

IN THE SUPREME COURT OF FLORIDA

NO. 72466

FILED

SID. J. WALKER

MAY 27 1988

NORMAN PARKER,
Petitioner,

CLERK SUPREME COURT
TALLAHASSEE, FLORIDA

v.

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

AMENDMENT SUPPLEMENTING

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF
HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND
APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION
OF PETITION FOR WRIT OF CERTIORARI

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AMENDMENT SUPPLEMENTING

PETITION FOR WRIT OF HABEAS CORPUS, MOTION
FOR STAY OF EXECUTION, AND/OR FOR STAY OF EXECUTION
PENDING FILING AND DISPOSITION OF PETITION FOR
WRIT OF CERTIORARI

Petitioner, Norman Parker, an indigent proceeding in forma pauperis, by his undersigned counsel, has petitioned this Court to issue its writ of habeas corpus pursuant to Fla.R.App.P. 9.030 (a)(3) and Fla.R.App.P. 9.100. Petitioner avers that he was sentenced to death in violation of his rights under the fifth, sixth, eighth, and fourteenth amendments to the Constitution of the United States, and under the Constitution and laws of the State of Florida. In support of his petition and in accordance with Fla.R.App.P. 9.100(e), Mr. Parker states:

I. JURISDICTION

This is an original action under Fla.R.App.P. 9.100(a). On Monday, May 23, 1988, Mr. Parker filed a petition for writ of habeas corpus in this Court. As a result of the unprecedented number of pending death warrants, see, e.g., Spalding et al. v. Dugger et al., No. 72,475 (Petition for Extraordinary Relief, for

a Writ of Prohibition, and for a Writ of Mandamus) (filed May 25, 1988) (discussing predicament faced by Office of the Capital Collateral Representatives in attempting to simultaneously represent unprecedented number of clients under death warrant), and the fact that Mr. Parker's undersigned counsel is presently representing four (4) clients against whom death warrants have been signed, by oversight two important claims an important claim not included in the Monday filing. However, counsel has been informed that this Court will not hear oral argument until May 7, 1988, and it is to be hoped that the additional issue presented here can be reviewed in conjunction with and as a supplement to Mr. Parker's petition for a writ of habeas corpus.

This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3), and Article V, Section 3(b)(9), Fla. Const. The petition and the instant supplement present issues which directly concern the judgment of this Court on direct appeal, and in post-conviction, and hence jurisdiction lies in this Court. See, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981). This Court reviewed the merits of the sentencing court's jury instructions on direct appeal and found that "there was no error" Parker v. State, 456 So. 2d 436, 444 (Fla. 1984). Petitioner requests that this Court revisit the jury instruction claim presented herein in light of errors of constitutional magnitude in the prior treatment: "[I]n the case of error that prejudicially denies fundamental constitutional rights . . . this Court will revisit a matter previously settled" Kennedy v. Wainwright, 483 So. 2d 424 (Fla. 1986). Moreover, Mr. Parker respectfully urges that the Court revisit the issue in light of significant changes in the law since the time of Mr. Parker's 1984 direct appeal. Cf. Tafero v. Wainwright, 459 So. 2d 1034,

1035 (Fla. 1984); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987).¹

II. NATURE OF RELIEF REQUESTED

Mr. Parker herein respectfully requests that this Court stay his execution, and reconsider the appropriateness of his sentence of death. He specifically requests that the death sentence be vacated, and that a new sentencing proceeding be conducted.

III. CLAIMS FOR RELIEF

CLAIM VII

MR. PARKER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT IMPOSE CONSECUTIVE SENTENCES ON THE OFFENSES ON WHICH MR. PARKER WAS CONVICTED, PROPER, AND LAWFUL, WHICH COULD ALSO HAVE BEEN ORDERED TO BE SERVED CONSECUTIVELY TO MR. PARKER'S EARLIER FLORIDA AND WASHINGTON, D.C., CONVICTIONS, WAS A LEGITIMATE, PROPER, AND LAWFUL THIRD ALTERNATIVE TO A SENTENCE OF DEATH OR LIFE IMPRISONMENT, THUS MISINFORMING AND MISLEADING THE JURY IN FAVOR OF VOTING FOR DEATH, AND VIOLATING MR. PARKER'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION.

Mr. Parker's jury was misled and misinformed. The trial court instructed the jury that the alternative to a sentence of death would be "life imprisonment, without possibility of parole for 25 years." (See, e.g., ROA, Vol. 24, p.83.) the jury, however, was never informed that that was not the only available alternative to a sentence of death -- i.e., that the Court could sentence Mr. Parker to consecutive sentences of

1. To the extent appellate counsel may have inadequately presented this issue -- which had been preserved by trial-level contemporaneous objection -- Mr. Parker submits that counsel's failing involved ineffective assistance. Since the substantial prejudice to Mr. Parker is apparent from the claim (see infra); relief on this basis is also proper. Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985).

imprisonment for the murder and the underlying felonies, and that these sentences could have been ordered to be served consecutively to the two previous convictions for which Mr. Parker was serving life sentences. The Court, eventually, did sentence Mr. Parker consecutively to the maximum available terms [ROA, Vol. 25, p.19]).

Defense counsel did in fact request that the Court provide the jury with such an instruction (ROA, Vol. 22, p. 1152). The Court refused. The prosecutor then vehemently argued to the jury that the "life sentence" alternative to death did not mean that "[h]e's not getting out" (ROA, Vol. 24, pp.66-68), and that "if life meant life" there would have been no homicide in this case.

The Court's refusal to instruct on the "consecutive sentences" alternative made these misleading prosecutorial arguments abundantly credible to the jury. (No curative instruction was provided.) The jury was thus misinformed as to the alternatives to a death sentence, and misled into voting death -- i.e., the trial court's failure to instruct provided credence to the prosecutor's misleading arguments for death. In fact, the trial court's refusal to appropriately instruct the jury on the option of consecutive sentencing (an option that was exercised in this case) was itself misleading: facing sentencing in a case involving a defendant with a serious record, the jury was led to believe that only two options were open -- death or a twenty-five year minimum. In failing to instruct, as requested, on the lawful, legitimate "third option," the trial court unconstitutionally skewed the jury towards death. See Beck v. Alabama, 447 U.S. 633 (1980). The jury deciding whether Norman Parker should live or die was misinformed. Cf. California v. Ramos, 463 U.S. 992 (1983).

Nothing was told to the jury with regard to the third option (consecutive sentences). As the United States Supreme Court has held in a related context, failing to provide a capital jury with

the information necessary to properly and fairly render a verdict, "inevitably [] enhance[s] the risk" of an unwarranted sentence of death. Beck v. Alabama, 447 U.S. 633, 637 (1980). The "risk" of an unwarranted death sentence under such circumstances is as intolerable as the risk of an unwarranted conviction which the Supreme Court discussed in Beck. Id. at 633.

The erroneous failure to instruct undeniably placed "artificial alternatives" before the jury, California v. Ramos, 463 U.S. 992, 1007 (1983), and served to mislead and misinform the jury in violation of the sixth, eighth and fourteenth amendments. See Caldwell v. Mississippi, ___ U.S. ___, 105 S. Ct. 2633 (1985). Doubtless, the flawed instructions provided the jurors with misinformation of constitutional magnitude, cf. Caldwell, supra, a risk which, in a capital case, is simply intolerable. Beck, supra; Caldwell.

Moreover, such an instruction interfered with the jury's ability to properly assess whether death was an appropriate penalty for Mr. Parker -- it interfered with their ability to properly assess both aggravation and mitigation. Cf. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). This Court has made clear that accurate instructions are a prerequisite to the constitutional validity of any sentence of death. See, e.g., Floyd v. State, 497 So. 2d 1211, 1215-16 (Fla. 1986); Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986). Here, the instructions were inaccurate, and when compounded by the prosecutor's argument, cf. Caldwell, supra, misled the jury.

The jury was not provided with the information needed to make a reliable and rational decision on the issue of whether a sentence of death was appropriate in this case. See Caldwell v. Mississippi, ___ U.S. ___, 105 S. Ct. 2633 (1985). Consequently, the trial court's refusal to instruct on consecutive sentences may well have persuaded the jury to sentence Mr. Parker to death in order to avoid setting him free. See Beck v. Alabama, 447

U.S. 625, 643 (1980). A death sentence obtained as a result of such misinformation simply does not comport with the reliability requirements mandated in capital cases. Beck, supra; see also Caldwell, supra; Adams, supra; Hitchcock, supra.

Mr. Parker's sentence of death is neither reliable nor individualized, and habeas corpus relief is proper.

Accordingly, because Mr. Parker's sixth amendment right to a reliable jury verdict, and eighth and fourteenth amendment rights to a reliable and individualized jury verdict in a capital case have been violated, he is entitled to the relief he seeks.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court grant a stay of execution, and that, upon judicious consideration of the matters contained herein and his petition for a writ of habeas corpus, that the Court order resentencing, or alternatively, a new appeal. Since Mr. Parker's petition presents questions of fact, he respectfully also urges that the Court relinquish jurisdiction to the circuit court for a proper evidentiary hearing on the factual questions attendant to this action.

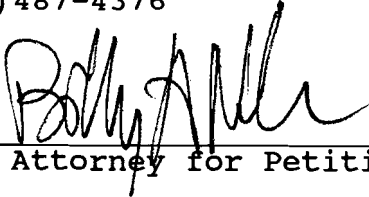
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Ralph Barriera, Assistant Attorney General, Department of Legal Affairs, 401 NW Second Avenue, Miami, FL 33128, this 28th day of May, 1988.


Counsel for Petitioner