IN THE SUPREME COURT OF FLORIDA

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| J.B. PARKER,<br><br>Petitioner,<br><br>-v-<br><br>RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida,<br><br>Respondent. | Case No. 72,951<br><br>**PETITION FOR WRIT OF HABEAS CORPUS** |

Petitioner J.B. PARKER, by his undersigned counsel, respectfully petitions this Court, pursuant to Florida Rules of Appellate Procedure 9.030(a)(3) and 9.100, to issue a writ of habeas corpus. Parker was denied the effective assistance of appellate counsel in the preparation, briefing, and argument of his direct appeal to this Court from his convictions and sentence of death. Accordingly, he is under sentence of death in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, as well as under the Constitution and laws of the State of Florida.

In support of this petition, and in accordance with Florida Rule of Appellate Procedure 9.100(e), Parker states the following:

## I.

## JURISDICTION

This is an original proceeding brought in accordance with Florida Rule of Appellate Procedure 9.100(a). This Court has jurisdiction pursuant to Article V, sections 3(b)(1) and 3(b)(9) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(3).

Appellate counsel failed adequately to address factual and legal issues which, had they been properly addressed and argued, would have resulted in the reversal of Parker's convictions and death sentence. This Court is the proper forum for this petition. See Knight v. State, 394 So. 2d 997 (Fla. 1981). The appropriate remedy from this Court is a review of the arguments which should have been made by the appellate counsel and, upon such review, entry of an order granting Parker's petition. See, e.g., Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969).

## II.

## STATEMENT OF FACTS

### A. Parker's May 5, 1982 Statement

At Parker's trial, the State contended that on April 27, 1982, Parker and three others -- John Earl Bush, Alphonso Cave, and Terry Wayne Johnson -- first robbed Frances Julia Slater as she worked as a clerk at a convenience store in Stuart, Florida, and then kidnapped her and drove her to a remote location. R 1134; 1144-46.[1] There, it was charged at Parker's trial, Bush stabbed her and Parker shot her. R 1144-46. A key element in the State's evidence was Parker's taped statement given to the Martin County Sheriff, James D. Holt, on May 5, 1982, shortly after his arrest on charges of the armed robbery, kidnapping and first degree murder of Ms. Slater.

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1 References to the record on the direct appeal of Parker's convictions and sentences, including the transcript of his trial, are indicated by the initial "R" followed by the page number stamped by the court clerk.

Within hours of his arrest, Parker asked to speak to the Martin County Sheriff. A1 at 5-6.[2] As Parker testified at the hearing held in connection with his Rule 3.850 motion, he asked to see the Sheriff to request permission to call his mother for the purpose of determining whether she had retained a lawyer to represent him.

Following his brief conversation with Parker, Sheriff Holt called Elton Schwartz, the Public Defender of the Nineteenth Judicial Circuit. A1 at 52. Shortly after Parker's arrest, the Public Defender's Office, consistent with its normal practice, had entered an appearance on behalf of Parker by sending letters to the State Attorney and police officials, including Sheriff Holt. R 1524-30. The letter advised Sheriff Holt that Parker, and two of 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.

In compliance with the Public Defender's request, Sheriff Holt contacted Schwartz, told him that Parker desired to make a statement, and requested that a lawyer from the Public Defender's Office meet with Parker. A1 at 52-53. Schwartz explained that members of his legal staff had already discussed the facts of the case with one of Parker's co-defendants, Alphonso Cave. A1 at 52. Schwartz further explained that, on the basis of those discussions, it was

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2 For the Court's convenience, an appendix accompanies this petition. The appendix contains frequently-cited and significant portions of the record on appeal, as well as pleadings filed on Parker's direct appeal. References to the appendix are designated with an "A" followed by the appendix exhibit number and the page of the exhibit. E.g., references to page 10 of the first appendix exhibit are designated "A1 at 10."

evident that a conflict of interest existed among the four co-defendants which would prevent the Public Defender's Office from ethically representing Parker. A1 at 52-53.

As a result of this conflict, Schwartz explained to Sheriff Holt that he did not want to send a member of his office to counsel Parker. A1 at 53. At the Sheriff's urging, however, Schwartz ultimately sent Steven T. Greene, an intern in his office, to meet with Parker. A1 at 53. Based on his determination that his office was conflicted and could not represent Parker, Schwartz instructed Greene not to discuss any of the facts with Parker. A1 at 53. Schwartz thereby incapacitated Greene from providing counsel to Parker because of his concern that establishing a true attorney-client relationship with Parker and obtaining confidential information from Parker could result in disqualification of the Public Defender's Office in all cases. The sole role that Schwartz permitted Greene to play in meeting with Parker that day was simply to advise Parker not to make any statements. A1 at 53.

Upon meeting Parker, Greene informed him that he was from the Public Defender's Office and simply advised Parker not to make any statements to the Sheriff. A1 at 65-66. At no time did Greene inform Parker of the conflict of interest or the decision of the Public Defender's Office not to represent Parker. Nor did Greene ever tell Parker that it was in his best interest to talk to a lawyer who could represent him free from the constraints imposed on the Public Defender's Office by the conflict. Consistent with the instructions he had received from Schwartz, Greene did not discuss the facts with Parker, made no efforts to learn the substance of what Parker would tell the Sheriff, and did not counsel him in any other way concerning the charges pending against him.

Parker was then taken to a small room where, in the presence of Sheriff Holt, Greene, and two detectives, a tape recorder was turned on and the Miranda rights were read to Parker. A2 at 774-77. The transcript of the tape reveals that Parker: 1) understood his Miranda rights; and 2) repeatedly requested permission to call his mother to determine if she had succeeded in retaining a lawyer to represent him. A2 at 777-79. In response to Parker's requests for counsel of his own choice, both Sheriff Holt and Greene told Parker that Greene was Parker's lawyer. A2 at 777-79. Frustrated in his efforts to learn whether his mother had obtained counsel for him, Parker ultimately made a statement to the Sheriff.

## B. Pretrial Suppression Hearing

At a pretrial suppression hearing on September 3, 1982, Parker's trial counsel, Robert R. Makemson, attempted to suppress statements Parker had made, including his taped statement of May 5, 1982. In support of that motion, trial counsel argued: (i) that the May 5, 1982 interrogation should have ceased because Parker invoked his right to counsel other than Greene; (ii) that his refusal to sign a rights waiver form indicated a desire to remain silent; and (iii) that, because Greene was not a member of the Florida Bar on May 5, 1982, he needed to obtain Parker's written consent before acting as his attorney. A1 at 74-79. Parker did not testify at the suppression hearing and trial counsel did not seek suppression on the basis of a violation of Parker's right to conflict-free counsel. The court denied the motion to suppress. A1 at 83-86.

## C. Parker's Trial

The State relied extensively on Parker's taped statement as part of its case-in-chief. R 761. The State

used the statement in efforts to impeach Parker's trial testimony, see A3, and repeatedly emphasized the inculpatory nature of the statement in its closing argument to the jury. A4. The jury returned verdicts of guilty on all counts. R 1201-02.

At the conclusion of the sentencing phase of Parker's trial on January 11, 1983, the jury recommended the death penalty by a vote of eight to four. R 1504. The judge accepted the jury's recommendation and imposed the death penalty. R 1507.

On November 22, 1983, this Court granted a motion by the State to relinquish jurisdiction and remand the case to the trial court, to permit that court to submit written findings of fact, pursuant to section 921.141(3) of the Florida Statutes, supporting the aggravating circumstances which it initially found warranted imposition of the death penalty on Parker. A5. On remand, the trial court eliminated one of the aggravating circumstances previously found (the circumstance of a prior juvenile act, see R 1721-22), and made written findings of fact based substantially on Parker's taped statement. A6.

D. The Appeal of Parker's Convictions and Sentence

Robert G. Udell was appointed to represent Parker on the direct appeal of his convictions and sentence to this Court. In his appellate briefs, Udell briefly and perfunctorily addressed the issues which Parker's trial counsel had presented on the suppression motion and at the trial. See A7; A8. Udell merely repeated the arguments made by Parker's trial counsel at the pretrial suppression hearing. See A7 at 17-21. He failed to argue to this Court: (i) that Parker's taped statement of May 5, 1982 should have been suppressed because Greene was incapable of providing effective assistance

to Parker due to the Public Defender's conflict of interest; (ii) that the statement should have been suppressed because Sheriff Holt's statements to Parker exceeded the bounds of legitimate clarification of arguably ambiguous statements; and (iii) that the statement should have been suppressed because the tape revealed that both Sheriff Holt and Greene clearly understood that Parker desired to assert his right to counsel, but nonetheless ignored his assertions and stated that Greene was Parker's attorney.

On May 5, 1984, this Court heard oral argument on Parker's direct appeal. On August 22, 1985, this Court affirmed Parker's convictions and sentence of death. Parker v. State, 476 So. 2d 134 (Fla. 1985). The mandate was issued on December 3, 1985.

**E. Motion For Post-Conviction Relief**

On December 3, 1987, Parker filed the Motion To Vacate Judgments and Sentences pursuant to Fla. R. Crim. P. 3.850, along with a memorandum of law and affidavits in support of the motion. The motion was filed in the Circuit Court of the Nineteenth Judicial Circuit of Florida, in and for Martin County, before Chief Circuit Judge Dwight L. Geiger.

An evidentiary hearing was held on February 11 and 12, 1988. Following the filing of additional briefs, Judge Geiger issued a one-page order denying Parker's motion on April 5, 1988. The brief on appeal from that order is being filed concurrently with this petition.

## III.

## NATURE OF RELIEF SOUGHT

In light of the constitutional violations discussed below, Parker seeks an order of this Court vacating his convictions and sentence of death and remanding the case to the

trial court for a new trial. In the alternative, Parker seeks an order vacating the sentence of death previously imposed upon him and remanding the case to the trial court with instructions to impose a life sentence.

## IV.

## BASES FOR THE WRIT

### PARKER'S RIGHT TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WAS VIOLATED BY THE FAILURE TO RAISE, AND EFFECTIVELY ARGUE, FUNDAMENTAL ISSUES

The failure of Parker's appellate counsel to raise and effectively argue obviously fundamental and critical issues on his direct appeal to this Court violated Parker's right to the effective assistance of appellate counsel under the Sixth and Fourteenth Amendments of the United States Constitution. See, e.g., Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987); Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985); Barclay v. Wainwright, 444 So. 2d 956 (Fla. 1984); Smith v. Wainwright, 484 So. 2d 31 (Fla. 4th DCA 1986).

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court established the standards for judging claims of ineffectiveness of counsel. Under these standards, the defendant must show that counsel's performance was deficient, such that it fell below "an objective standard of reasonableness," id. at 688, and prejudiced the defense, such 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. "Reasonable probability" was defined as "a probability sufficient to undermine confidence in the outcome." Id. at 694.

In Wilson, supra, 474 So. 2d at 1163, this Court tracked the Strickland standards for claims of ineffective assistance of appellate counsel:

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

The failure of Udell to make the most fundamental arguments concerning the inadmissibility of Parker's taped statement, together with his failure to argue effectively the issues raised in his appellate briefs and at oral argument concerning that statement, constitutes deficient performance under Strickland and this Court's decisions. Udell compounded these deficiencies by failing to demonstrate to this Court the critical importance of the taped statement to both Parker's conviction and sentence.

Udell's deficient performance was clearly prejudicial to Parker. Had Udell properly made the most fundamental arguments regarding the trial court's error in denying the suppression motion, this Court would have reversed the convictions and sentence.

## A. PARKER'S APPELLATE COUNSEL FAILED TO MAKE THE MOST FUNDAMENTAL LEGAL ARGUMENTS CONCERNING THE INABILITY OF THE PUBLIC DEFENDER'S INTERN TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL

In Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985), this Court, in finding appellate counsel ineffective, reasoned that "[i]t is the unique role of [the] . . . advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process." Id. at 1165. This Court found that

appellate counsel in Wilson "fail[ed] to present his client's case in its most favorable posture." Id. at 1164.

On the direct appeal, Udell merely argued that Parker's right to an attorney was violated prior to the taping of his statement because he indicated "three times during the taking of the statement that he wanted to find out if his mother had obtained an attorney for him" and, accordingly, under Miranda v. Arizona, 384 U.S. 436 (1966), all questioning should have ceased. A7 at 18.

Apart from this basic argument, however, it is indisputable that Udell failed to fulfill the duty enunciated in Wilson to highlight for this Court the errors committed by the suppression hearing court and to present Parker's motion to suppress in its most favorable light.

On appeal, Udell challenged the trial court's denial of the suppression motion but failed even to suggest the most fundamental reason, amply supported by the record, for suppression of the taped statement -- the denial of Parker's right to conflict-free counsel at the time the statement was made. Rather, in his briefs and at oral argument, with no authority whatsoever, Udell merely repeated the argument raised by Parker's trial counsel that Greene, as an intern, who had not yet been admitted to the Florida Bar, was required to inform Parker of that fact. A7 at 21.

**1. The Failure to Argue that the Public Defender's Conflict of Interest Prevented the Intern from Providing Effective Assistance of Counsel**

It is clear that the conflict of interest among Parker and his co-defendants prevented the Public Defender's Office from effectively representing Parker when he made his taped statement. This was "obvious on the record, and must have leaped out upon even a casual reading of the transcript."

Matire, supra, 811 F.2d at 1438. Udell, however, failed to make this argument or cite any of the numerous supporting authorities.

The basis of the conflict of interest and its impact on Greene's ability to represent Parker was brought out at the September 3, 1982 hearing on Parker's motion to suppress. The Public Defender testified that prior to sending Greene to meet Parker, members of his legal staff had talked to Cave, one of Parker's co-defendants, and learned Cave's version of the facts underlying the charges against the defendants. A1 at 52. On the basis of this discussion, which involved confidential attorney-client communications, Schwartz determined that a conflict of interest existed between Cave and Parker, and that the conflict would prevent the Public Defender's Office from representing Parker. A1 at 52-53. Schwartz testified that he told the Sheriff:

> Look, I don't want to have an attorney going over and going into the facts of the case with him because I know there is going to be a conflict and as soon as we do that and establish an attorney-client relationship with Mr. Parker, then, that would create a conflict between all four of them and we could not represent any of them. And I explained to him that if there was any way to put this off until we can get the appointment of counsel straightened out that it would be to everybody's best interest.

A1 at 53.

Despite his decision not to represent Parker, Schwartz testified that, at the Sheriff's insistence, he sent Greene to meet with Parker. A1 at 53. Schwartz informed Greene of the conflict of interest and told him that he had determined that the Public Defender's Office could not represent Parker. A1 at 53. Concerned about the conflict, and the possibility of learning confidential information that would preclude his office from representing any of the

defendants, however, Schwartz instructed Greene not to discuss the facts of the case with Parker. A1 at 53.

The very next day, May 6, 1982, Schwartz moved for permission to be relieved from representing Parker as a result of the conflict and requested that a private attorney be appointed to represent Parker. A9. As that motion and Schwartz's testimony at the suppression hearing made clear, Schwartz knew, before dispatching Greene to "represent" Parker in connection with Sheriff Holt's interrogation, that his office could not provide conflict-free counsel to Parker. As a direct result of this conflict, Greene did not discuss any of the facts of the case with Parker or otherwise seek to counsel him. A1 at 66. The Public Defender's conflict thus precluded Greene from providing effective assistance of counsel at a critical stage in the proceedings.

Legal precedents at the time of Parker's direct appeal conclusively demonstrated the strength of this argument. Despite these precedents and the clear record made at the suppression hearing of a fundamental legal basis for suppressing Parker's statement, Udell never raised the issue on appeal.

The United States Supreme Court has long held that a defendant's Sixth Amendment right to the effective assistance of counsel is violated when an actual conflict of interest impairs the attorney's ability to represent him. See Glasser v. United States, 315 U.S. 60, 76 (1942). 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 of interest existed; and 2) the conflict adversely affected the attorney's performance.

Both elements are present here. It is beyond question that a conflict of interest actually existed. Having met with Cave, and having learned his version of the facts, the Public Defender determined that a conflict existed between Cave and Parker. The nature of the conflict is clear -- in his statement to police, Cave accused Parker of shooting Ms. Slater.

This conflict adversely affected Greene's ability to assist Parker in obvious ways. Greene did nothing beyond recommend that Parker not make a statement. It cannot be disputed that a reasonably effective attorney could have, and would have, done much more for Parker. Such an attorney would have at least discussed the underlying facts with Parker, the relevant law, and the statement he allegedly wanted to give to the Sheriff. On express instructions from Schwartz, Greene was precluded from providing such counsel as a direct consequence of the Public Defender's conflicted position. Had Greene reviewed the facts with Parker and been in a position to explain the legal consequences flowing from those facts, Greene would have been in a position to actually assist Parker by explaining precisely why he should not make a statement.

**2. The Failure to Argue that the Right to an Attorney Includes the Right to Confidential Communication and Advice Based on Such Communication**

Greene's mere presence during the taking of Parker's statement enabled the State to rebut Udell's argument on appeal that Miranda required that all questioning cease once Parker indicated that he wished to contact his mother to determine whether she had succeeded in retaining a lawyer. A10 at 32. Because Udell never brought to this Court's attention the constitutional deficiency in Greene's "representation" created by the Public Defender's conflict, the essential flaw in the State's position on the direct appeal was never

addressed by this Court. The requirements of Miranda are not met by the simple presence of an attorney. The fundamental rights protected under Miranda expressly recognize the importance of the ability of such an attorney to counsel the defendant. And yet, in neither his briefs nor his oral argument did Udell make the obvious legal and factual response -- that Greene's mere presence and bare advice did not satisfy the requirements of Miranda.

In Miranda, the Supreme Court held that prior to an interrogation, an accused must be advised of his constitutional rights to an attorney and to remain silent, and that when an accused requests a lawyer, all questioning must cease and the accused must have the opportunity to consult with a lawyer. Miranda, supra, 384 U.S. at 444-45.

In Fare v. Michael C., 442 U.S. 707, 721-22 (1979), the Supreme Court elaborated on the rationale underlying the Miranda right to consult with an attorney:

> [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.

Thus, the Supreme Court reasoned that the Miranda right to an attorney encompasses the right to the confidential communication protected by the attorney-client relationship, and legal advice based on that communication. Id.

Notwithstanding the statements by Sheriff Holt and Greene that Greene was "representing" Parker, A2 at 777-79, the facts demonstrate that he never had the benefit of confidential communication or any other form of consultation with Greene. The conflict, and Schwartz' instructions to Greene not to discuss the facts of the case with Parker, prevented any meaningful communication or advice based on such communication. Udell's failure to present this legal

argument on Parker's behalf was a glaring deficiency in his performance as Parker's appellate counsel.

Nor did Udell emphasize in his appellate arguments the grossly misleading nature of the statements of Sheriff Holt and Greene to Parker that Greene represented him. Both Sheriff Holt and Greene were well aware that the Public Defender had determined that his office could not represent Parker and was ethically obligated to withdraw. Yet, in their efforts to overcome Parker's requests that he have the opportunity to consult another attorney, both Greene and Sheriff Holt repeatedly emphasized that Greene was functioning as Parker's appointed counsel. Thus, in response to Parker's requests, Greene stated: "Well, I'm acting as your attorney today," A2 at 777, and "Well, that's why I'm representing you today." A2 at 778. Sheriff Holt told Parker: "I went back and explained to you that you did have a lawyer appointed to you." A2 at 779.

In its opinion affirming Parker's convictions and sentence of death, this Court noted, with apparent approval, that "[t]he sheriff repeatedly advised appellant that a lawyer had been appointed to represent him and that nobody was going to force the appellant to make a statement." Parker, supra, 476 So. 2d at 136. This Court's failure to take into account the fundamental inability of Greene to provide counsel, and the consequent misleading nature of this advice, flows directly from Udell's failure to present this critical legal argument. Udell thus failed in his obligation to present Parker's case in its most favorable posture, thereby leading this Court to overlook this fundamental error requiring suppression of the taped statement.

### 3. The Failure to Argue that Parker's Right to Counsel of His Choice Was Violated

In addition to his other failures, Udell failed to argue effectively to this Court another issue which was "obvious on the record" and which "must have leaped out upon even a casual reading of the transcript," Matire, supra, 811 F.2d at 1438, of Parker's taped statement -- that Parker's constitutional right to counsel of his choice was violated.

In Powell v. Alabama, 287 U.S. 45 (1932), the Supreme Court held that an accused's Sixth Amendment right to counsel includes "a fair opportunity to secure counsel of his own choice." Id. at 53. 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 (1974); 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).

It is apparent from Parker's taped statement that he did not consider Greene his attorney, and that he repeatedly expressed a desire to be represented by the lawyer he believed his mother had retained. This is most strikingly brought out in the following exchange:

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| 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."

A2 at 778-79 (emphasis added). The context of this passage unmistakably reveals that Parker's statement "Another one" meant that he wanted to be represented by a lawyer other than Greene. The entire transcript reveals that Parker was not given an opportunity to contact either his mother or another attorney.

Despite this blatant constitutional error, Udell did not raise this point in his written briefs. While he made passing reference to a nebulous right to hire counsel of one's choice in his oral argument, Udell did not cite any case law authorities or facts in the record in support of this right and of its violation in Parker's case.

**B. PARKER'S APPELLATE COUNSEL FAILED TO ARGUE THAT THE SHERIFF EXCEEDED THE BOUNDS OF PERMISSIBLE CLARIFICATION OF ARGUABLY AMBIGUOUS STATEMENTS**

In its brief on Parker's appeal, the State contended that if Parker had invoked his right to counsel during the taping of his statement, his other statements indicating a desire to talk created an "ambiguous situation" analogous to Cannady v. State, 427 So. 2d 723 (Fla. 1983). A10 at 30. The State further contended that the Sheriff properly clarified Parker's desires, A10 at 31, in accordance with Cannady, in which this Court first addressed the issue of a defendant's ambiguous or equivocal requests for an attorney.

Even a cursory reading of Cannady and a comparison of that decision with the facts of Parker's case clearly re-

veal that the Sheriff exceeded the bounds of permissible clarification of arguably ambiguous statements and, therefore, Parker's taped statement should have been suppressed. As Cannady and the decisions on which it is based demonstrate, the Sheriff, either intentionally or inadvertently, acted improperly in violation of Parker's constitutional rights.

Although Udell cited Cannady in his written briefs and oral argument, he failed to employ that critical decision to "highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process." Wilson, supra, 474 So. 2d at 1165. Udell's failures in this regard constituted a major deficiency in his performance as Parker's appellate counsel.

1. **The Cannady Decision**

In Cannady, a police officer sought to interrogate a defendant who was in jail. The defendant was brought to an office and was advised of his rights. In this Court's own words, the following then occurred:

> According to McKeithen [the police officer] appellant [the defendant] started acting nervous so McKeithen asked him outright if he killed Carrier [the victim]. Appellant started crying and said, "I didn't mean to shoot that man, I didn't mean to kill that man, it wasn't supposed to happen that way." McKeithen said that appellant kept crying and then said, "I think I should call my lawyer." McKeithen said that he then ceased his questioning and placed a telephone in front of appellant. McKeithen testified that appellant continued crying and kept saying, "I didn't mean to kill that man, it wasn't supposed to happen that way." McKeithen asserted that three or four minutes later he asked appellant if he wanted to talk about it and appellant said yes.

427 So. 2d at 726.

Faced with the issue of whether the defendant had invoked his right to counsel, this Court reasoned:

> While expressing a desire to speak to an attorney, which presumably indicates a wish not to answer any more questions, appellant was also readily confessing his guilt by repeatedly saying he did not mean to kill the man, thereby indicating a desire to continue talking to the police without the benefit of an attorney's presence. When a person expresses both a desire for counsel and a desire to continue the interview without counsel, further inquiry is limited to clarifying the suspect's wishes. Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979); Nash v. Estelle, 597 F.2d 513 (5th Cir.), cert. denied, 444 U.S. 981, 100 S.Ct. 485, 62 L.Ed.2d 409 (1979).

Id. at 728-29 (emphasis added). Applying this reasoning to the facts, this Court held that the police officer properly limited his comments to clarifying the defendant's wishes and that the police officer had properly determined that the defendant did not wish to consult counsel before giving his statement.

**2. The Failure to Distinguish the Facts in Cannady**

Udell inexcusably failed to highlight the many significant factual distinctions between Cannady and Parker's situation. It is undeniable that his "application of case law to the facts before the Court was cursory and totally lacking in persuasive advocacy." Wilson, supra, 474 So. 2d at 1164.

In Cannady, it was obviously necessary for the police officer to attempt to clarify whether the defendant wanted to invoke his right to counsel. Both before and after his solitary comment, "I think I should call my lawyer," the defendant actually talked about the crime of which he was charged and even confessed his guilt. In such circumstances,

it was certainly unclear whether the defendant truly sought the advice of counsel.

By contrast, the transcript of Parker's taped statement reveals an overwhelming and unmistakable desire to consult with the attorney whom he believed his mother had retained. The transcript shows that, unlike the defendant in Cannady, who made one equivocal comment about an attorney, Parker repeatedly sought to be allowed to communicate with his mother for the purpose of meeting with his attorney. A2 at 777-79.

Parker, unlike the defendant in Cannady, did not speak of the charges against him or confess his guilt while he simultaneously sought to invoke his right to counsel. Parker's isolated remark -- "I just want to get this off my mind . . . . Talk," A2 at 778 -- cannot be considered comparable to the pervasive and overwhelming desire to make a statement exhibited by the defendant in Cannady. Thus, while Parker may have had an urge to discuss the facts of his case -- a natural tendency for an incarcerated defendant who believes that he is innocent -- this comment clearly did not suffice to create an ambiguity which called for any clarification.

Moreover, in Cannady, in response to the defendant's statement "I think I should call my lawyer," the police officer gave the defendant an opportunity to contact his lawyer by placing a phone in front of him. Cannady, supra, 427 So. 2d at 726. The defendant's failure to then call his attorney added to the confusion over the defendant's desires and legitimized the need for clarification. Parker, in contrast, was not given the opportunity to contact his attorney. Greene and Sheriff Holt merely rebuffed Parker's unambiguous assertions of his right to an attorney by declaring that Greene was Parker's appointed attorney. A2 at 777-79.

These numerous factual differences serve to show the inapplicability of Cannady to Parker's situation -- Parker's unambiguous assertion of his right to an attorney obviated any need for clarification of his desires, and required that all questioning cease immediately. See Miranda v. Arizona, 348 U.S. 436, 474 (1966); Fare v. Michael C., 442 U.S. 707, 719 (1979); Colquitt v. State, 396 So. 2d 1170 (Fla. 3d DCA 1981); Singleton v. State, 344 So. 2d 911 (Fla. 3d DCA 1977). Parker's appellate counsel utterly failed to highlight this critical point for the Court.

### 3. The Failure to Argue that Sheriff Holt Exceeded the Limits of Permissible Clarification

On the basis of Cannady, the State argued that Sheriff Holt acted properly and lawfully by attempting to clarify Parker's desires. A10 at 31. In Cannady, this Court held: "When a person expresses both a desire for counsel and a desire to continue the interview without counsel, further inquiry is limited to clarifying the suspect's wishes." Cannady, supra, 427 So. 2d at 728 (citation omitted). In violation of the principles established in Cannady, Sheriff Holt's response to Parker's request for other counsel was not sufficiently limited. Udell, however, never raised this issue.

If any clarification of Parker's desires was conceivably necessary, the transcript of the taped statement makes clear that Greene clarified them. Greene's question -- "Do you wish to make no statements until you get your mother to get another lawyer other than myself to represent you?," A2 at 778-79 -- and Parker's response -- "I was waiting on -- I want my mom to get me a lawyer . . . . Another one," A2 at 779 -- unquestionably demonstrate that Parker's sole concern at that point was to meet with the attorney he believed his mother had procured. Nonetheless, Sheriff Holt

did not stop the taping session and permit Parker to contact his mother.

Even if clarification at that point was required, Sheriff Holt did not, like the police officer in Cannady, simply -- and appropriately -- ask Parker whether he wanted a lawyer or wanted to make a statement. Instead, he first "assured" Parker that he "understood" him. A2 at 779. Sheriff Holt then allegedly "reminded" Parker that "you felt like that there was something being put on you that wasn't right." A2 at 779. Sheriff Holt's words may very well have prompted Parker to abandon his request for an attorney and to make a statement by reinforcing a defendant's primary motive to talk -- to establish his innocence.

Sheriff Holt's speech at that point clearly went beyond mere clarification. The force of this argument, completely missed by Udell, is demonstrated by Thompson v. Wainright, 601 F.2d 768 (5th Cir. 1979), cited by this Court as authority in Cannady. In explaining its holding that when a defendant makes an equivocal request for counsel, further questioning is strictly limited to clarifying the request, the Fifth Circuit stated:

> [T]he limited inquiry permissible after an equivocal request for legal counsel may not take the form of an argument between interrogators 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.

Thompson, supra, 601 F.2d at 772.

The reasoning in Thompson demonstrates that Sheriff Holt's comments went beyond clarification of Parker's desires. Sheriff Holt's statement that "I went back and explained to

you that you did have a lawyer appointed for you," A2 at 779, served to challenge and deny Parker his constitutional rights to a nonconflicted lawyer and a lawyer of his own choosing. And Sheriff Holt's alleged reminder to Parker that "you felt like that there was something being put on you that wasn't right" had the effect of persuading Parker to make a statement. A2 at 779. As explained in Thompson, such comments are contrary to the purpose of clarification.

On the direct appeal of Parker's conviction and sentence of death, Udell made none of these fundamental and critical arguments concerning the lower court's error in denying Parker's motion to suppress. Udell's performance thus "fell far below the range that is professionally acceptable." Wilson, supra, 474 So. 2d at 1164.

## C. THE DEFICIENT PERFORMANCE OF PARKER'S APPELLATE COUNSEL PREJUDICED PARKER ON HIS DIRECT APPEAL

The failure of Parker's appellate counsel to raise the most fundamental reasons why the lower court erred in failing to suppress Parker's taped statement prejudiced Parker on his direct appeal. Udell failed to highlight the harm caused by the taped statement at Parker's trial and the fundamental constitutional errors committed by its admission. These failures "compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Wilson, supra, 474 So. 2d at 1163 (citation omitted).

### 1. Prejudice to Parker in Connection with His Conviction

Under Strickland, a defendant is prejudiced by his counsel's deficiencies if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra,

466 U.S. at 694. There is clearly more than a reasonable probability that, if Udell had raised and persuasively argued the most obvious legal and factual reasons why Parker's taped statement ought to have been suppressed, this Court would have determined that failure to suppress the statement constituted reversible error requiring a new trial.

The legal and factual arguments which Udell failed to raise were all indisputably meritorious, and "must have leaped out upon even a casual reading" of the transcripts of Parker's taped statement and the hearing on his pretrial motion to suppress. Matire, supra, 811 F.2d at 1438. All of these issues were directed to the most basic aspect of Parker's defense -- the suppression of his taped statement. As stated in Smith v. Wainwright, 484 So. 2d 31 (Fla. 4th DCA 1986) (citing Strickland v. Washington, 466 U.S. 668 (1984)): "[A]ppellate counsel who fails to raise a meritorious issue which is a fundamental and intrinsic part of his client's case is ineffective."

The constitutional error in admitting the statement cannot be considered harmless. As Udell correctly pointed out to this Court regarding the "harmless error" rule at the time of Parker's direct appeal:

> It should be noted that reviewing courts may not regard constitutional error as harmless if there is a reasonable possibility that the error may have contributed to the accused's conviction or if the error may not be found harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).
>
> Such error cannot be construed to be harmless because, although [in the taped statement] he denied the actual killing of the victim, he admitted being present during the robbery killing and murder and in light of the felony murder rule such statement cannot be said to be wholly exculpatory.

A8 at 6.

Udell's characterization of the taped statement as not "wholly exculpatory," however, failed to portray fully and fairly the devastating effect of the statement on Parker's defense. The statement was highly inculpatory; the State Attorney at Parker's trial used the statement to devastating effect on cross-examination of Parker, arguing that Parker had in fact admitted participation in the crimes, see A3; and the statement was repeatedly emphasized during the State's closing argument at the guilt phase of Parker's trial. See A4. Absent the taped statement, the State would have had little evidence of Parker's active participation in the underlying felonies, thus raising a reasonable probability of acquittal or conviction on a lesser charge.

As a result of the extremely incriminating nature of the statement and the manner in which it was employed by the State at Parker's trial, had Udell made the most basic and appropriate arguments against its admission, this Court would not have found the wrongful admission of Parker's taped statement harmless error. Parker thus was prejudiced by Udell's failure to make those arguments, which would have led this Court to vacate Parker's conviction and/or remand for a new trial.

**2. Prejudice to Parker in Connection with Imposition of the Death Sentence**

The centrality of Parker's taped statement to a proper imposition of the death penalty under Florida statutory law is apparent on the record of Parker's trial and direct appeal. First, the overwhelming majority of the trial court's findings of fact underlying the statutory aggravating circumstances which it found in support of Parker's sentence of death under section 921.141(3) of the Florida Statutes are derived exclusively from Parker's taped statement. A6.

Second, the facts which the State emphasized in support of the aggravating circumstances of "heinous, atrocious and cruel" and "cold, calculated and premeditated" are taken solely from Parker's taped statement. In both its brief on Parker's direct appeal and the oral argument before this Court, the State emphasized Parker's taped remarks which suggested that: i) Parker was aware of Bush's pre-designed plan to kill Ms. Slater; ii) Bush told Ms. Slater that he intended to kill her; and iii) Ms. Slater subsequently pled for her life. A10 at 38; 41.

But for Parker's taped statement, at least two of the statutory aggravating factors which were found to support the imposition of the death penalty would not have been found by the trial court or affirmed by this Court. Without such aggravating factors, it is reasonably probable that the death penalty would not have been recommended by the jury at Parker's trial, imposed by the trial court, or affirmed by this Court as warranted under section 921.141(3) of the Florida Statutes.

Furthermore, without the taped statement, there would have been insufficient evidence of Parker's active participation to justify a death sentence under the standards established by the United States Supreme Court in Enmund v. Florida, 458 U.S. 782 (1982). In Enmund, the Supreme Court held that the Eighth Amendment prohibited the imposition of 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." Id. at 797.

Parker's appellate counsel, however, failed to argue to this Court that, absent Parker's taped statement, his death sentence violated the constitutional requirements of Enmund. The evidence introduced at Parker's trial aside from the taped statement simply does not constitute sufficient proof that Parker knew that co-defendant Bush had a

gun and intended to kill the victim, let alone that he himself killed, attempted to kill, or intended a killing to occur.

The trial testimony of Georgeanne Williams, standing alone, would not have been sufficient to satisfy the Enmund standards. Ms. Williams -- the girlfriend of John Earl Bush, R 892-95, a co-defendant of Parker -- testified that she spoke to Parker at the Martin County Jail through a crack in the door of his cell, and Parker told her that he shot the victim after Bush stabbed her. R 882-83. Parker categorically denied ever meeting Ms. Williams and testified that he never made any statement, much less an incriminating one, to Ms. Williams. R 996-97.

As Bush's girlfriend, Ms. Williams had a clear motive to lie about Parker's involvement in the killing -- to save her boyfriend from execution. Even though Bush had already been tried and sentenced to death at the time of Parker's trial, Ms. Williams would still have had substantial reasons to lie. Ms. Williams first testified about her alleged conversation with Parker at a deposition prior to both the Bush and Parker trials; consequently, she could easily have felt compelled to repeat it at Parker's trial to avoid a charge of perjury. Also, because Bush's conviction and death sentence had not yet been affirmed by this Court at the time of Parker's trial, Ms. Williams would have thought it possible to help her boyfriend by pointing to Parker as the primary assailant.

A review of the trial transcript establishes the centrality of the taped statement to the State's case for imposing the death penalty on Parker. Without it, the State would be forced to rely exclusively on Ms. Williams' testimony concerning Parker's alleged admission. At the trial, Parker denied ever meeting Ms. Williams and denied making any admission that he had shot Ms. Slater. R 996-97. With-

out the taped statement, the State would have been unable to challenge Parker's credibility through use of the statement and would have no evidence, other than Ms. Williams' statement, of Parker's active involvement. Because the taped statement should not have been admitted, the constitutional standards of Enmund would have required, at the very least, a new trial. Appellate counsel's failure to raise the fundamental error committed by denial of the motion to suppress thus clearly prejudiced Parker.

## Conclusion

For the foregoing reasons, Parker requests this Court to issue a writ of habeas corpus, vacating his convictions and sentence of death.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Habeas Corpus 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.

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