IN THE SUPREME COURT OF FLORIDA

RALEIGH PORTER,

Appellant,

v. Case No. 85,410

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

OF COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

Porter is on an active death warrant scheduled for execution on March 29, 1995. Previously, this Court affirmed his judgment in a decision reported as Porter v. State, 400 So. 2d 5 (Fla. 1981). The Court remanded for resentencing and after reimposition of the death sentence, this Court affirmed. Porter v. State, 429 So. 2d 293 (Fla. 1983). Thereafter, the Court affirmed the summary denial of a motion for post-conviction relief; Porter v. State, 478 So. 2d 33 (Fla. 1985) and denied habeas corpus petition. Porter v. Dugger, 559 So. 2d 201 (Fla. 1990).

Porter filed a second, successive Rule 3.850 motion raising three grounds and after hearing oral argument, the Honorable Isaac Anderson denied relief on March 23, 1995. This appeal follows.

ISSUES:

1. Porter was denied an adversarial testimony at both the guilt and sentencing phases because either counsel was burdened by an actual conflict of interest or the state failed to disclose its intention to charge Larry Schapp as a codefendant and failed to disclose a deal with Matha Thomas.

II. No adversarial testing occurred at Porter's resentencing proceedings because critical exculpatory impeachment evidence was not disclosed to defense counsel and/or because defense counsel was burdened by an actual conflict of interest.

III. Newly discovered evidence establishing Porter's good conduct in prison and his rehabilitation requires post-conviction relief.

SUMMARY OF THE ARGUMENT

The trial court correctly concluded that Porter's successive post-conviction motion was abusive and that Porter failed to show that exercise of due diligence in discovering what he has now presented. The conflict of interest claim could have been urged previously and in part was considered and rejected by the federal courts after summary denial in the state courts.

The claim that Porter is a changed man now and should not be executed is legally insufficient to be cognizable as a basis for collateral relief.

ARGUMENT

Claims I and II --

The instant claims must be rejected as an abuse of the writ because they either were or could have been raised in earlier postconviction proceedings. See Rule 3.850(f); Kennedy v. State, 599 So. 2d 991 (Fla. 1991); Davis v. State, 589 So. 2d 896 (Fla. 1991); Francis v. Barton, 581 So. 2d 583 (Fla. 1991); Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993); Swafford v. State, 636 So. 2d 1309 (Fla. 1994).

Additionally, Porter's claims are procedurally barred for the failure to urge them within the time constraints of Rule 3.850(b). See Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993); Adams v. State, 543 So. 2d 1244, 1246 - 1247 (Fla. 1989); Zeigler v. State, 632 So. 2d 48 (Fla. 1993); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

The state would respectfully request that the state courts continue to enforce their procedural default policy; otherwise, the failure to do so may result in the federal courts engaging in second-guessing the results of the court under Harris v. Reed, 489 U.S. 255, 103 L.Ed.2d 308 (1989).

It should be noted that Porter in the lower court has relied on a number of decisions of this Court which are clearly distinguishable. Unlike cases such as Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989), where critical trial witnesses had submitted affidavits calling into question their trial testimony, no such circumstance is present here. Matha Thomas who testified

in Porter's trial now has provided an affidavit indicating only that he has previously done yard work for the now-deceased prosecutor Gene Berry and was asked to help on drug cases after the Porter trial but declined. He has not recanted his trial testimony or his testimony at the federal evidentiary hearing that he did not know about any deal. Porter v. Dugger, 850 F.Supp. 941, 947 (M.D. Fla. 1992); Porter v. Singletary, 14 F.3d 554, 561 (11th Cir. 1994). Unlike Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994) or Scott v. State, (Fla. Case No. 84,686 and 84,687), there is no contention -- nor could there be -- that Porter is innocent or another party is more culpable.

A review of the trial testimony establishes unequivocally that Porter is guilty of the offenses of first degree murder.

Richard Olson, who lived near the victims Mr. and Mrs. Walrath saw a man walk up to their front door and go inside between 6:30 and 7:00 (R 486). Later he saw the garage door open and the Walraths' car backed out; there was no one other than the driver in the car (Tr 487). A young man was driving away in a hurry (R 487 - 488).

A broken fingernail lay on the rug underneath Mr. Walrath; neither of the two murder victims had fingernails missing from their hands (R 502 - 503) The victims' auto was discovered later that evening (R 503). The doors were locked and no keys were present (R 504). Exhibit 5 consisting of coins and jewelry were received by Detective Runkle from Porter's friend Tammy Lloyd)

(R 529). Runkle went with Lloyd and Dinah Raymond to recover some other items at a coin shop in Cape Coral (R 530).

Dr. Imami performed the autopsy on Mr. and Mrs. Walrath and found multiple injuries, trauma and strangulation (R 539 - 544).

Harold Thompson supervised Porter on a crew burying cable in the vicinity of the Walraths' residence. He went to Porter's apartment at 6:30. Porter was not there but Tammy and Dinah were (R 545 - 547). Porter did not arrive at work the next day (R 548). They cut the sprinkler line at the victims' house (R 550). Coworker Stanley Campbell saw Porter talked to Mr. Walrath on August 21, 1978 after the sprinkler was cut (R 554).

Tammy Lloyd who was living with Raleigh Porter along with Dinah Raymond drove Porter to a site and left him; he said he was going to do a B & E (R 560 - 562). Porter returned at 10:00 or 10:30 and said he got the car and some other stuff. She identified Exhibit 4, a photo of the Walrath's car that Porter possessed (R 563). They drove by the house Porter claimed to have broken into and saw some police there. Porter gave her some jewelry, Exhibit 5 (R 564) which she turned over the next day to Detective Runkle (R 565). Porter also had a television set and some silverware (R 566). Porter told her he killed the two old people. The next day they disposed of the coins (R 567).

Larry Schapp heard there had been a double homicide, went to Porter's apartment and asked if he had been involved. Porter said he had robbed and killed them (R 576). They dumped the TV set in some bushes (R 577) which Schapp later assisted Detective Kleynen in recovering (R 578).

Dinah Raymond also testified that she drove Porter to a spot where Porter directed and let him out (R 590 - 591). The next day they drove to Cape Coral and Porter went to a coin shop (R 594).

Investigator Kleynen identified Exhibit 6, a photo of the television set that was recovered (R 611). He also identified a photo of a set of keys found in the dumpster behind the apartment where Porter lived (R 613) as well as the car keys themselves (R 614). The keys fit the Walraths' vehicle (R 618). Another set of keys, Exhibit 9, also in the dumpster fit the car (R 620). Exhibit 10, taken from the dumpster were papers pertaining to the vehicle belonging to Mr. and Mrs. Walrath (R 621).

Sergeant David Lucas identified Exhibit 11, a fingernail found at the murder scene and a photo (Exhibit 12) of Porter's hands depicting a missing fingernail (R 635 - 639).

Matha Lee Thomas, a cellmate of Porter's testified that Porter admitted to him that he killed the two victims; he knocked them down and strangled them (R 645 - 646).

Finally, there can be no doubt as to Porter's guilt because in the last federal habeas evidentiary hearing, Porter introduced Exhibits 16 A and 16 B, transcribed interviews of Porter with trial attorney Widmyer and investigator Kenneth Walker in which he admitted committing the murders.

In the August 23, 1978 interview with investigator Walker (Exhibit 16B) Porter mentioned that Dinah Raymond and Tammy Lloyd "didn't know I murdered them" (p. 6). When Walker asked Porter

why he killed the victims Porter responded, "I didn't want to get busted" and:

> "Q. Okay. And you went there to rob them, right?
>
> A. Uh-huh."

(p. 8)

* * *

> " . . . A. And uh, so I took I cut a telephone uh, electrical cord and I tied it around his neck and did the same thing to her.
>
> Q. Lamp cords. That was the lamp cords.
>
> A. Yeah.
>
> Q. Okay.
>
> A. One off that little . . .
>
> Q. Did you tighten them up?
>
> A. Yeah, they was tied in a knot."

(p. 10)

Porter stomped the victims before putting the cord around their neck "to try to bust their heart". He thought the victims died of choking because the "stomping didn't kill them". (p. 11) They were alive before he put the cord on them (p. 12).

In the August 22, 1978 interview between Porter and attorney Widmyer and investigator Walker, Porter again admitted the killings (Exhibit 16A, p. 3). He admitted telling Tammy Lloyd he committed the murders (p. 6). He told Schapp what had happened (p. 7) When asked if he killed the victims because he thought they'd recognized him, Porter responded affirmatively (p. 9).

Porter introduced in his federal evidentiary hearing transcripts of interviews with his trial attorney and public defender investigator admitting his guilt in the murders. Porter cannot benefit from A. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992) for there is no codefendant who received a lighter sentence and his reliance on Justice Grimes' dissent is, as found by the lower court a facetious remark. Appellant is not aided by Guzman v. State, 644 So. 2d 996 (Fla. 1994), where this Court found error in the trial court's refusal to grant counsel's request to withdraw due to a conflict of interest. In the instant case Widmyer withdrew from representing Matha Thomas and presumably perceived no reason to seek to withdraw in Porter's case. He vigorously cross-examined former client Larry Schapp at trial, even inquiring whether he had killed the Walraths. Thus, he cannot be said to be protecting Schapp's interest at the expense of Porter:

> Q. Mr. Schapp, were you clean shaven for about August 21st, 1978?
>
> A. Yes, sir, I was.
>
> Q. How tall are you?
>
> A. How tall am I.
>
> Q. Yes.
>
> A. Five foot nine and a half.
>
> Q. Thank you. Now, you say that you helped Raleigh Porter get rid of the television and other miscellaneous items, is that not correct?

A. Shawn and myself removed the T.V. from the premises.

Q. Okay. But, you did this for Raleigh, is that correct.

A. Well, it depends on how you word it, did it for Raleigh.

Q. Yes or no or, no, were you doing it for yourself?

A. No.

Q. Were you doing it for the other guy?

A. No, sir.

Q. Then, were you doing it for Raleigh?

A. Yes, sir.

Q. Okay. Didn't you know that you were implicating yourself as an accessory?

A. Yes, sir. I realized after I had done it.

Q. Why did you help get rid of this stuff?

A. A that time, I was -- I was afraid.

Q. You were afraid of Raleigh?

A. Yes, sir.

Q. Okay. Were you afraid he would do you bodily harm?

A. I wasn't too sure of that.

Q. And yet, when you came back that evening, after you had heard about the crime, weren't you going to confront him and ask him whether or not he did it, give him a chance to turn himself in or else you would?

A. The day after?

Q. Yes.

A. Did you say?

Q. Yes, sir.

Then you weren't really all that afraid of him, were you?

A. Well, that question can't be answered with just a yes or no. One makes a mistake and realizes it, regardless of the consequences are you have to face up to it.

Q. All right.

A. I had made an error in judgment.

Q. At that time -- (interrupted).

MR. BERRY: Excuse me, Your Honor. I ask that he be allowed to finish his answer and not be interrupted.

MR. WIDMEYER: He did finish his answer, as far as I'm concerned.

THE COURT: You may proceed. You will have the right of cross examination or redirect.

Q. (Continuing by Mr. Widmeyer) Mr. Schapp, when you came back to do this on the 22nd and saw all the Officers at the apartment and approached one of them, this is the time that you approached them to tell them your story?

A. That's correct.

Q. Mr. Schapp, did you kill these people?

A. No, sir, I did not."

(R 579 - 81)

And in closing argument Porter's defense counsel suggested to the jury that Schapp might have been the killer:

"Larry Schapp, also of Raleigh's general shape, gave damaging testimony. He was clean shaven at the time of the murders, although he now has a beard. He had also lived with Raleigh for awhile. Suppose, just suppose,

> that Raleigh had planned to burglarize that very house. Could not he have confided that plan to Larry Schapp, and could not Larry Schapp have done it and in fear and panic blamed Raleigh Porter? He had the opportunity to place the blame. That could explain how this and this and this got into the trash dumpster behind that apartment. Larry Schapp had the key to that apartment. Perhaps Raleigh got his loot, the jewelry that he gave Tammy and the old coins that were sold, if they came from the Walrath house, from Larry. Possible. Doubt."

(R 684 - 685)

Clearly, there was no actual conflict of interest adversely affecting performance and appellant's continued efforts to urge potential, imaginary and speculative conflict -- a theory rejected in the federal courts -- should not prevail now.

With respect to the "new "information by Matha Thomas, his affidavit adds nothing to change the prior resolution in federal court.

With respect to the contention that attorney Norton represented Matha Thomas after Widmyer withdrew, that fact was elicited in this 1988 federal evidentiary hearing. Woodard also testified there that he had been a partner of Norton. All of the Court exhibits now attached as appendices were public and available for collateral counsel to obtain several years ago. Indeed, Porter filed, his habeas corpus previously in this Court (559 So. 2d 201) after the federal evidentiary hearing but prior to the district court's disposition.

With due diligence counsel could have previously discovered that which he now presents. The pretrial deposition of Schapp

might have led counsel to pursue the potential conflict with Widmyer since Schapp had stated in his deposition that after he was questioned by Officer Kleynen:

> "Nobody has really questioned me besides Kleynen, except the date after that, I stopped by your office, and spoke with you about the jail sentence, how I felt."
>
> (emphasis supplied)
> (Depo. p. 14, Vol. 7
> of appeal Case No. 55,841)

Moreover, resentencing counsel Woodard (who had no connection to Schapp attempted to impeach Schapp at the resentencing proceeding (F.S.C. Appeal 61,063). While Woodard could not assert that some kind of deal was made with Schapp that line of inquiry would have put collateral counsel exercising due diligence on notice to look at the court files they now have apparently done.

III. The claim that Porter has changed --

The material submitted by appellant in the lower court that he has changed from the person who committed this double homicide in 1978 does not suffice for a collateral challenge to his sentence, it constitutes perhaps appropriate matters for consideration on an application for clemency. The Governor's decision to sign a warrant adequately rejects Porter's proffer . The claim is also barred as successive. In 1985, Dr. Harry Krop provided an affidavit for the first 3.850 and federal habeas corpus action opining that Porter had evinced "positive changes", "emotional maturity and a psychological shift in attitude". Porter merely repeats and supplements that argument now.

This claim is legally meritless.

CONCLUSION

For the foregoing reasons the order of the lower court summarily denying relief on the successive motion for postconviction relief should be affirmed.

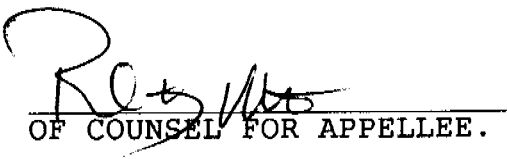
Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar ID#: 0134101
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ~~U.S. Regular Mail~~ Delivery to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 27 day of March, 1995.



OF COUNSEL FOR APPELLEE.