease all representation of Parker in light of the acknowledged conflict, Schwartz committed the grievous error of sending Greene to "represent" Parker at a critical stage of the proceedings. By instructing Greene not to review the facts with Parker, Schwartz hobbled his talents to Parker's lasting detriment.

2. The Adverse Effect of the Conflict on Greene's Ability to Represent Parker

It is beyond question that the conflict adversely affected Greene's ability to counsel Parker when he met with him at the Martin County Jail. The conflict rendered Greene incapable of actually assisting Parker by confidentially discussing the facts and relevant law. As a result of the conflict, Greene could do no more than essentially advise Parker of a right which he already knew he had.

Schwartz did not instruct Greene: (1) to inform Parker of the Public Defender's conflict of interest and that it could not represent Parker in this matter; (2) to inform Parker that, as a result of this conflict, he was precluded from discussing the facts or effectively counseling him in deciding whether to make a statement; (3) to inform Parker that he had a right to another attorney, and that he should insist on exercising that right before making a statement; and (4) to insist that Parker be permitted to contact another attorney.

Greene's sworn statements make clear that he never informed Parker of the Public Defender's conflict of interest, the extent to which that conflict precluded Greene's effective representation, and Parker's right to another attorney. P 204-05, 1169-71. Greene aggravated these critical omissions by insisting, in the face of Parker's repeated requests for other counsel, that he represented him. P 990-91, 1199-1201. Greene, however, did not review the facts or the substance of any statement Parker might make. P 112, 205. Nor did Greene explain to Parker the relevant law, including the felony murder doctrine. P 112-113. Greene merely advised Parker not to make a statement to the Sheriff, P 112, 204, 1169-71, and repeatedly stated that he, Greene, was Parker's counsel. P 990-91, 1199- 1201.

It is axiomatic that, prior to the commencement of an interrogation, an accused must be advised of his right to an attorney and to remain silent, and that when an accused requests a lawyer, questioning must cease and the accused must be provided the opportunity to "consult" with a lawyer. Miranda v. Arizona, 384 U.S. 436, 445 (1966). The importance of the accused's right to consult with his lawyer -- and the attorney-client privilege which protects such consultations -- was highlighted in Fare v. Michael C., 442 U.S. 707, 721 (1979):

> [A] lawyer is able to protect his client's rights by learning the extent, if any, of the client's involvement in the crime under investigation, and advising his client accordingly.

This reasoning makes clear that a defendant's right to an attorney includes the right to an attorney-client relationship, the confidential communications protected by that relationship, and advice based on that relationship.[6]

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[6] The American Bar Association's standards for defense counsel also emphasize the importance of establishing an attorney-client relationship, actual consultation between defense counsel and defendant regarding the underlying facts, and assistance based on such consultation. See, e.g., A.B.A. Standards for Criminal Justice §§ 4-3.1 (establishment of attorney-client relationship); 4-3.2 (interviewing the client) (2d ed. 1982 supp.).

Greene could not have satisfied Parker's right to an attorney because the Public Defender's conflict of interest prevented Greene from discussing freely and candidly with Parker the extent of his involvement in the crime. The importance of the right to consult with an attorney prior to making any statement is clearly underscored by Parker's own evidentiary hearing testimony. Absent advice from Greene based on the facts and the law, Parker could well have thought that denying he was the triggerman would be sufficient to avoid the death penalty. As Parker testified, had he understood that the death sentence could also be imposed under the felony murder doctrine, he never would have made a statement. P 205-06.[7]

Notwithstanding his instructions to Greene, Schwartz recognized the importance of a defendant's right to consult

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[7] The vital importance of the lawyer's ability to discuss with his client the relevant facts and legal issues to the effective assistance of counsel is noted in numerous other cases, none of which Makemson cited. See, e.g., Neal v. Wainwright, 512 F. Supp. 92 (M.D. Fla. 1981) (because defense counsel did not inform the defendant of the elements of the crimes with which he was charged or that he had a potential conflict of interest, defendant's guilty plea and waiver of the right against self-incrimination was not knowing, intelligent and voluntary); Rinehart v. Brewer, 561 F.2d 126 (8th Cir. 1977) (as a result of counsel's failure to inform defendant of possible penalty, defendant did not validly waive rights when he entered guilty plea).

with his attorney about the facts. In his May 6, 1982 motion for appointment of private counsel for Parker on the grounds of conflict of interest, Schwartz stated:

> That the office of the Public Defender conferred with the defendants, J.B. Parker and John Earl Bush, but only for the purpose of completing the financial information attached hereto; advising them of their constitutional rights; and advising them as to the possible consequences of waiving any of their constitutional rights prior to being advised by an attorney appointed to represent them concerning the merits of the case.

R 1534 (emphasis added). Although Schwartz clearly recognized the importance of unconflicted counsel to provide full advice and representation before waiver of any constitutional rights, his motion was made too late to prevent the irreparable harm already inflicted on Parker as a direct result of his office's attempt to represent Parker while hobbled by a conflict.

Parker's Sixth Amendment right to the effective assistance of counsel was violated when Greene attempted to act as Parker's attorney at the Martin County Jail.[8] Had

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[8] The transcript of the May 5, 1982 taped statement and the evidentiary hearing reveal no suggestion that Parker waived his right to nonconflicted counsel. In order for a defendant to knowingly and voluntarily waive that right, he must have been aware of the conflict, the limitations on his attorney imposed by the conflict, and his right to obtain other counsel. See, e.g., United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978); Gray v. Estelle, 616 F.2d 801 (5th Cir. 1980); DeArce v. State, 405 So. 2d 283 (Fla. 1st DCA 1981).

Makemson pointed out this fundamental constitutional violation at the suppression hearing, it is certainly likely that the court would have suppressed Parker's taped statement. Makemson's failure to raise Greene's ineffective assistance itself constitutes ineffective assistance under Strickland.

Likewise, if Makemson had argued, on the basis of Miranda and Michael C., the centrality of consultation with an attorney, and legal advice based on that consultation, to one's constitutional right to an attorney prior to police interrogation, it is reasonably probable that the suppression hearing court would not have found either that Greene adequately represented Parker because he was "a lawyer" who gave Parker good advice, or that Parker validly waived his rights.

B. Trial Counsel Failed to Argue that Parker's Right to Counsel of His Choice Was Violated

In Powell v. Alabama, 287 U.S. 45, 53 (1932), the United States Supreme Court held that the right to counsel affords a defendant "a fair opportunity to secure counsel of his own choice." Numerous lower federal courts have expounded on this right. See, e.g., United States v. Inman, 483 F.2d 738, 739-40 (4th Cir. 1973), cert. denied, 416 U.S. 988 (1971); Gandy v. Alabama, 569 F.2d 1318, 1323 (5th Cir. 1978); Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981), cert.

denied, 454 U.S. 1162 (1982). As explained by the Sixth Circuit in Linton:

> The right to choose one's own counsel is an essential component of the Sixth Amendment because, were a defendant not provided the opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut.

656 F.2d at 209.

From the moment Parker was arrested and placed in a cell at the Martin County Jail on May 5, 1982, he consistently attempted to assert his right to secure counsel of his own choosing. When a magistrate first informed Parker of the charges against him, Parker expressed his desire to hire his own counsel. P 200, 497; R 1550. Having seen his mother at the Fort Pierce State Attorney's office in the company of the mother of someone who worked for a lawyer who had previously represented him, Parker reasonably believed that his mother was attempting to retain that lawyer. P 197-98, 496. During their brief private conversation at the jail, Parker told Greene that he believed his mother was attempting to retain a lawyer, and he wanted that lawyer to represent him. P 117-18, 497-98, 502. And, during the taping of the statement, Parker repeatedly and unmistakably

expressed a desire to be represented by counsel other than Greene. See P 1199-1201.

Makemson never argued that Parker was never given a fair opportunity to secure counsel of his own choosing, despite the strong evidence of Parker's desire for counsel other than Greene, and the absolute refusal of both Greene and Holt to acknowledge and permit Parker to exercise that constitutional right. Again, had he argued this fundamental issue, there is a strong possibility that the suppression hearing court would have suppressed Parker's taped statement.

C. Trial Counsel Failed to Argue that the Statement Should Be Suppressed Because the Sheriff Exceeded Legitimate Clarification of Ambiguous Statements

Even if clarification of Parker's intention's was required, Sheriff Holt went beyond the scope of legitimate clarification. The case law as of September 1982 limited Holt to clarifying Parker's desires. On the basis of the facts and the case law, Makemson was obligated to argue that Sheriff Holt's response to Parker went beyond any justifiable attempt at clarification.

In Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979), the court reiterated and explained its earlier holding in Nash v. Estelle, 597 F.2d 513 (5th Cir.), cert. denied,

444 U.S. 981 (1979), that when a defendant makes an equivocal request for counsel, further questioning is strictly limited to clarifying the request. When the statement is clarified as a request for an attorney, all questioning must cease. Thompson, 601 F.2d at 771. The court further reasoned that:

> [T]he limited inquiry permissible after an equivocal request for legal counsel may not take the form of an argument between interrogatories and suspect about whether having counsel would be in the suspect's best interests or not. Nor may it incorporate a presumption by the interrogator to tell the suspect what counsel's advice to him would be if he were present. Such measures are foreign to the purpose of clarification, which is not to persuade but to discern.

Id. at 772.

The tape of Parker's statement reveals the following exchange among Parker, Greene and Sheriff Holt:

Parker:	Do I have to sign this to talk to you all?
Sheriff Holt:	No, sir. You can still talk to us without it.
Greene:	Well, you can -- they want you to sign that there because it states right here that you're waiving your rights. Do you understand your rights here?
Parker:	Yes, sir, the reason I was wanting one here.
Greene:	Excuse me?

Parker: That is why I was wanting my lawyer. I want to see if my mom has a lawyer so I can have him with me.

Greene: Well, that's why I'm representing you today. Do you wish to make no statements until you get your mother to get another lawyer other than myself to represent you?

Parker: I was waiting on -- I want my mom to get me a lawyer.

Sheriff Holt: Okay, J.B., --

Parker: Another one.

Sheriff Holt: I think I understand where you're coming from. You asked me to come over and that's why I'm here. I went back and explained to you that you did have a lawyer appointed for you. Nobody is going to make you make a statement. You asked me could you talk to me and explain to me just exactly what happened, that you felt like that there was something being put on you that wasn't right. You wanted to tell me the story just like it was. Am I correct in that?

P 1200-01 (emphasis added). This exchange demonstrates that Greene sought to clarify Parker's arguably equivocal statements, and that Parker unambiguously responded that he wanted a lawyer other than Greene to represent him at the taping session. At this point, under Thompson, all questioning should have ceased and Parker should have been allowed to call his mother.

Instead of stopping the taping session, however, Sheriff Holt proceeded to question Parker further. As suggested by Thompson, it cannot be assumed that Sheriff Holt's comments were merely designed to clarify Parker's desires. Sheriff Holt's statement that "I went back and explained to you that you did have a lawyer appointed for you" directly challenged and denied Parker his constitutional rights to a non-conflicted lawyer and a lawyer of his own choosing. The statement was also inaccurate and misleading because -- as Sheriff Holt was aware -- the Public Defender had decided not to represent Parker due to the conflict of interest. P 1156-57.

Furthermore, by reminding Parker that "you felt like that there was something being put on you that wasn't right," P 1201, Sheriff Holt encouraged Parker to talk by reinforcing a motive for Parker to make a statement -- to establish his innocence. Sheriff Holt's comments exceeded the permissible limits of legitimate clarification of equivocal statements under Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979). Had Makemson argued this position at the pretrial suppression hearing, it is reasonably probable that the court would have granted Parker's motion to suppress.

D. Trial Counsel Failed to Introduce Parker's Testimony at the Suppression Hearing

Like his failures to make the most fundamental and appropriate legal arguments at the suppression hearing, Makemson's failure to introduce Parker's testimony at that hearing was objectively unreasonable under Strickland v. Washington, 466 U.S. 668 (1984). The record below demonstrates that Makemson's failure to introduce Parker's testimony resulted from: (1) his failure to perceive the importance of that testimony to the suppression hearing court's ultimate findings; and (2) his facile acceptance of Parker's own layman's account of why he made his statement, and corresponding failure to explore with Parker precisely what prompted him to abandon his request to call his mother and make a statement. The record establishes no plausible strategic reason to refrain from introducing Parker's testimony.

1. The Significance of Parker's Testimony at the Suppression Hearing

At the suppression hearing, the court was required to determine whether Parker waived his rights to remain silent and to an attorney voluntarily, knowingly and intelligently, and whether he made his statement freely and voluntarily. See, e.g., United States v. Edwards, 415 U.S. 800 (1974); Ross v. State, 386 So. 2d 1191 (Fla. 1980). Makemson testi-

fied that his strategy at the hearing was to show that, prior to making his statement, Parker expressed a desire for an attorney. P 82. That much is clear from the transcript of the tape itself. Contrary to Makemson's strategy, however, this evidence, standing alone, was not sufficient to rebut the State's contention that Parker voluntarily abandoned his rights and made a statement.

The taped statement reveals that Parker ultimately abandoned his request to call his mother, and proceeded to make his inculpatory statements. Only Parker could have described his state of mind at that point and explained what compelled him first to cease requesting to contact his mother, and then to make his statement. Had Parker testified, he would have explained that he did not voluntarily forego his desire to be represented by counsel of his own choosing. See P 207-08, 987-88. Rather, Parker gave up seeking to have the attorney he believed his mother had retained because both Sheriff Holt and Greene responded to his repeated requests to call his mother by stating that Greene was Parker's lawyer. Id. Parker was therefore forced to conclude that he was not going to be allowed a different attorney. Id.

Similarly, had he had the opportunity to testify at the suppression hearing, Parker would have explained that he did not make his statement voluntarily. See P 987-88.

Instead, when Sheriff Holt stated that "you felt like that there was something being put on you that wasn't right," P 1201, Parker was reminded of Bush's identification of Parker as the one who shot Slater. See P 209-10, 987-88. This compelled Parker to tell his side of the story. Id.

Parker's testimony would also have shed crucial light at the suppression hearing on what he understood his rights to be at the time of the taping, how he perceived Greene, and what he meant and intended to say when he told Greene and Sheriff Holt that he wanted to call his mother. Parker would have explained that when he stated on the tape "Yes sir, the reason I was wanting one here," P 1200, in response to Greene's questioning, he meant that he wanted to invoke his right to an attorney. See P 207. Also, when Parker stated that "I was waiting on -- I want my mom to get me a lawyer. . . . Another one," P 1201, he was affirming his desire to speak with the lawyer his mother was obtaining, and not Greene. See P 207. Parker's evidentiary hearing testimony thus unequivocally reveals that he never considered Greene to be his attorney.

Furthermore, if Makemson had raised the legal arguments that Parker was entitled to a nonconflicted lawyer of his own choosing, see supra pp. 18-29, Parker's testimony that he desired a lawyer other than Greene, and that Greene

did not discuss with him the facts or even the felony murder doctrine, might well have caused the court to conclude that Parker's constitutional rights were violated. However, Makemson never even asked Parker how he perceived Greene because -- as he testified at the evidentiary hearing -- he was not "so concerned as to whether or not Mr. Parker did not want Mr. Greene to be his lawyer . . . ." P 296.

2. Trial Counsel's Failure to Introduce Parker's Testimony Was Not a Reasonable Strategy

At the evidentiary hearing, Makemson explained his "strategy" behind not introducing Parker's testimony at the suppression hearing: Parker had told him that he asked to see the Sheriff because he was aware that Bush had accused him of being the triggerman and, therefore, he wanted to tell the Sheriff his side of the story. P 81-82. Makemson believed that if Parker were to testify to this effect at the suppression hearing, it would undercut his claim that the statement and waiver of his rights were involuntarily made. P 294.

This does not amount to a valid strategic reason for excluding Parker's testimony from the suppression hearing. What Makemson claimed Parker told him concerning why he made his statement is not inconsistent with Parker's sworn statements at the evidentiary hearing that he felt compelled

to abandon his rights and make a statement. Makemson's ineffectiveness lies in his acceptance of what Parker "told me," P 270, and his own failure to learn from Parker the legally significant facts concerning why he felt compelled to abandon his desire to call his mother to determine whether she had found a lawyer to represent him.

E. Trial Counsel's Deficient Representation at the Suppression Hearing Prejudiced Parker at the Guilt and Sentencing Phases of His Trial

Makemson's failures to make the most appropriate legal arguments and to introduce Parker's own testimony at the pretrial suppression hearing constituted deficient representation that prejudiced Parker at the guilt and sentencing phases of his trial. Absent Parker's statement, there is a reasonable probability that the jury would not have found Parker guilty of first degree murder or rendered an advisory verdict of the death penalty, and the trial court would not have imposed the death penalty. Moreover, without the taped statement, the death penalty could not be imposed on Parker without violating the constitutional standards of Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, ___ U.S. ___, 107 S. Ct. 1676 (1987).

1. The Significance of the Taped Statement to Parker's Conviction

The fundamental importance of Parker's taped statement to the State's case against Parker at both the guilt and sentencing phases of his trial is conclusively demonstrated in the record below.

Although it is likely that Parker sought to exculpate himself when he made his taped statement, the statement is highly incriminating. At the trial, the State was able to argue, solely on the basis of the statement, that Parker admitted that:

- Before Parker and his codefendants arrived in Stuart, Parker heard Bush state his intention to commit a robbery. See P 1202.
- Parker was aware that Bush had a gun before the first stop at the convenience store. See P 1204.
- Parker believed that Bush intended to commit robbery during the first stop at a convenience store. Id.
- Parker walked into the convenience store during the second stop even though he knew Bush intended to commit a robbery. Id.
- Parker was inside the convenience store during the robbery and he walked out when a car pulled up because he did not want to be identified. See P 1204-05.
- After Slater was placed in the car, Parker heard Bush state that he

intended to kill her. See P 1205-06.

- Parker saw Bush stab and shoot Slater. See P 1206-07.
- Parker heard Slater plead for her life. See P 1212.
- Parker heard Bush say prior to entering the convenience store the first time that he intended to kill Slater, and Parker believed that he had planned and intended to kill her. See P 1212-13.

The State considered the taped statement so incriminating that it introduced it into evidence as part of its case-in-chief at the guilt phase of Parker's trial. See R 761. Parker testified in his own behalf at the guilt phase -- obviously in hopes of mitigating the incriminatory character of his taped statement -- and was cross-examined on the basis of that statement. See P 1258-1331. In the process of using the statement to impeach Parker's direct testimony, the State Attorney emphasized Parker's early awareness of Bush's intention to commit crimes and repeatedly quoted statements in which Parker arguably admitted participating in the crimes. Id.

The State's closing argument at the guilt phase demonstrates the State's strong reliance on Parker's statement to prove his guilt. See P 1333-77. Again, the State Attorney quoted portions of the tape which purportedly revealed Parker's

knowledge of Bush's criminal intentions and proved Parker's active participation. See P 1341, 1343, 1353-54. Furthermore, to demonstrate to the jury that Parker was guilty as an aider and abettor, the State relied heavily on Parker's admissions in his statement, particularly his admission that he entered the convenience store knowing of Bush's criminal intentions. See P 1340-43, 1346-47, 1376-77. Absent the taped statement, there would be no evidence to support these contentions.

2. Absent the Taped Statement, It Is Reasonably Probable that the Jury Would Not Have Found Parker Guilty of Murder

Without Parker's statement, there is a reasonable probability that the jury would not have found Parker guilty of first degree murder on the grounds of either premeditated killing or felony murder.

Although Georgeanne Williams testified at Parker's trial that she spoke to Parker through a crack in the door of his cell at the Martin County jail, and claims that Parker informed her that he shot the victim after co-defendant Bush stabbed her, R 881-83, a separate argument raised by Parker on this appeal illustrates why the State cannot rely on Williams' testimony as sufficient evidence of premeditated killing. Because the State had taken the inconsistent

position at the two prior trials of co-defendants Bush and Cave that those defendants were the triggermen, the dictates of Due Process required it to inform the jury and trial court of that fact. See infra Point III. The State's inconsistent positions demonstrates the State's own disbelief of Williams' testimony. Had proper disclosure of this fact been made to the jury, there is a reasonable probability that they would not have believed Williams' testimony.

Williams' testimony was highly suspect, and it is probable that neither the trial court nor the jury chose to believe her. Williams was the girlfriend of Parker's co-defendant Bush. R 892-95. Although her boyfriend had already been convicted at the time of Parker's trial, Williams still had substantial motives to lie. First, Bush's conviction had not yet been affirmed, and Williams might therefore have believed that she could still save him from electrocution. Second, Williams first told the state attorneys what Parker allegedly told her at a deposition prior to the trials of both Bush and Parker. See P 1379-80. Having already made that sworn statement at a time when she undoubtedly had motives to lie, she may well have faced charges of perjury if she changed her testimony.

Setting aside Parker's taped statement and Georgeanne Williams' testimony, the evidence fails to prove that Parker is even guilty of felony murder. That evidence does not tend to prove, beyond a reasonable doubt, Parker's prior knowledge of, or active participation in, the robbery, kidnapping and killing.

3. The Significance of the Taped Statement to Parker's Death Sentence

The importance of the taped statement to the imposition of the death sentence on Parker is undeniably revealed in the trial court's findings of fact, pursuant to Fla. Stat. § 921.141(3) (1981), supporting its conclusion that the statutory aggravating circumstances justified imposition of the death penalty. P 569-70. The overwhelming majority of those findings are drawn either directly from Parker's incriminating remarks in his taped statement or from inferences derived therefrom. Given the trial court's reliance on Parker's taped statement, it may be fairly presumed that the jury also looked substantially to the taped statement in both balancing the statutory aggravating and mitigating factors, and rendering an advisory verdict in favor of the death sentence by an eight to four vote.

4. In the Absence of the Taped Statement, Imposition of the Death Penalty on Parker Would Plainly Violate the United States Constitution

Even assuming there was sufficient evidence, other than the taped statement, to support a finding that Parker was guilty of first degree murder, that evidence was most certainly not sufficient for Parker to receive the death penalty under the constitutional principles set forth in the Supreme Court's decisions in Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, ____ U.S. ____, 107 S. Ct. 1676 (1987).[9]

The vast majority of the trial court's findings of fact in support of the aggravating circumstances could not have been found in the absence of the taped statement. And, any findings derived from Georgeanne Williams' testimony might very well not have been found by either the jury in its advisory verdict or the trial court if the State had informed them -- as it had an obligation to do -- that the State had twice previously argued that someone other than Parker was the triggerman. See infra Point III.

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[9] The court below incorrectly ruled that Parker's claim that his death penalty was invalidly imposed could not be raised on this motion. This claim concerns the prejudice to Parker resulting from the ineffective assistance of counsel at the suppression hearing, a claim that clearly is not precluded.

Without the taped statement, Parker could not have been sentenced to death consistent with the standards enunciated by the United States Supreme Court in Enmund and Tison. In Enmund, the Supreme Court ruled that it would be unconstitutional to impose the death penalty on a defendant who did not "himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U.S. at 797. In Tison, similarly, the Supreme Court held that the death penalty may not constitutionally be imposed on a defendant absent "major participation in the felony committed, combined with reckless indifference to human life. . . ." 107 S. Ct. at 1688.

Georgeanne Williams' testimony that Parker "confessed" to her that he was the triggerman can hardly be considered the predicate for a finding that the Enmund-Tison standards have been satisfied in view of the State's failure to inform the jury and trial court of its inconsistent positions at the prior trials of two co-defendants. See infra Point III. If they had been so informed, the jury might not have recommended, and the trial court might not have imposed, the death penalty. Moreover, given the highly dubious quality of Williams' testimony, it is likely that neither the jury nor the trial court chose to believe it, and based their findings in support of the death penalty instead on the taped statement.

POINT II

PARKER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL

A. Parker's Trial Counsel at the Sentencing Phase Was Ineffective

Parker's representation at the penalty phase of the trial "fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. at 688. Makemson's performance was defective in that he: (1) failed to anticipate the State's introduction of evidence of Parker's prior juvenile and criminal acts during cross-examination of the psychologist, Dr. Eddy; (2) failed properly to prepare for the introduction of that evidence; and (3) failed to introduce additional witnesses in mitigation following the cross-examination of Dr. Eddy.

1. Trial Counsel Failed to Anticipate the Nature of the Cross-Examination of the Psychologist

Makemson testified below that he did not want to be responsible for "parading" Parker's juvenile and criminal history before the jury and, therefore, he consciously avoided introducing any evidence of Parker's positive qualities. P 271. Makemson, however, inexplicably and egregiously failed to perceive that the testimony of Dr. Eddy -- that Parker had a "passive" and "nonaggressive" personality -- opened the door to the very same evidence.

A reasonably effective attorney would have known that an expert witness can be cross-examined on the facts or hypotheses he or she considered or failed to consider in rendering an opinion. This is a fundamental and longstanding principle of Florida law. See, e.g., Pensacola Electric Co. v. Bissett, 59 Fla. 360, 52 So. 367, 370 (1910) (quoting Williams v. State, 45 Fla. 128, 34 So. 279 (1903)); Thurston v. State, 355 So. 2d 1224 (Fla. 1st DCA 1978). See also 1 C. Ehrhardt, Florida Evidence § 702.3, at 403 n.1 (2d ed. 1984).

The purpose of cross-examining an expert witness on the facts or hypotheses underlying his or her opinion is equally obvious -- the cross-examiner seeks to undermine the expert's credibilty and impeach his or her testimony. See, e.g., Pensacola Electric Co., supra, 52 So. at 370. See also S. Gard, Florida Evidence Rule 238 (Cross-Examination of Expert Witnesses) at 361 (5th ed. 1967). Accordingly, Makemson should have known that Dr. Eddy's testimony would open the door to evidence of Parker's juvenile and criminal history.[10]

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[10] In rejecting Makemson's objections to the introduction of evidence of Parker's juvenile and criminal history during Parker's cross-examination, the trial court recognized this firmly-established legal principle when it stated: "Every expert I ever saw is cross examined on the basis of the facts that he uses to come to his opinion." P 1433.

Makemson attempted to prevent the State from introducing evidence of Parker's prior juvenile and criminal acts by waiving the mitigating factor of "no significant history of prior criminal activity" under Fla. Stat. § 921.141(6)(a) (1981). R 1695-96. Makemson believed that Maggard v. State, 399 So. 2d 973 (Fla.), cert. denied, 454 U.S. 1059 (1981), prohibited the State from introducing evidence of a defendant's criminal history for any purpose, once the defendant waived that mitigating factor. P 68-69.

His actions, however, in warning Mrs. Parker and Smith not to provide positive character evidence demonstrate that he was well aware of the dangers of opening the door through the introduction of such evidence. Yet he failed to understand, through misplaced reliance on Maggard, that the very danger of providing to the State an opportunity to submit evidence of Parker's prior criminal and juvenile history was presented through Dr. Eddy's testimony. As this Court recently reiterated in Muehleman v. State, 503 So. 2d 310, 315-16 (Fla.), cert. denied, 108 S. Ct. 39 (1987), however, waiver of the mitigating factor of no significant history of prior criminal activity is no bar to the admission of evidence of prior crimes when such evidence is relevant to rebut the defendant's expert testimony. Muehleman does not establish a novel proposition of law but simply recognizes longstanding principles governing admission of evidence.

Neither of the State's "expert" witnesses at the evidentiary hearing on Parker's Rule 3.850 motion contended that Makemson could reasonably believe that his waiver of the mitigating circumstance would prevent the introduction of evidence of Parker's prior record by the State to rebut Dr. Eddy's testimony. To the contrary, both indicated that it was quite clear to them that putting Dr. Eddy on the witness stand would allow them to present evidence of Parker's juvenile and criminal history, and they eagerly awaited that opportunity. P 155-56, 246-47.

2. Trial Counsel Failed to Prepare Properly for the Introduction of Evidence of Parker's Record

Makemson's failure to recognize that the State would be permitted to introduce evidence of Parker's juvenile and criminal history on cross-examination of Dr. Eddy was compounded by his failures to: (1) properly prepare Dr. Eddy for that cross-examination; and (2) conduct a proper and reasonable investigation of Parker's background.

During his cross-examination of Dr. Eddy, the prosecutor effectively impeached Dr. Eddy and undermined the force of his opinion testimony by reading from police reports of Parker's prior juvenile and criminal acts. P 1398, 1404-05, 1412, 1420, 1478-86. Dr. Eddy had never seen the police

reports, and was forced to admit that he was unaware of the details of Parker's prior acts. See P 1481-83.

Makemson testified below that he was "disappointed" with the way Dr. Eddy handled himself on cross-examination. P 288. Dr. Eddy's poor showing, however, was primarily the result of Makemson's failure to supply Dr. Eddy with the police reports. Makemson did not give Dr. Eddy the police reports because he left it to him, as the expert, to determine what information he needed. Id. It was Makemson's responsibility, however, as Parker's lawyer, to prepare Dr. Eddy properly for the inevitable cross-examination by sufficiently informing him of Parker's prior juvenile and criminal acts.

Makemson also failed to prepare properly for the introduction of evidence of Parker's criminal history by conducting a reasonable investigation of Parker's background. Makemson testified below that his strategy in introducing Dr. Eddy's testimony was to establish that: (1) Parker was a non-violent person, and therefore he would not present a danger to other inmates if he were given a sentence of life imprisonment; and (2) it would have been "completely out of character" for Parker to be the triggerman. P 66. Although Makemson testified that he recalled asking Parker and his mother for the "names" of additional witnesses, P 77, 94-95,

that cannot be deemed a reasonable investigation. Makemson had every obligation to seek out additional potential witnesses to support Dr. Eddy's expert testimony.

Makemson did not even attempt to locate and consult with the persons who most likely could support and bolster Dr. Eddy's conclusions, while countering the harmful evidence introduced by the State. Makemson was aware that Parker had been sent to the Florida School for Boys at Okeechobee as a result of juvenile acts, yet never even considered talking to Parker's guidance counselors or anyone else at that institution. P 284-85. Makemson never sought out any of Parker's other family members, who could reasonably be expected to be familiar with his character. P 283, 1002-15. And Makemson never sought out any of Parker's neighbors and teachers, who would also have personal knowledge of Parker's character and the socio-economic circumstances in which he was raised. P 1016-25.

Given the substantial probability that Dr. Eddy would be impeached on the basis of Parker's criminal and juvenile history, Makemson's preparations for that impeachment should have included a reasonable investigation of Parker's background. See, e.g., Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987); Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986), cert. denied, 107 S. Ct. 1986

(1987). Having failed to conduct such an investigation, Makemson was unable to present additional witnesses in mitigation. This effectively deprived Parker of the opportunity to present evidence of his positive and unique qualities as a human being, to which he was clearly entitled. See, e.g., Hitchcock v. Dugger, __ U.S. __, 107 S. Ct. 1821, 1824 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 113-16 (1982); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978).

The evidence given by Parker's relatives, neighbors, counselors and teachers revealed that, had Makemson conducted a reasonable investigation, he could have introduced numerous witnesses in mitigation following the State's impeachment of Dr. Eddy. See P 973-83, 1002-33.

B. There Was No Legitimate Strategic Reason Not to Introduce Additional Mitigation Witnesses Following the Psychologist's Cross-Examination

While courts sometimes defer to strategy judgments when assessing the adequacy of representation, Makemson's failure to introduce mitigation testimony was the product of his decision not to conduct a proper investigation of Parker's background. Makemson, as discussed above, simply failed to perceive that Dr. Eddy's testimony would open the door to evidence of Parker's criminal history.

Makemson admitted below that if he had known that evidence of Parker's criminal history would be received, and if he had a "good witness" from the Florida School for Boys, he would have presented such testimony. P 80. But Makemson never knew if such a witness existed because he did not interview anyone at that institution. P 284-85. Such an unreasonable omission cannot be deemed a reasonable strategic choice. See Kimmelman v. Morrison, 477 U.S. 365 (1986) (attorney's failure to file timely motion was result of failure to investigate rather than strategic decision).

As undeniably revealed in the trial transcript, the jury was already informed of substantially all of Parker's prior acts by the time the State had concluded its impeachment of Dr. Eddy. See P 1388-1504. Makemson's failure to introduce additional witnesses thus stands in marked contrast to those cases, relied upon by the State below, in which the attorney's decision not to introduce witnesses in mitigation in fact precluded the State from introducing damaging counter-testimony. See, e.g., Burger v. Kemp, ___ U.S. ___, 107 S. Ct. 3114 (1987); Dobbs v. Kemp, 790 F.2d 1499 (11th Cir. 1986), cert. denied, 107 S. Ct. 2203 (1987); James v. State, 489 So. 2d 737 (Fla. 1986).

C. Parker Was Prejudiced by Trial Counsel's Failure to Conduct a Reasonable Investigation and Present Additional Mitigation Witnesses

Parker was prejudiced under the Strickland standards for ineffective assistance of counsel. Makemson's failure to introduce additional mitigation evidence after the State thoroughly impeached and rebutted Dr. Eddy's testimony clearly "undermine[s] confidence in the outcome" of the sentencing phase of Parker's trial. Strickland v. Washington, 466 U.S. at 694.

If the jury and trial court had heard the testimony of the available mitigation witnesses following the State's cross-examination of Dr. Eddy, there is a reasonable probability that the jury would not have recommended, and the court would not have imposed, the death penalty. The judge and jury would have seen all of Parker's unique characteristics as a human being, and not merely the negative aspects of his past. As the Eleventh Circuit recently reemphasized: "the major requirement of the penalty phase of a trial is that the sentence be individualized by focusing on the particularized characteristics of the individual." Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir. 1987), citing Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) and Gregg v. Georgia, 428 U.S. 153, 199 (1976). See also Brown v. State, 13 FLW 317 (emphasizing potential importance of

evidence of defendant's family background and personal history) (Supreme Court of Florida, May 20, 1988).

The evidence introduced at the evidentiary hearing on Parker's Rule 3.850 motion reveals substantial evidence of Parker's positive qualities which the jury at his trial never heard. For example, Makemson could have and should have introduced the testimony of Parker's former counselors at the Florida School for Boys, professionals who have worked with many troubled youths on an intimate basis, including Parker. They would have presented highly significant testimony in response to evidence of Parker's juvenile acts. The counselors would have testified from personal knowledge that Parker had made great efforts to overcome his juvenile problems through counseling and had made substantial progress toward becoming a productive member of society; that he was a diligent worker; that he did not pose disciplinary problems at the school in comparison to other youngsters; and that he was extremely well-liked by his counselors and peers. P 1026-33. In fact, one potential witness would have testified that Parker was, in many respects, a "model" student. P 238-39.

Parker's counselors would also have testified that he was highly impressionable and prone to being misled by more aggressive young men. See P 1026-27, 1030-33. This

testimony, from professionals who had worked closely with Parker, would certainly have helped counteract what the jury and court had already heard during the State's cross-examination of Dr. Eddy, and would have strongly supported the defense theory that Parker acted under the substantial domination of another when the crimes were committed.

In addition, Parker's former school teachers, basketball coach, friends and family members would also have testified in mitigation of the evidence introduced by the State, had Makemson sought their testimony. Those who knew him would have described Parker as a kind and generous person, and a hard worker. See P 973-83, 1002-19. The jury would have heard about the poor economic environment and the difficult circumstances in which Parker was raised. See P 1018-25. Through such testimony, the court and jury would not have simply seen a person who had already been involved in numerous crimes and, therefore, deserved the death penalty, but rather a troubled young man worthy of compassion.

By introducing the testimony of Dr. Eddy, and thereby foreseeably enabling the State to introduce evidence of Parker's criminal history, Makemson had an obligation to show the jury a more complete, balanced and accurate portrayal of Parker than that created by the State's evidence. His failure to seek out and introduce the available mitiga-

tion witnesses deprived Parker of the effective assistance of counsel.

POINT III

THE STATE'S FAILURE TO DISCLOSE TO THE TRIAL COURT ITS INCONSISTENT FACTUAL CONTENTIONS CONCERNING THE IDENTITY OF THE TRIGGERMAN VIOLATED PARKER'S DUE PROCESS AND EIGHTH AMENDMENT RIGHTS

The State of Florida, by its attorneys Robert Stone and James Midelis, argued to juries at three separate trials that three different defendants fired the single shot that killed Slater. The prosecutors were well aware that only one defendant could have fired the gun. The State's failure to disclose to the trial court and jury its inconsistent triggerman theories violated Parker's right to a fair trial because it deprived his counsel of his ability to argue to the jury that even the State entertained substantial doubts that Parker was the triggerman. Consequently, Parker's conviction and death sentence are unreliable, arbitrary and capricious in violation of the Eighth and Fourteenth Amendments.

The State's prior inconsistent positions are revealed by an examination of the transcripts of the co-defendants' trials. At the trial of John Earl Bush, in November 1982, prosecutor Stone held up a gun in one hand and a bullet in another hand and stated to the jury:

> This is a .38 Special. This is a live round. State's Exhibit Number 22 [a photograph of the bullet wound to Slater's

> head] is what happens when a live round is fired by John Earl Bush and smashes into the skull of Frances Julia Slater.

P 1525-26.

Stone made a similar argument three weeks later at the trial of Alphonso Cave:

> And I submit to you that regardless of whether Alphonso Cave pulled the trigger or used the knife, he's just as guilty as who did, as who did. He was there. He was involved. And the only statement you have that he didn't pull the trigger was his own self-serving statement, that after he heard Bush's statement implicating him, "I better make the best possible statement now on my own behalf." -- <u>he's the only one at that point that tells you he didn't pull the trigger</u>. Who had the gun from the beginning? Alphonso Cave. Who had the gun in the store? Alphonso Cave. Who put her in the back seat? Alphonso Cave. Who took her out of the back seat? Alphonso Cave. Who had the gun? And who was outside with Frances Slater? Alphonso Cave.

P 1543-44 (emphasis added).

Although the State thus argued at both the Bush and Cave trials that both Bush and Cave were guilty as charged even if they did not fire the fatal shot, the fact remains that the State also contended that sufficient evidence existed to find both Bush and Cave guilty, beyond a reasonable doubt, of the act of firing that single shot. These inconsistent factual contentions demonstrate the State's uncertainty con-

cerning the identity of the triggerman. This crucial fact was never disclosed to the Parker jury.

At Parker's trial, only a month later, the prosecution declared that Parker was the triggerman as if there could be no doubt whatsoever. In his opening statement Stone stated starkly:

> J.B. Parker executed her. He shot her in the back of the head on the morning of April 27th.

R 503.

Similarly, during closing argument, Stone stated:

> I also submit to you that J.B. Parker did the shooting . . . . And John Earl Bush stabbed her and J.B. Parker stood over her behind her and executed her, on the morning of April 27th, 1982. And that is consistent with the evidence in this case.

R 1145-46.

There is nothing ambiguous about these remarks. Indeed, Stone conceded in his testimony below that at each trial he invited the jury to convict the defendant on the ground that the defendant then on trial was the person who actually fired the fatal bullet, without advising the court or the jury that contradictory positions were being taken in the other trials. P 257-60. This tactic deprived Parker of the fair trial to which he is constitutionally entitled.

Three juries were asked within a period of two months to find that the defendant then on trial fired the only bullet from the gun that killed Slater. Each jury deliberated without the knowledge that the State took the position that someone else fired the shot. All three defendants were convicted and sentenced to death. In any one of these cases -- and particularly Parker's case, the last of the three to be tried -- the jury might well have reached a different determination with respect to guilt and sentencing, had it known that the State itself was unsure as to who fired the gun.

The right to a fair trial is violated when the prosecution takes inconsistent positions at successive trials of co-defendants. See Green v. Georgia, 442 U.S. 95 (1979); Drake v. Kemp, 762 F.2d 1449, 1478 (11th Cir. 1985) (Clark, J., specially concurring), cert. denied, 106 S. Ct. 3333 (1986); United States v. Powers, 467 F.2d 1089, 1097 (7th Cir. 1972) (Stevens, J., dissenting), cert. denied, 410 U.S. 983 (1973). Cf. United States v. Kattar, 840 F.2d 118, 127-28 (1st Cir. 1988); Troedel v. Wainwright, 667 F. Supp. 1456, 1458-60 (S.D. Fla. 1986), aff'd, 828 F.2d 670 (11th Cir. 1987).

A prosecutor must not only seek to convict, but must seek to do justice. See A.B.A. Standards for Criminal Justice § 3-1.1(b)(c) (2d ed. 1982 supp.). He has a responsibility to guard the rights of the accused as well as those of

society at large. Id. at § 3-5.8(c)(d). As the Supreme Court stated in Brady v. Maryland, 373 U.S. 83, 87 (1963): "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."

The Supreme Court's decision in Green v. Georgia, 442 U.S. 95 (1979), highlights the constitutional errors inherent in the State's inconsistent positions at the three trials. Green's co-defendant, Moore, was tried and convicted of rape and murder. At Moore's trial the State presented a witness who testified that Moore had confided in him that he had killed the victim, shooting her twice after ordering Green to run an errand. At the penalty phase of Green's trial, however, the trial court excluded that witness' testimony that Moore had fired both shots. The prosecutor then invited the jury to conclude that each defendant had fired one shot:

> I don't know whether Carzell Moore fired the first shot and handed the gun to Roosevelt Green and he fired the second shot or whether it was vice versa or whether Roosevelt Green had the gun and fired the shot . . . but I think it can be reasonably stated that you Ladies and Gentlemen can believe that each one of them fired the shots so that they would be as equally involved and one did not exceed the other's part in the commission of this crime.

442 U.S. at 96-97, n.2. The jury was not informed that the

State had taken a directly contradictory position at Moore's trial.

Based upon the trial court's exclusion of the testimony and the impropriety of the prosecutor's closing arguments, the Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment was violated. Green's death sentence was vacated. See also United States v. Powers, 467 F.2d 1089, 1097-98 (7th Cir. 1972), cert. denied, 410 U.S. 983 (1973) (Stevens, J., dissenting).[11]

In his concurrence in Drake v. Kemp, 762 F.2d 1449, 1478 (11th Cir. 1985), Judge Clark highlights the due process violations inherent in the maintenance of inconsistent factual positions by the government. In Drake, two defendants were separately tried for murder and armed robbery. Campbell, the first to be tried, claimed that Drake committed the murder. In his closing argument, the prosecutor stated:

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[11] In Powers, then-Circuit Judge Stevens persuasively discussed the effect of the maintenance by the government of mutually inconsistent positions at successive trials of codefendants:

> [T]he fact of the inconsistency [here convicting one defendant for failing to file a tax return for monies received, and then convicting another defendant for mail fraud involving the receipt of the same money], may properly be brought to the attention of the jury and the government put to the burden of explaining how it could argue that the same transaction can prove, beyond a reasonable doubt, two mutually exclusive propositions. . . . There is no question in my mind that Powers' inabil-

(Footnote continued on next page)

"It is my thoughts on this evidence that this is the actual slayer, Mr. Campbell. . . . Campbell admits the entire case against him except that he didn't do it, that Drake did it. I don't believe that you ladies and gentlemen are going to buy that kind of story. . . ." Id. at 1472. At the penalty phase of the trial, the prosecutor continued: "there is one person who believes in capital punishment, . . . for he similarly killed his victim. . . ." Id. Mr. Campbell was convicted of both the murder and armed robbery and the jury recommended the death penalty.

One year later, the same prosecutor tried Drake, and relied on Campbell's testimony. Despite his previous arguments at Campbell's trial, the prosecutor argued to the jury: "Drake must have been the one who actually beat the victim. . . ." Id.

Judge Clark opined that the State's action in maintaining inconsistent positions at the trials violated the fundamental fairness requirement stemming from the due process clause of the Fourteenth Amendment. He stated:

(Footnote continued)

> ity to bring this fact to the attention of the jury may well have been the critical difference between his conviction and his possible acquittal.

The refusal by the majority in Powers to adopt the dissent's position was not based upon a disagreement with the legal principles set forth by the dissent. Rather, the majority concluded that the proper factual foundation had not been laid in the trial court, thus precluding the Circuit Court from passing upon this issue. Id. at 1096.

> The prosecution's theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate that fundamental fairness essential to the very concept of justice. . . . The State cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed purpose of a search for truth . . . . [T]he prosecutor changed his theory of what happened to suit the state. This distortion rendered Henry Drake's trial fundamentally unfair.

Id. at 1479 (emphasis added).[12]

What Judge Clark condemned as inherently unfair, and a violation of due process, occurred at the trial of Parker. The State argued inconsistent triggerman theories at the trials of three co-defendants. The verdicts cannot be reconciled with concepts of due process of law and fundamental fairness.

The Parker jury was deprived of the vital information that the State was taking inconsistent positions in consecutive trials of three co-defendants. The sentence of death recommended by the jury was thus made under circumstances that render the decision unreliable, arbitrary and capricious in violation of the Eighth and Fourteenth Amendments.

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[12] This issue was not discussed in the majority opinion which granted relief on a different ground.

A death sentence must be the product of a reasoned, rational, deliberative process, and may not be based upon caprice or emotion. Lockett v. Ohio, 438 U.S. 586 (1978). Procedures must be designed to channel discretion and to avoid arbitrary results. Spaziano v. Florida, 468 U.S. 447 (1984); Woodson v. North Carolina, 428 U.S. 280 (1976). Implicit in these commands is the assumption that the jury will not be misled or be permitted to conduct its deliberations in ignorance of the relevant particularized circumstances of the crime or of the individual. Here, there is a strong possibility that three men have been sentenced to death because three separate juries were encouraged by the State to believe that they were recommending a sentence for the triggerman, in ignorance of the State's own doubts and inconsistent positions in the other cases. These factors render the jury recommendations arbitrary and unreliable in violation of the Eighth Amendment.

This Court's recent decision on the appeal from the denial of co-defendant Cave's Rule 3.850 motion, Cave v. State, 13 FLW 455 (July 1, 1988), is not to the contrary. On his appeal Cave challenged the State's contention that he was the triggerman on the grounds of prosecutorial misconduct. Cave did not contend that the jury and trial court should have been informed of the State's inconsistent positions but rather contended that, having argued that Bush was the

triggerman, the State was precluded from contending that Cave fired the single shot that killed Slater because such an argument constituted, according to Cave, a deliberate mischaracterization of the known evidence.

Parker does not contend on this appeal that the State's contention that he was the triggerman was a mischaracterization of the evidence submitted at his trial. Rather, Parker maintains that to make this argument -- knowing that the State itself, as admitted in Stone's testimony at the evidentiary hearing, P 257-60, encouraged three separate juries to find that three separate defendants fired the single fatal shot -- deprived Parker of the due process of law. The inconsistent positions taken by the State demonstrate its lack of confidence in the veracity of Williams' testimony. The jury was entitled to take into account this significant fact. As demonstrated by the cases cited above, the government may not take such inconsistent factual positions and fail to make full disclosure of this fact without violating a defendant's constitutional right to due process of law.

POINT IV

"EXPERT" TESTIMONY ON THE EFFECTIVENESS OF DEFENSE COUNSEL WAS IMPROPERLY ADMITTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, the court below improperly received, over the objections of defense counsel,

P 154; see also P 149, 162, 242-44, the "expert" testimony of Robert Stone, the State Attorney who prosecuted Parker, and James Midelis, the Assistant State Attorney at Parker's trial and now a St. Lucie County Judge. The court qualified Judge Midelis as an "expert" in the field of homicide prosecutions, P 150, and Robert Stone as an "expert" in the field of criminal practice, P 244, and then permitted them to render their "expert opinions" as to whether Parker was denied the effective assistance of counsel at various stages of his trial. See P 154-64, 244-52. Their opinions were based solely upon a limited review of some of the motion papers and their recollections of the trial, and not on a full review of the trial record. P 148, 163, 168-69, 187, 190-91, 245, 253-55.

Expert testimony is admissible only if its subject matter is not a matter of common knowledge or understanding, and if such testimony will aid the trier of fact. Fla. Stat. Ann. § 90.702 (West 1979); Johnson v. State, 314 So. 2d 248, 252 (Fla. 1st DCA 1975). Whether Parker was denied the effective assistance of counsel is a question of law that calls for the court's own judgment in assessing the performance of trial counsel and in applying established legal precedents to the record. Such questions of law are not the appropriate subject of expert testimony. Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882 (1981).

While Fla. Stat. Ann. § 90.703 (West 1979) does permit expert opinion on an ultimate fact, both the state rule and Fed. R. Evid. 704 have been routinely interpreted to bar expert opinion on questions of law. See Town of Palm Beach v. Palm Beach County, 460 So. 2d 879 (Fla. 1984); Gurganus v. State, 451 So. 2d 817 (Fla. 1984); City of Cooper City v. PCH Corp., 496 So. 2d 843 (Fla. 4th DCA 1986). See also Thundereal Corp. v. Sterling, 368 So. 2d 923, 928 (Fla. 1st DCA 1979) ("Opinion testimony of expert lawyers upon legal questions, other than that as to the law of another jurisdiction, . . . that amounts to a conclusion of law, cannot be properly received in evidence, for the determination of such questions is exclusively within the province of the court.") (quoting 31 Am. Jur. 2d Expert and Opinion Evidence § 69 (1967)).[13]

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[13] See also United States v. Scop, 846 F.2d 135, 139 (2d Cir. 1988); 7 Wigmore, Evidence § 1952 (Chadbourn rev. 1978); M. Graham, Handbook on Florida Evidence § 703.1, at 535 (1987) ("Section 90.703 of course permits neither a lay nor expert witness to render an opinion as to questions that are matters of law for the court") (citing Marx & Co. v. Diners' Club, Inc., 550 F.2d 505, 510 (2d Cir.), cert. denied, 434 U.S. 861 (1977) (applying Fed. R. Evid. 704)); United States v. Baskes, 649 F.2d 471, 479 (7th Cir. 1980), cert. denied, 450 U.S. 1000 (1981) (applying Fed. R. Evid. 704); McCormick On Evidence § 12, at 31 (E. Cleary 3d ed. 1984).

Moreover, neither Midelis nor Stone, as the prosecutors who obtained Parker's conviction and vigorously sought a sentence of death, brought to his role as an "expert" on the effectiveness of his adversary the independence and lack of bias required of expert witnesses. It is highly doubtful that they could express an objective opinion on Makemson's effectiveness. Both were simply too involved in advocating Parker's guilt and in pressing for the death sentence to be objective.

When Midelis and Stone repeatedly testified that Makemson rendered effective assistance of counsel on behalf of Parker, they expressed self-serving opinions addressed to the ultimate legal issue. Such testimony was outside the bounds of permissible opinion evidence and should not have been received.

CONCLUSION

For the foregoing reasons, appellant, J.B. Parker, respectfully requests that the order of the court below be reversed, and the motion pursuant to Fla. R. Crim. P. 3.850 to vacate and set aside the judgments of conviction and sentence imposed by the trial court be granted.

Dated: August 24, 1988

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was furnished by Federal Express to Richard G. Bartmon, Esq., Assistant Attorney General, 111 Georgia Avenue - Suite 204, West Palm Beach, FL 33401 this 24th day of August, 1988.

Michael P. Aaron
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