FILED
SID J. WHITE
APR 26 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

**SUPREME COURT OF FLORIDA**

ROBERT LACY PARKER,

Petitioner,

v. Case No. 74,978

RICHARD L. DUGGER,

Respondent,
_____/

ROBERT LACY PARKER,

Appellant,

v. Case No. 78,700

STATE OF FLORIDA,

Appellee.
_____/

# BRIEF OF APPELLANT ROBERT LACY PARKER

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## I. FACTS AND STATEMENT OF THE CASE

This is an appeal from the dismissal of a petition for post-conviction relief (Case No. 78,700). It has been consolidated with a previously filed amended petition for habeas corpus (Case No. 74,978).

Appellant Robert Lacy Parker was convicted of three counts of homicide on March 9, 1983. The procedural history of his various direct appeals and collateral proceedings through March, 1990, is detailed in the statement of facts in his petition for relief under Florida Rule of Criminal Procedure 3.850. R. 108-112. That petition was dismissed as untimely on August 30, 1991. R. 607. This appeal followed, R. 608-09, and was stayed by this Court, see Order of December 18, 1991, pending the disposition of a renewed direct appeal of Mr. Parker's death sentence ordered by the United States Supreme Court in Parker v. Dugger, 498 U. S. 308, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991).

The mandate in Parker v. Dugger, supra, remanded appellant's case for renewed consideration on direct appeal of the validity of his death sentence under Tedder v. State, 322 So. 2d 908 (Fla. 1975). This mandate in turn resulted from federal habeas corpus proceedings begun in the United States District Court for the Middle District of Florida on July 26, 1986, by Robert Link, Mr. Parker's trial counsel and original appellate counsel. That collateral proceeding and a prior 3.850 filed by Mr. Link were begun within two years of the conclusion of the original direct appeal.

Not surprisingly, neither the original 3.850 nor the federal habeas corpus proceedings commenced by Mr. Link raised issues of the effectiveness of his performance at trial, sentencing or on appeal.

Appellant's death sentence on Count II of the indictment was vacated by this Court on August 11, 1994. Parker v. State, 643 So. 2d 1032 (Fla. 1994). Rehearing was denied by this Court on October 14, 1994. On January 11, 1995, appellant Parker was resentenced to life in prison on Count II of the indictment in Circuit Court in Jacksonville.

Appellant Parker's resentencing alleviates the necessity to consider those claims of his 3.850 petition which concern the effectiveness of trial counsel at the sentencing phase of Parker's trial. The following claims are moot as a result of this Court's action in Parker v. State, and the resentencing which resulted:

(1) Claim V/A (failure to discover and present mitigation evidence); Record pp. 114-129, 152-161, and 168-70;

(2) Claim VI (reliance on evidence from co-defendant trial at sentencing); Record pp. 179-93;

(3) Claim VII (failure to consider non-statutory mitigation evidence); Record pp. 193-213;

(4) Claim VIII (burden of persuasion re: sentencing); Record pp. 214-222; and

(5) Claim IX (denigration of jury's role in sentencing); Record pp. 223-233.

**The following claims in the original petition pertain to guilt/innocence issues, were not mooted by Parker v. State, and remain viable in the pending appeal:**

**(1) Claim V/B (failure of counsel to discover that appellant was incompetent to stand trial); Record pp. 130-52, 161A-67;**

**(2) Claim V/C (pursuit of duress defense and failure to pursue intoxication defense); Record pp. 170-72;**

**(3) Claim V/D (failure to secure services of adequate mental health expert); Record pp. 173-78; and**

**(4) Claim X (newly discovered evidence of improper state conduct regarding potential defense witnesses); Record pp. 234-36.**

**These claims pertain to the effectiveness of trial counsel during pretrial preparation and investigation and during trial.**

In the order dismissing the petition as untimely, the court below did not reach the merits of the petition. Appellant Parker adopts the allegations of fact and legal arguments set forth in the petition in support of the substantive validity of the claims set forth there.

## II. SUMMARY OF ARGUMENT

The State's arguments as to the timeliness of the petition below were considered and rejected by this Court as a necessary part of the decision in 1989 to permit volunteer counsel to appear

and submit the 3.850 petition below. Therefore, an ad hoc exception to those rules was made in 1989 and constitutes the law of the case.

Trial counsel was precluded by applicable ethical rules from challenging his own effectiveness below. There was no volunteer counsel available until 1989, and independent counsel is essential for the presentation of ineffectiveness claims. Ample authority exists for an exception to procedural default rules under these peculiar circumstances.

The statutory policy of the State of Florida as expressed in Section 27.701, Florida Statutes (establishing CCR) is that indigent inmates under a sentence of death shall have the assistance of counsel in collateral challenges to their conviction and sentence. By historical accident, Mr. Parker's co-defendant received the assistance of CCR. Mr. Parker should not be penalized because it was necessary for him to wait for volunteer counsel to appear, and to impose a procedural bar to his claims would deprive him of the equal protection of the laws.

Appellant Parker has a right to counsel through the conclusion of his initial appeal as of right. The procedural rules of the State oblige him to present his Sixth Amendment ineffectiveness challenges only in collateral proceedings. There was no volunteer lawyer to assist him with these claims until 1989, and his original trial and appellate counsel was unable to present or evaluate these claims. To subject him to a procedural bar on these facts would impair the exercise of his Sixth Amendment right to counsel in his

initial appeal, notwithstanding the designation of the ineffectiveness aspects thereof as a "collateral" proceeding.

This case should be remanded for review of the legal sufficiency of the claims or an evidentiary hearing.

## III. ARGUMENT

### A. The Law of the Case is that the Claims Presented Below Were Not Time-Barred at the Time They Were Filed.

When Holland & Knight originally appeared in Mr. Parker's case, he was subject to an active death warrant. Steven Goldstein, Esq., of the Volunteer Lawyers Resource Center in Tallahassee filed a petition for habeas corpus in this Court on an emergency basis seeking a stay of execution and permission for Holland & Knight to appear in Mr. Parker's defense to explore ineffectiveness issues, which had not previously been addressed in Mr. Parker's case. At the time these events occurred, Mr. Parker was already past the two-year time bar established by Florida Rule of Criminal Procedure 3.850 for the pursuit of ineffectiveness challenges, and a prior 3.850 had been filed on his behalf by Mr. Link. At that time, therefore, any 3.850 petition filed by volunteer counsel was necessarily both successive and beyond the time limits of the rule. Pursuant to Mr. Goldstein's motion, this Court issued an order staying Mr. Parker's execution on condition that Holland & Knight appear, and permitting a period of approximately four months for

the evaluation and presentation of ineffectiveness challenges via a Rule 3.850 petition. In March, 1990, the dismissed 3.850 petition was filed as a result.

After this Court granted Mr. Goldstein's motion to stay the scheduled execution, the State filed a Motion to Vacate Stay of Execution on or around November 9, 1989. The memorandum which accompanied this motion argued that no stay of execution was necessary to permit consideration of Mr. Parker's ineffectiveness challenges. Among others, the reasons advanced by the State in that motion were that Mr. Parker's collateral attacks were barred by the two-year limitation in Rule 3.850, that the assertion of those arguments would constitute an improper successive petition, and that he had no right to the assistance of counsel in collateral proceedings. Motion to Vacate Stay of Execution (Case No.74,978) at pp. 4-7. These are precisely the arguments made by the State before the Circuit Court in Jacksonville in the hearing which resulted in the dismissal of the petition herein and the order on appeal. R. Vol. VI, pp. 40-48.

This Court rejected the State's time-bar arguments in 1989. Although this determination was not explicit in the orders which were issued, the consideration of those arguments by this Court was an essential, integral part of the determination to stay Mr. Parker's execution and permit the appearance of Holland & Knight. As a result, they constitute the law of the case and should not now be revisited merely because, some five years later, Mr. Parker has experienced a fortunate turn in his case. Sax Enterprises, Inc. v.

David and Dash, Inc., 107 So. 2d 612 (Fla. 1958); Sanders v. State, 82 Fla. 498, 90 So. 455 (1928); Flinn v. Shields, 545 So. 2d 452 (Fla. 3rd D.C.A. 1989); Dhondy v. Schimpeler, 528 So. 2d 484 (Fla. 3rd D.C.A. 1988); S/D Enterprises, Inc. v. Chase Manhattan Bank, N.A., 375 So. 2d 1109 (Fla. 3rd D.C.A. 1979). The State has not thus far advanced any significant argument in opposition to the propriety of the course chosen by this Court in 1989, beyond what was already considered and rejected at that time.

This Court may take judicial notice of the materials filed by the parties in connection with the motion to stay execution in 1989. They are a part of the record in Case No. 74,978, which is a portion of this consolidated appeal. The decision made at that time took into account the then existing shortage of volunteer counsel to pursue ineffectiveness and other collateral challenges on behalf of death-sentenced inmates who could not be represented by CCR. The equities which motivated the Court at that time are no less relevant now. In reliance on that decision, significant resources have been expended and significant arguments presented which deserve consideration on their merits. The recognition that an ad hoc exception to the time-bar rules was made by this Court in 1989 and should not be changed merely because Mr. Parker has successfully challenged his sentence will not open Pandora's Box or result in a flood of new successive petitions. Presumably few, if any, inmates' cases present the unique circumstances confronting Mr. Parker in 1989, when he was subjected to a death warrant prior to ever having an independent consideration of trial counsel's

effectiveness by any lawyer.

An exception was created for Mr. Parker in 1989, and represents the law of this case on the time-bar issues.

**B. Trial Counsel Was Precluded By Ethical Rules from Attacking His Own Effectiveness.**

The State has taken the position that the unavailability of volunteer counsel prior to 1989 is not relevant to the time-bar issues under Rule 3.850 because Robert Link, Mr. Parker's trial and original appellate counsel, could have filed ineffectiveness challenges within the two-year period.[1]

The State's argument on this subject disregards the ethical obligations of trial counsel and the requirements of orderly procedure in this state. Mr. Link was precluded from challenging his own effectiveness by, among other things, the "lawyer as witness" rule, currently codified as Rule 4-3.7, Florida Bar Rules of Professional Conduct. This rule (and its precursor which was in effect in 1989) prevents a lawyer from simultaneously acting as advocate and witness in the same case, if his testimony will necessarily pertain, as here, to contested issues. In addition, Mr. Link would not have been able to exercise independent, critical judgment on behalf of Mr. Parker in evaluating issues of his own

[1] Mr. Link did in fact file collateral challenges in state and federal courts within two years of the finality of the original direct appeal. These issues did not pertain to ineffectiveness.

competence. To attempt to do so would have required a compromise of independent professional judgment in violation of current Rule of Professional Conduct 4-1.7 and its precursor in effect in 1989. Finally, Mr. Link would have been unable to evaluate the effectiveness of his own performance in connection with information which he failed to discover and therefore failed to present, which is the basis of the significant issues raised herein concerning Mr. Parker's competence to stand trial and the effect of his history of drug abuse and mental illness on his ability to form the specific intent pertinent to the offenses with which he was charged.[2]

The case law clearly establishes that an unacceptable conflict of interest is presented when a lawyer must argue his own ineffectiveness. See, e.g., Riley v. District Court of Second Judicial Dist., 181 Colo. 90, 507 P.2d 464 (1973) (lawyers could not argue their own ineffectiveness because position is inherently inconsistent and probably would be necessary witnesses); People v. Willis, 479 N.E. 2d 1184 (Ill. App. 1985) (lawyer had conflict of interest in arguing his own incompetence); Lewis v. United States, 446 A. 2d 837 (D.C. App. 1982) (same). The same rule applies to members of a public defender's or other law office who are confronted with the necessity of proving the ineffectiveness of another member of the office. Adams v. State, 380 So. 2d 421 (Fla. 1980) (public defender faced unacceptable dilemma of vigorously

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[2] In that sense, Mr. Parker's petition herein depended on newly discovered evidence, and should not be time-barred by the two-year provision of Rule 3.850.

advocating petitioner's ineffectiveness claim or defending professional reputation of his own office); McCall v. Dist. Court for the 21st Jud. Dist., 783 P. 2d 1223 (Colo. 1989) (en banc); see also, Parker v. State, 304 So. 2d 478 (Fla. 1st D.C.A. 1974).

In Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992), this Court considered and rejected an argument like the one presented by the State here. In Breedlove, appellant was a death-sentenced inmate whose original trial and appellate work and an initial collateral challenge pursuant to Rule 3.850 had been conducted by the Public Defender's office in Miami. No ineffectiveness issues were raised on direct appeal, in the original 3.850, or within the two year limit of Rule 3.850. This Court waived the two year limit in Breedlove's case, stating:

> Breedlove's first rule 3.850 motion was filed in 1982. In 1985, this Court's amendment to rule 3.850, providing that postconviction motions must be filed within two years of a conviction being final, became effective. Despite this two-year time limit, Breedlove did not attempt to amend his petition to add more issues. However, Breedlove was represented by the public defender's office both at his trial and during his first rule 3.850 proceeding. Therefore, that office was unable to assert a claim of ineffective assistance of trial counsel. Adams v. State, 380 So. 2d 421 (Fla. 1980). On the peculiar facts of this case, we choose to overlook the procedural default as it relates to claims of ineffective assistance of counsel.

595 So. 2d at 11. Appellant Parker asks for no more here.

Numerous courts have recognized the impropriety of having an attorney participate as advocate in claims which challenge his own effectiveness in a prior trial. For example, in Stephens v. Kemp, 846 F. 2d 642, 651 (11th Cir. 1988), the Court found "cause" to bypass a state procedural default in the fact that the defendant

was represented in his first state court collateral proceeding by his original trial counsel. The Court stated (citations omitted):

> We find "cause" for petitioner's failure to raise the ineffective assistance issue in his first state habeas petition in the fact that petitioner's trial counsel, whose effectiveness is here challenged, also represented him in the first state habeas petition. ... Moreover, as our resolution of the merits of this claim indicates, counsel's failings caused petitioner to suffer an "actual and substantial disadvantage," thus constituting the "prejudice" that ... must be established before a procedurally defaulted claim may be heard by a federal habeas court. ... The district court therefore properly entertained petitioner's ineffective assistance claim on the merits.

Id. at 651.

Similarly, in Osborn v. Shillinger, 861 F. 2d 612 (10th Cir. 1988), the Court rejected the state's argument that an ineffectiveness claim was barred because the petitioner failed to raise it in direct appeal. The Court there recognized that ineffectiveness claims are not appropriate for direct appeals because they require independent fact-finding. Quoting the United States Supreme Court opinion in Kimmelman v. Morrison, 477 U.S.365, 106 S. Ct. 2574, 2585, 91 L. Ed. 2d 305 (1986), the court observed (citations omitted):

> Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance, consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case.

861 F. 2d at 622-23. For these reasons, the court rejected the state's procedural default argument, stating "Where, as here, ... the allegedly ineffective counsel handled both the trial level proceedings and the direct appeal, a petitioner may raise an ineffective assistance of counsel claim for the first time collaterally."

In Alston v. Garrison, 720 F. 2d 812 (4th Cir. 1983), the Court evaluated a situation in which allegedly ineffective counsel had defaulted on constitutionally based objections to the admission of evidence at trial by not raising a contemporaneous objection on the record. The failure to raise these objections was compounded in the defendant's direct appeal, which was conducted by the same attorney who defended the trial. In federal habeas, the defendant asserted that there was "cause" for failing to raise the constitutional arguments in the state courts because of the fact that his ineffective lawyer had represented him throughout the state trial and appellate proceedings, and "the claim of ineffective assistance of counsel obviously was not raised by Alston's counsel, either at trial or on appeal," because trial and appellate counsel "could hardly have been expected to assert his own incompetence." The Court accepted this argument and found that counsel's ineffectiveness was prejudicial to Alston.

In this case, appellant's trial counsel stuck by him through an initial round of state and federal collateral proceedings, because there was no one else to do so. He did *not* initiate the incongruous spectacle of challenging his own competence before the

courts of this state, as the appellee would apparently suggest he should have. His conduct was understandable and appropriate, and he could not ethically have proceeded otherwise. The fact remains, however, that until the appearance of Holland & Knight in 1989, Mr. Parker had no one to evaluate or advise him regarding his Sixth Amendment issues. These issues were addressed as promptly as possible, and Mr. Parker should not be penalized because of the fact that volunteer lawyers were in short supply.

**C. The Statutory Policy of the State of Florida Assures Indigent Death-Sentenced Inmates of Representation in Collateral Attacks on Their Convictions and Sentences.**

Throughout Robert Parker's appellate proceedings, the statutory policy of the State of Florida has been that indigent death-sentenced individuals shall receive representation through the office of the Capital Collateral Representative. Florida Statutes § 27.701 (1986). Although there is dictum to the effect that this statute does not add to the substantive or constitutional rights of the benefitted class, Troedel v. State, 479 So. 2d 736 (Fla. 1985), the fact remains (as this Court may judicially notice) that Mr. Parker's indigent co-defendant, Tommy Groover, has received representation from CCR since his conviction in a trial which preceded Mr. Parker's. A rejection of Mr. Parker's ineffective assistance claims for procedural default would depend on the accident of history that Mr. Groover's case was tried first,

and therefore he was the first to reach CCR's door. This Court should not countenance a difference of outcome in which one man is represented and another's claims are barred because of the caprice of history which caused Mr. Groover to be tried before Mr. Parker, and therefore to receive the benefits of Section 27.701 at a time when the supply of volunteer lawyers was insufficient to allow Mr. Parker's meritorious claims to be discovered, evaluated and pursued by an independent lawyer prior to the imposition of a time-bar. To do so would be to apply the procedural rules of the State in a manner which deprives Mr. Parker of equal protection of the law.

**D. Appellant Parker has a Right to Counsel in his Initial Appeal as of Right.**

In Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963), the Court held that an indigent criminal defendant had a right to counsel in his first appeal as of right in state court. The rights to be vindicated therein include the Sixth Amendment right to effective counsel at trial. In Florida, this Sixth Amendment right cannot be vindicated until the initial direct appeal has become final, because ineffectiveness claims are generally restricted to collateral proceedings instituted under Rule 3.850. McKinney v. Florida, 579 So. 2d 80 (1991); Kelley v. State, 486 So. 2d 578 (Fla.), cert. denied, 479 U.S. 871 (1986). The Sixth Amendment right to effective counsel is no less significant than the other constitutional rights protected at trial

and during the initial appeal. The assistance of new, independent counsel is ordinarily necessary to allow the defendant to evaluate his ineffectiveness claims. Kimmelman v. Morrison, supra, 106 S. Ct. at 2585. Where the original trial counsel serves as counsel on direct appeal, the policy of Douglas must be vindicated on collateral review if the defendant's Sixth Amendment rights are to be protected.

In this instance, the unavailability of independent counsel at the time Mr. Parker filed his initial 3.850 compromised the assertion of his ineffectiveness claims. It also deprived him of the right guaranteed by Douglas v. California to have an attorney on his first appeal as of right, all the way to the end of the initial assertion of constitutional claims resulting from his trial. Because no separate appellate counsel was available, and state law required him to withhold his ineffectiveness challenges until his conviction and sentence were final and a 3.850 motion was ripe, the federal constitution requires that any procedural default resulting from the absence of counsel who could properly bring these challenges be waived. The "failure" of Mr. Link and the unavailability of volunteer counsel to file ineffectiveness claims on a timely basis in the first forum which could entertain those claims under state law is cause to waive the time limit and successive petition bars here. Cf. Coleman v. Thompson, 111 S. Ct. 2546, 2567-68 (1991) (issue raised but not reached on facts because procedural default followed presentation of ineffectiveness challenges by new counsel in first available collateral

proceeding).

### E. The Court Below Failed to Reach the Merits of Parker's Meritorious Claims.

The claims presented below evidence meritorious claims as to whether appellant was competent to stand trial, as to whether he was voluntarily intoxicated on the night of the offenses, as to whether trial counsel pursued a legally inappropriate defense (duress) while omitting one (intoxication) which was legally and factually supported, and as to whether the State unlawfully interfered with the testimony of exculpatory witnesses. These claims were not reviewed by the court below on the erroneous premise that they were procedurally barred. This case should be remanded for a review of the merits of these claims in the initial instance by the trial judge who is familiar with the case. In the alternative, this Court can review the sufficiency of the claims and remand for an evidentiary hearing.

## IV. CONCLUSION

For the reasons set forth above, appellant Robert Lacy Parker requests entry of an order overruling the dismissal of his postconviction petition pursuant to Rule 3.850, Florida Rules of Criminal Procedure, and remanding this case for review of the legal sufficiency of the claims or, in the alternative, for an

evidentiary hearing on the remaining claims of his petition.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Brief of Appellant Robert Lacy Parker has been served by U.S. Mail on Barbara Yates, Esq., at the office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050, on this 25th day of April, 1995.

Jonathan C. Koch