IN THE SUPREME COURT OF FLORIDA

J. B. PARKER,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary, Florida Dept. of Corrections, & TOM BARTON, Superintendent, Florida State Prison,

Respondents.

CASE NO. 74,749

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS & MOTION FOR STAY OF EXECUTION

COMES NOW Respondent, RICHARD L. DUGGER, by and through undersigned counsel, and files this Response, to show cause why the pending petition, for writ of habeas corpus, ~~should not be~~ granted.

I. PRELIMINARY STATEMENT

This Response is filed in opposition to Petitioner's petition for a writ of habeas corpus, filed on or about September 20, 1989, seeking relief for alleged ineffectiveness of appellate counsel.

The symbol "PE" will refer to Petitioner's Exhibits, attached to the pending petition, "R" to the Record, already before this Court, of Petitioner's direct appeal, ~~Parker v.~~

State, Case No. 63,177; and "RE" to Respondent's Exhibits attached to this response. "P" will refer to the record on appeal of Petitioner's first Rule 3.850 in Parker v. State, Case No. 72,374.

11. PROCEDURAL HISTORY

Petitioner is presently in Respondent's lawful custody, under a valid judgment and sentence of death, imposed by the Martin County Circuit Court, the Honorable Judge Phillip Nourse presiding, on January 11, 1983. (R, 1706-1711;). Petitioner was convicted on January 7, 1983, of the first-degree murder, robbery with a firearm and kidnapping of Frances Julia Slater, on April 27, 1982. (R, 1547, 1692). Following the jury's 8-4 advisory recommendation for death, (R, 704), Judge Nourse imposed the death penalty, as sentence for the murder conviction. (R, 1706-1711). On remand from this Court, for such purpose, the Circuit Court entered its written factual findings in support of the death penalty, basing the death sentence on evidence supporting four aggravating circumstances (murder committed in the course of a kidnapping and robbery; murder committed for pecuniary gain; murder was "heinous, atrocious and cruel;" and was done in a "cold, calculated and premeditated manner"), and three mitigating circumstances (age of Petitioner; absence of sexual molestation of the victim; "acceptable" trial behavior) (R, 1706-1711).

Petitioner appealed hi5 conviction and sentence to this Court, raising the following grounds (as restated):

> (1) The trial court erred, in permitting the State to introduce prior consistent statements, made by a state witness, Georgeann Williams, to family members, as rebuttal to allegations of falsification at trial;
>
> (2) The trial court erred, in refusing to grant Petitioner's requested jury instructions, on independent acts of others;
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> (3) The trial court abused its discretion, in limiting defense cross-examination of state witness Georgeann Williams, on the subject of Williams' prior arrest for petty larceny;
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> (4) The trial court committed error, in denying Petitioner's motion to suppress Parker's May 4, 1982 statement to policy;
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> (5) The trial court abused its discretion, in permitting the State, at the sentencing phase, to introduce rebuttal evidence, on Parker's prior criminal history, when Parker had waived reliance on the statutory mitigating factor of absence of significant prior criminal history;
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> (6) The trial court erred, in permitting the sentencing jury, by jury instructions, to consider the aggravating circumstances of "heinous, atrocious and cruel"; "cold, calculated and premeditated";

and further erred, in improperly "doubling" the factors of robbery and pecuniary gain;

(7) That prosecutorial comments at the guilt phase, referring to the excluded statement of codefendant John Bush, denied Parker a fair trial, by creating an improper inference that Parker shot the victim, Frances Slater; and

(8) That the trial court erred, in overruling Parker's objections to the State's exercise of peremptory challenges during voir dire, and in failing to hold a hearing, under State v. Neil, 457 So.2d 481 (Fla. 1984).[1]

In addressing each of these issues, this Court unanimously upheld Petitioner's conviction and sentence. Parker v. State, 476 So.2d 134 (Fla. 1985). In specific review of Parker's challenge to the trial court's suppression ruling, this Court rejected the contention that Petitioner's request to see his mother, to check and see if she had obtained an attorney for him, was an invocation of his right to silence. Parker, 476 So.2d, supra, at 137-138. This Court concluded that, based on the Record, Parker "made a knowing, intelligent and voluntary waiver of his right to silence; that he "repeatedly voiced his desire to make a statement," even in the face of contrary advice, by a "representative" of the public defender's office; and that Parker

[1] This last issue was raised in a supplemental brief, filed by Petitioner's counsel on direct appeal, Robert G. Udell.

was repeatedly advised of his right to refuse to make any statements. Parker, 476 So.2d at 138.

On December 7, 1987, Petitioner filed a post-conviction motion in the Circuit Court, Martin County, Florida. (P, 455-492). In said motion, Petitioner asserted the following grounds for relief (as restated):

> (1) That trial counsel, Robert Makemson, rendered ineffective assistance, in allegedly failing to assert certain grounds in support of efforts to suppress Parker's May 5, 1982 statement, and failing to have the statement excluded;
>
> (2) That counsel was further allegedly ineffective, by failing to investigate or present certain mitigation evidence and/or witnesses, at sentencing;
>
> (3) That the State violated Parker's due process rights by failing to disclose the fact of the State's arguments, at the prior trials of Parker's codefendant, that each of the codefendants was the "triggerman" of the murder; and
>
> (4) That the imposition of the death penalty, considering Parker's alleged role and degree of culpability, violated Eight Amendment principles in Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. (1987).

(P, 457-490).

After an evidentiary hearing in February, 1988, P, 1-359, the Circuit Court, Martin County, denied Petitioner's post-conviction motion on April 5, 1988.

On August 24, 1988, Petitioner filed a petition for habeas corpus in this Court raising the following grounds:

> 1. Petitioner received ineffective assistance of counsel for appe11ate counsel's failure to argue that Petitioner's trial attorney had a conflict of interest which prevented him from providing competent advice.
>
> 2. Petitioner received ineffective assistance of counsel for appellate counsel's failure to argue that Petitioner's rights included the right to confidential communication.
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> 3. Petitioner received ineffective assistance of counsel for appellate counsel's failure to argue that his right to counsel of choice was violated.
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> 4. Petitioner received ineffective assistance for appellate counsel's failure to argue that police exceeded the bounds of permissible clarification of ambiguous statements.
>
> 5. Petitioner received ineffective assistance of counsel for appellate counsel's failure to adequately distinguish the facts of controlling case law.

Parker v. State, 542 So.2d 356 (Fla. 1989).

This Court consolidated both cases for review. All of Petitioner's claims were deemed to be meritless Parker v. State, 542 So.2d 356 (Fla. 1989).

On September 28, 1989, Petitioner filed a second motion for post-conviction relief which is currently pending before the trial court. This petition is now before this Court.

No federal habeas corpus relief has yet been sought by Petitioner.

III. FACTS

Respondent relies on the facts contained in this Court's prior opinion, on direct appeal, Parker, 476 So.2d at 135-136. Any additional relevant facts appear in the body of the argument below.

IV ARGUMENT

ISSUE I

PETITIONER'S SENTENCE WAS THE RESULT OF REASONED JUDGMENT BY THE TRIAL COURT AND SUCH SENTENCE RECEIVED MEANINGFUL REVIEW ON APPEAL, CONSEQUENTLY ANY CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS WITHOUT MERIT (PETITIONER'S CLAIMS I-III RESTATED)

Petitioner claims that his constitutional rights were violated due to an alleged failure by the trial court to make

timely and sufficient written findings in support of his death sentence pursuant to Section 921.141(3), Florida Statute (1985). Relying on this Court's opinion in Van Royal v. State, 497 So.2d 125 (Fla. 1986), Petitioner claims that the trial court's 1983 sentencing order was inadequate and was not remedied by a subsequent sentencing order filed in 1984 (PE-G).

Respondent submits that this issue is moot as this Court granted a relinquishment to the trial court in order to supplement the record (PE.-G). Jones v. State, 332 So.2d 615 (Fla. 1976); Ferguson v. State, 417 So.2d 639 (Fla. 1982). Furthermore, despite the fact that Van Royal, supra, was not rendered till almost three years later, supplementation of the record in this case does not violate Van Royal.

In that case the only relevant evidence pertaining to the trial court's imposition of the death penalty was the oral pronouncement of death. This Court characterized the record as being devoid of specific findings. Van Royal, 497 So.2d at 628. Due to that inadequacy this Court felt compelled to reverse the sentence. Id. The record in the instant case is not devoid of specific findings. The 1983 sentencing order contains which aggravating and mitigating circumstances the trial court weighed in its determination. (PE.-B). Since this Court requires both clarification and explanation of the applicable aggravating and mitigating circumstances, this record is simply incomplete. Patterson v. State, 513 So.2d 1263 (Fla. 1987). Although incomplete, this order negates any claim that the record was

inadequate. Rhodes v. State, 14 FLW 343 (Fla. July 6, 1989). In Rhodes, supra the sentencing order merely stated which aggravating and mitigating factors applied. Id at 346. Absent were the specific findings of fact which were applicable to the aggravating and mitigating circumstances:

> We note that in this case it is difficult to ascertain from the sentencing order the analysis used by the trial court to weigh the aggravating and mitigating factors; it appears the trial court merely stated which aggravating and mitigating factors applied, the findings of fact contain little analysis and very little application of the, specific facts of Rhodes case. Although we find the sentencing order in this case to be sufficient, we urge trial judges to use greater care when preparing their sentencing orders so it is clear to this Court how the trial judge arrived at the decision to impose the death sentence.

Rhodes, 14 FLW at 346. As clearly reasoned and articulated by this Court, such writings are needed to provide this Court with an opportunity for meaningful review as well as to make a determination that the trial court exercised reasonable judgment. Van Royal, 497 So.2d at 628; Rhodes 14 FLW at 346. The sentencing order in the instant case is akin to that found in Rhodes, consequently, supplementation of the record was appropriate. Ferquson, supra; Cave v. State, 445 So.2d 341

(Fla. 1984), The fact that the 1983 order was not submitted till two weeks after pronouncement of the sentence is of no avail. This Court has held in a subsequent case to Van Royal that a written order filed two and one half months after sentencing and prior to certification of the record was sufficient. Mueleman v. State, 503 So.2d 310, 317 (Fla. 1987). In any event, the requirement that a written order be contemporaneous to an oral pronouncement will not apply to the instant case. Grossman v. State, 525 So.2d 833 (Fla. 1988); Stewart v. State, 14 FLW 430, 432 (Fla. August 31, 1989). Petitioner should also be precluded from raising this issue as this Court's relinquishment is now law of the case. Greene v. Massey, 384 So.2d 24 (Fla. 1980).

Petitioner alleges that the trial court's 1984 order may not have been the product of a well reasoned judgment. This claim is not supported by the record. Although the State filed a motion to relinquish jurisdiction Respondent cannot understand how that translates into any evidence that the trial court was not aware of its duty. Written findings of fact are an aide to a reviewing Court. The fact that the trial court did not reduce to writing his entire analysis does not mean that an appropriate analysis was not undertaken. Furthermore when appraised of the fact that more evidence of an analysis was needed for a proper review, the trial court conducted a hearing for this purpose and entered a more complete order detailing the applicable facts of the case to the respective aggravating and mitigating circumstances (PE.-G; RE.-A). Contrary to Petitioner's statement the incompleteness of

the **1983** order was first brought to the attention of the Court by appellate counsel and not the State (PE.-C pg. 28). The State through Assistant Attorney General Lydia Valenti submitted a proposed order which made specific reference to aggravating circumstance §921.141(5)(b)(RE-B), which is the defendant was previously convicted of another capital felony, or of a felony involving the use or threat of evidence to the person. Upon further consideration our office suggested that the aggravating circumstance remain (RE-C). Also evident from that correspondence is that Petitioner's attorneys were fully aware of the State's position and were provided with every opportunity to submit their own proposed order (RE A-C). This was also made clear to the trial court (RE-D). Ultimately the trial court decided to delete the aggravating circumstance (PE-G). The above facts illustrate that the trial court reviewed all the facts and reweighed the appropriate and competing circumstances (PE-G). Petitioner has not overcome the well established presumption that the trial court adhered to the basic rules of procedure. Harris v. Rivera, **454** U.S. **339, 70** L.Ed 2d **530, 102** S.Ct. **460 (1981).**

Petitioner also claim that this court's review on direct appeal was flawed. The sole premise for this claim is the fact that the Court mentions the "extra aggravating factor" in the opinion, Parker v. State, **476 So** 2d **134, 136** (Fla. **1985).** This claim is lacking in logic and evidence. Although mentioned once that factor was never discussed anywhere in the opinion. Parker, supra. Secondly a review of the briefs filed subsequent to the

new order reveals that the parties considered the factor waived. Cf. State v. Anderson, 537 So.2d 1373 (Fla. 1989). In the State's answer brief on the issue of the aggravating factors, no mention is made of that factor during the harmless error argument (RE.- E, pg. 38-44). Similarly in Petitioner's reply brief no mention is made of this omitted aggravating factor (RE.-F, pg 12). The only factors discussed were the remaining four which were present in the 1984 order. Thirdly this Court made a determination during the appeal that the 1983 order lacked the requisite factual findings (PE.-D & F). The new order rectified that problem (PE.-G). Mindful therefore of the absence of factual findings to that aggravating factor Petitioner suggests that this Court somehow forgot about that deficiency and relied on the order anyway. There is just no evidence to support such a fantastic theory. Harris v. Rivera; supra. Fourthly when discussing the sufficiency of the evidence under §921.141(5)(h) this Court's opinion mirrors the evidence found to be sufficient in the trial court's 1984 sentencing order. Parker 476 So.2d at 139-140 (PE.-G). Lastly, this Court stated that it complied with its duty and reviewed the entire record. Id. at 140. There is no question that the 1984 order was a part of the record.

Moreover, the fact that this Court did not rely on the wrong order on direct appeal is clear from its review of Petitioner's case in the subsequent habeas petition and appeal of his motion for post-conviction relief. Parker v. State, 542 So.2d 356 (Fla. 1989). The State's response to Petitioner's Rule 3.850 and its

answer brief on the appeal of his **3.850** state that there were four aggravating circumstances relied upon by the trial court (RE.-G & H). Similarly in both the Petitioner's own habeas petition and the State's response to it include the trial court's **1984** order (RE.-I & J). Consequently when reviewing any claim of prejudice under Strickland v. Washington, **466** U.S. **668 (1984)** this Court was presented with only the second order, therefore review in this Court was premised on the correct aggravating and mitigating circumstances.

Lastly Petitioner claims that his appellate counsel Mr. Udell provided ineffective assistance of counsel for: 1) his failure to address the inadequacy of the **1983** order and the impropriety of this Court's remand and 2) failure to raise improper reliance on a nonstatutory aggravating circumstances. Under the applicable standard of Strickland and Wilson v. Wainwright, **474** So.2d **1162** (Fla. **1985)** Petitioner has failed to establish either deficient performance or prejudice.

Petitioner attempts to base his claim on Cave v. State, **445** So.2d **341.** In actuality what Petitioner is raising is a Van Royal claim. However Petitioner is well aware that Van Royal came out three years after his direct appeal. Furthermore this Court in Grossman v. State, **525** So.2d **833, 841** (Fla. **1988)** has stated that Van Royal will not be applied retroactively. Simply put the rule of Van Royal was not available and appellate counsel cannot be held ineffective for failure to present it. Steinhorst v. Wainwright, **477** So.2d **537** (Fla. **1985).**

Mr. Udell did argue that the 1983 order was incomplete as it did not contain any factual findings (PE.-C pg 28). The proper remedy at that time was employed by this Court when it remanded for supplementation of the record. How could Mr. Udell in good faith argue against a remedy that would cure a deficiency that he complained about? Under the law as it existed at that time coupled with the facts of this case the remand was proper. Jones v. State, 332 So.2d 615. Petitioner has failed to overcome the strong presumption that this Court knows and follows the law. Harris v. Rivera, supra. There is nothing in Cave which suggests differently as remand was granted there as well. Id. at 342; Steinhorst, 477 So.2d at 541.

Mr. Udell cannot be held to be ineffective for failure to argue reliance on a nonstatutory and improper aggravating circumstance as that factor was deleted from the 1984 sentencing order. Since the subsequent order rectified the problem, how can there be any deficiency, let alone any prejudice? The new order worked to the advantage of Petitioner in the sense that now there were only four factors rather than five relied upon for the death penalty. The State's harmless error argument was somewhat diluted with the absence of one aggravating factor.

As articulated above there is no proof to substantiate the claim that either this Court or the trial court ultimately relied on any improper nonstatutory aggravating circumstances. Petitioner has failed to demonstrate any deficiency or prejudice. Strickland.

Based on both procedural and substantive grounds relief should be denied.

ISSUE II

THE PROSECUTOR'S COMMENTS DURING SENTENCING PHASE DID NOT AMOUNT TO REFERENCES TO VICTIM IMPACT

Petitioner claims that various prosecutorial comments rendered his trial fundamentally unfair. Booth v. Maryland, 482 U.S. 496 (1986)

Initially it should be pointed out that this is not the proper forum for this claim as Petitioner should have raised it in a motion for post-conviction relief. Jackson v. Duuqer, 14 FLW 355, 357 f.n. 2 (Fla. July 6, 1989). Furthermore this Court has determined that absent a timely objection Petitioner is procedurally barred from raising this claim at this juncture. Grossman v. State, 525 So.2d 833, 842 (Fla. 1988). This is especially so in light of the fact that this is Petitioner's second petition for habeas corpus relief. Jones v. State, 533 So.2d 290 (Fla. 1988). Petitioner's reliance on Jackson v. Dugger, supra is unavailing as the issue there was preserved for appeal. In that case Petitioner made a timely objection, moved for a mistrial and raised the issue on direct appeal. Id. at 355-356. None of those factors are present in the instant case. Petitioner makes mention of a motion in limine (RE.-K). The motion makes specific reference to very particular evidence.

Basically it involves introduction of the victim's family to the perspective jurors, and a request that no reference be made to the fact that Ms. Slater was killed two days prior to her nineteenth birthday (RE.-K). The motion was argued prior to voir dire and decided in Petitioner's favor (R, **14-30**). Nothing stated in the present habeas petition was addressed or was the subject of that motion. If it was, this Court may rest assured Mr. Makemson would have objected if terms of the motion had been violated. In any event even if included in the motion in limine, this does not substitute for a timely objection, request for curative instruction or motion for mistrial. Correll v. State, **523** So.2d **562, 566** (Fla. **1988**). This issue has not been preserved and should not be considered by this Court. Hamblen v. State, 14 FLW **347** (Fla. July **6, 1989**). Respondent urges this Court to issue a plain statement that appellant is in irrevocable procedural default upon this claim so as to prevent its subsequent unjustified litigation on the merits in a federal habeas corpus proceeding in the event of a favorable decision here, see Harris v. Reed, **489** U.S. ___, **103** L.Ed 2d **308 (1989)**.

In any event Petitioner's claim lacks any merits as the information referred to was nothing more than occasional references by the prosecutor to the victim's family in closing argument. Preston v. State, **531** So.2d 154 (Fla. **1988**). The prosecutor's comments referred to on pgs. **1440-1450** of the record were prefaced with the following:

> Perhaps there is some mitigating factor when someone wrongs another person and the person then kills the person who wronged him. Okay? That's a mitigating factor. But is that what this case is all about?

(R, 1449).

> You look at this instruction and you read them all very, very carefully. Without any pretense of moral or legal justification, okay?

(R, 1450).

These comments were a proper comment on the existence vel non of any aggravating or mitigating circumstance.

Also complained of was the prosecutor's statement that there is no sympathy for J.B. Parker (R, 1463-64). This is a direct response to Petitioner's mitigating evidence which was an attempt to elicit sympathy from the jury. Specifically the mitigation evidence included testimony by Dr. Eddy that Petitioner suffers from marked social and culture deprivation, profound feelings of rejection, and feelings of victimization (R, 1249, 1252, 1253-1255). This was also prefaced by the prosecutor's comments concerning the existence of any possible mitigating evidence with respect to Petitioner's character (R, 1462).

Overall, the statements complained of lack the impact and magnitude of those found impermissible in either Booth or South Carolina v. Gathers, ___U.S.___, 57 U.S. L.W. 4629 (June 12, 1989). The statements in Booth contained information regarding

the personal characteristics of the victim, the emotional impact of the crime on the family, a family member's comments and opinion regarding the positive qualities of the victim and the serious emotional problems suffered by the family. Id. 96 LED 2d 448-452. The impermissible statements found in Gathers are extensive portions of a religious poem/prayer found in the victim's possession. References were also made to the victim's voter registration card in an effort to characterize him as a patriotic American.

Reference during the sentencing phase to the pain and loss suffered by the victim's family does not violate Booth or Gathers. The statements here are materially different in scope of the information provided and the likely effect of the information on the jury. The extensive and emotionaly charged details of the family's loss in Booth are not present here. The prayer-like invocations found in Gathers are also missing from the facts of the instant case. The jury was already fully aware that Ms. Slater was young and employed and that her parents would now be deprived of their daughter at future holidays. Nothing said by the prosecutor added to these already known facts; nothing was said to compare the victim's worth to that of the Petitioner; the jury was not informed about any relevant facts about the victim's accomplishments nor was anything read to the jury concerning specific statements made by family members. In conclusion nothing said created any risk that the Petitioner's death sentence was based on constitutionality impermissible or

irrelevant consideration. The statements fall far short of the emotional pleas and sermons found in Booth or Gathers.

Petitioner's claim lacks merit both procedurally and substantively. Since his first claim is uncompelling as well, this Court should deny both the writ and his motion for a stay of execution. A stay of execution....should not be regarded as an automatic remedy granted simply upon request," Mulligan v. Zant, 531 F.Supp. 459, 460 (M.D. Ga. 1984), inasmuch as the State has a legitimate interest in the finality of all litigation, including capital litigation. Witt v. State, 387 So.2d 922, 925 (Fla. 1980), cert. denied, 449 U.S. 1067 (1981). In other words "justice, though due to the accused, is due to the accuser also," Snyder v. Massachusetts, 291 U.S. 97, 122 (1934), and "justice delayed is justice denied," United States ex rel. Geislerv. Walters, 510 F.2d 887, 893 (3d Cir. 1975).

CONCLUSION

WHEREFORE, based on the foregoing facts and authorities this petition, and Petitioner's motion for a stay of execution should be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Response in Opposition to Petition for Writ of Habeas Corpus & Motion for Stay of Exeuction", has been forwarded by United States Mail to: FRANCIS LANDRY, ESQUIRE, PROSKAUER ROSE GOETZ & MENDELSOHN, Attorneys for Petitioner, 300 Park Avenue, New York, New York 10022, this 6th day of October, 1989.

Of Counsel