

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. 89,936**

**NORMAN PARKER, JR.,**

Appellant,

vs.

**THE STATE OF FLORIDA,**

Appellee.

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AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH  
JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA  
CRIMINAL DIVISION

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**ANSWER BRIEF OF APPELLEE**

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## STATEMENT OF THE CASE AND HISTORICAL FACTS

The defendant was indicted for one count of murder, four counts of robbery, one count of sexual battery and an unlawful possession of a firearm charge, committed on July 18, 1978. (R.1-17).<sup>1</sup> He pled not guilty and was tried in September, 1981. On September 18, 1981, the jury found the defendant guilty as charged.

The penalty phase was conducted on September 21, 1981, and the jury recommended a sentence of death on that date by a vote of 10 to 2. The Honorable Judge Fredricka Smith sentenced the Defendant to death on November 18, 1981, having found the following five aggravating factors: 1) the capital felony was committed while defendant was under a sentence of imprisonment (the defendant had escaped while serving a life imprisonment term for a first degree murder committed in Dade County); 2) the defendant had been previously convicted of another capital offense or felony involving the use or threat of violence to a person (a second degree murder committed in Washington D.C. and the above stated Dade County murder); 3) the capital felony was committed while the defendant was engaged in the commission of a sexual battery; 4) the capital felony was committed for

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<sup>1</sup> The symbol "R.\_" refers to the 3 volume record on appeal in the instant case. Excerpts of the original trial transcripts and records, as well as excerpts of prior post conviction proceedings, were included in an Appendix prepared by the State in the court below; said Appendix is part of the record herein.

financial or pecuniary gain; and, 5) the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R.154-159); See also Parker v. State, 456 So. 2d 436, 443 (Fla. 1984). The trial court did not find any mitigating factors. Id.

The Florida Supreme Court affirmed the conviction and death sentence in 1984, having established the following historical facts:

The evidence at trial established that on July 18, 1978, defendant and his partner Manson were admitted to a Miami home in order to complete an illegal drug transaction with two male occupants of the home. Soon thereafter, defendant and Manson produced a sawed-off shotgun and a chrome-plated revolver, respectively, and demanded cocaine and money from the two victims. The two victims were forced to surrender jewelry, strip naked, and lie on a bed. Two other occupants, a female and her boyfriend (Chavez), were discovered in another room and also forced to strip naked and surrender jewelry. All four victims were then confined in the same room, on the same bed. Defendant and Manson exchanged weapons and defendant guarded the four victims while Manson searched the home for additional loot. Defendant threatened to kill the victims because he had escaped from jail and had nothing to lose. The victims pleaded with defendant and Manson to take what they wanted and leave. Chavez also pleaded with defendant and Manson to leave his girlfriend alone. After a period of time, defendant aimed the revolver at Chavez's back, whereupon Manson handed defendant a pillow. Defendant then shot Chavez through the pillow. The other three victims heard the muffled shot and nothing further from Chavez. Chavez died from a single gunshot wound to the chest. Defendant then committed a sexual battery on the female. Defendant and Manson fled, but were later identified by the surviving victims from a photographic lineup.

On August 24, 1978, defendant shot a man in a Washington, D.C., bar. A bullet from this victim's body was matched with the bullet taken from Chavez's body. Jewelry found in possession of the defendant in D.C. was similar to jewelry taken from the Miami victims. Defendant testified that he had been in D.C. during the summer of 1978, including the day that the Miami murder was committed. Four other defense witnesses testified by deposition that defendant was in D.C. during the summer of 1978 but, on cross examination, were unable to swear defendant was in D.C. during the period, July 17-19, 1978.

During the penalty phase, the evidence showed that defendant had been sentenced previously to life imprisonment in 1967 for a first-degree murder committed in Dade County, Florida, and that he was sentenced to life imprisonment for a second-degree murder committed in D.C. in August, 1978.

Parker v. State, at 456 So.2d 440

The defendant had raised eight (8) issues on direct appeal as follows:

I.

WHETHER THE DEFENDANT WAS DENIED HIS FLORIDA AND FEDERAL CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS WHERE THE COURT FAILED TO SUPPRESS STATEMENTS OBTAINED BY INTERROGATING OFFICERS IN VIOLATION OF THE DEFENDANT'S INVOCATION OF HIS RIGHTS TO COUNSEL AND SILENCE AND WHERE THE STATEMENTS WERE INVOLUNTARY?

II.

WHETHER THE DEFENDANT WAS DENIED HIS RIGHT TO A FAIR TRIAL, DUE PROCESS AND A JURY CONSTITUTED FROM A FAIR CROSS SECTION OF THE



COMMUNITY AS GUARANTEED BY THE FLORIDA AND FEDERAL CONSTITUTIONS?

III.

WHETHER THE TRIAL COURT ERRED IN REFUSING THE DEFENSE REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES AND PROHIBITING THE DEFENSE FROM EXERCISING A REQUESTED CHALLENGE AFTER TEN HAD BEEN USED?

IV.

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO INTRODUCE THE DEFENDANT'S STATEMENT AS TO THE WASHINGTON, D.C. SHOOTING WHEN AN INDEPENDENT CORPUS DELICTI HAD NOT BEEN ESTABLISHED?

V.

WHETHER THE CIRCUMSTANTIAL EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE GUILTY VERDICTS WHERE THERE WAS A TOTAL ABSENCE OF SUBSTANTIAL, COMPETENT EVIDENCE THAT THE DEFENDANT PARTICIPATED IN ANY OF THE CHARGED OFFENSES?

VI.

WHETHER THE ADMISSION OF EVIDENCE CONCERNING THE DEFENDANT'S USE OF OTHER NAMES IMPROPERLY SUGGESTED THAT HE WAS A CRIMINAL AND CONSEQUENTLY DEPRIVED HIM OF A FAIR TRIAL?

VII.

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE INTO EVIDENCE SEVERAL PHYSICAL ITEMS IN THE ABSENCE OF A

SUFFICIENT PREDICATE FOR INTRODUCTION WHERE  
THERE EXISTED A SUBSTANTIAL QUESTION AS TO  
RELEVANCY AND AUTHENTICITY?

VIII.

WHETHER APPLICATION OF SECTION 921.141,  
FLORIDA STATUTES, TO IMPOSE DEATH UPON THE  
DEFENDANT VIOLATES THE SIXTH, EIGHTH, AND  
FOURTEENTH AMENDMENTS TO THE UNITED STATES  
CONSTITUTION?

Brief of Appellant on direct appeal, Case No. 61,512, copy included at R.161-237.

On January 2, 1987, the defendant filed a motion to vacate judgment and sentence of conviction, raising thirteen (13) issues. Parker v. State, 611 So. 2d 1224, 1226 (Fla. 1993). During the pendency of this post conviction proceeding, the governor issued a death warrant for the defendant's execution.

Pursuant to Fla.R.Crim.P. 3.851, the defendant filed a petition for writ of habeas corpus in the Florida Supreme Court, raising seven (7) claims for relief, which were decided adversely to him. Parker v. Dugger, 537 So. 2d 969 (Fla. 1988). Said habeas claims were that: 1) a pretrial statement to the police was obtained in violation of Parker's fifth and sixth amendment rights to counsel; 2) felony murder instructions to the jury were constitutionally deficient and appellate counsel was ineffective for failing to raise this on direct appeal; 3) trial court erroneously failed to instruct the jury on lesser included offenses of the contemporaneous non capital felonies, and appellate counsel was ineffective for failing to

raise this issue on direct appeal; 4) the use of the cold, calculated and premeditated aggravator was a violation of the ex-post facto clause; 5) the jury and the trial judge erroneously considered victim impact evidence in violation of Booth v. Maryland, 482 U.S. 496 (1987); 6) the use of an underlying felony as an aggravator violated the eighth and fourteenth amendments; and, 7) the trial judge erred in not advising the jury that the sentences in the present case could be imposed consecutively to the sentences in the separate murders for which defendant had been convicted. Id.

During the pendency of the above habeas proceedings, the trial court granted the defendant a stay of execution for a three (3) day evidentiary hearing on his claim of ineffective assistance of counsel at the penalty phase. Parker v. Dugger at 537 So. 2d 973; R. 345, 351. After the conclusion of the evidentiary hearing, the defendant on December 23, 1988, filed a "Supplement" to his motion to vacate adding additional claims. Parker v. State, at 611 So. 2d 1226.

The trial court then denied the claim of ineffective assistance of counsel at penalty phase, after making factual and credibility determinations, from the evidentiary hearing, adverse to the defense. Said findings were affirmed by this Court after appeal thereof. Parker v. State, at 611 So. 2d 1227-28. The trial court also denied other claims of ineffective assistance of trial counsel as being conclusively refuted by the record. Said rulings were also affirmed by this Court. Parker v. State, at 611 So. 2d 1227. The

remainder of the claims in the first motion for post conviction relief, and the claims in the Supplement, which the trial court noted was "untimely", were found to be procedurally barred as they were or could have been raised on direct appeal. Parker v. State at 611 So. 2d 1226. Said claims were as follows: 1) Parker's unconstitutionally obtained statements were admitted at trial; 2) the jury instructions failed to define felony murder; 3) jury instructions on lesser included offenses were omitted; 4) the jury instructions on the "cold, calculated, and premeditated" aggravating factor were deficient; 5) statements of the victim's father were erroneously admitted; 6) the felony-murder aggravator fails to narrow the class of persons eligible for the death penalty; 7) the jury was not instructed that sentences could be served consecutively; 8) Parker was absent during "important stages" of the proceedings; 9) instruction on circumstantial evidence was denied; 10) the jury's sense of responsibility was diminished; 11) Parker bore the burden of proving that a life sentence was warranted; 12) an erroneous jury instruction was given on the vote required for a life sentence; 13) jurors were erroneously excused for cause; and, 14) mitigating evidence was not considered fairly. Id.

The defendant then filed a second motion for post conviction relief, at issue herein, based upon an alleged change of law pursuant to Espinosa v. Florida, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). (R. 28-78). The defendant raised the following claims: 1) the jury instruction on the cold, calculated and premeditated (CCP) aggravator was vague and invalid; 2) consideration of the CCP factor violated the prohibition against the ex post facto

application of laws; 3) the aggravator of while under sentence of imprisonment was vague and invalid; 4) the jury improperly considered the “automatic” felony murder aggravator; 5) the trial court failed to consider mitigating evidence; and, 6) the trial court failed to advise the jury that the defendant could receive consecutive sentences for his crimes. (R. 28-78). The defendant also alleged that his trial and direct appeal counsel were ineffective for failing to properly preserve and raise the foregoing claims. Id.

The trial judge conducted a Huff<sup>2</sup> hearing (R. 571-607), after which the above claims were summarily denied. The trial judge found the claim of error, with respect to the CCP jury instruction, was procedurally barred for failure to object to same at trial. (R. 346). The remainder of the claims were found to be procedurally barred because they were untimely, and raised during prior proceedings and were thus successive. (R. 346-47). This appeal has ensued.

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<sup>2</sup> Huff v. State, 622 So. 2d 982 (Fla. 1993).

## **SUMMARY OF THE ARGUMENT**

The defendant's convictions and sentences became final prior to 1985 and he thus had until January 1, 1987 to timely litigate his post-conviction claims. The defendant did in fact previously file for post conviction relief by way of a Rule 3.850 motion in the trial court and petition for habeas corpus in this Court. All of the claims at issue herein were previously raised in said prior post conviction proceedings, or on direct appeal, with the exception of the unconstitutional CCP jury instruction claim. As such, the previously raised claims were properly found to be successive and time barred by the court below. The CCP jury instruction issue was also properly found to be procedurally barred, because there was no objection to the instruction at trial, and the issue was not raised on direct appeal. The summary denial of all claims by the court below was thus proper.

## ARGUMENT

### I.

#### **THE CLAIM WITH RESPECT TO THE JURY INSTRUCTION ON COLD, CALCULATED AND PREMEDITATED AGGRAVATOR IS PROCEDURALLY BARRED FOR FAILURE TO OBJECT AT TRIAL AND PURSUE SAME ON APPEAL.**

The Appellant claims that the jury instruction on the cold, calculated and premeditated (CCP) factor was erroneous. The jury instruction given in the instant case was the previously standard one, invalidated in Jackson v. State, 648 So. 2d 85 (Fla. 1994). (R. 147). The Court below properly ruled that this claim is procedurally barred for failure to object to the CCP instruction at trial. (R. 346). The Appellant has also claimed that his trial and appellate counsel were ineffective for failing to properly object to and raise the instructional error. The trial court summarily denied this claim as well, stating:

...the defendant next argues that his trial attorney's performance in failing to object was deficient. This claim of ineffective assistance of counsel, is likewise barred since the issue of ineffective assistance of counsel was already raised by the defendant in his first 3.850 motion and no new facts have been discovered. Francis v. Barten, 581 So. 2d 583 (Fla. 1991).

Moreover, the defendant cannot demonstrate the prejudice required in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), since in Mr. Parker's case the Florida Supreme Court has already determined that, in view of the other compelling aggravating factors, the absence of the CCP aggravator would not have changed the sentencing decision.

(R. 346).

A claim of erroneous jury instruction on the CCP aggravator is cognizable in a successive motion for post conviction relief, such as that in the instant case, only when the defendant has contemporaneously objected to the wording of the instruction or requested a legally sufficient alternative instruction at trial , and raised the issue on direct appeal. See James v. State, 615 So. 2d 668, 669 (Fla. 1993) (post conviction claim based upon Espinosa v. Florida, that penalty phase instructions on the CCP and HAC aggravators were unconstitutionally vague, "are procedurally barred unless a specific objection on that ground is made at trial and pursued on appeal."); Harvey v. Dugger, 656 So. 2d 1253, 1258 (Fla. 1995) (post-conviction claim, based in part, upon Espinosa v. Florida, that the jury instruction on the CCP aggravator was unconstitutionally vague, was rejected because defendant, "did not object to these instructions or request legally sufficient alternative instructions, these claims are procedurally barred."); Pope v. State, 22 Fla.L.Weekly S743, 744 (December 4, 1997) (post conviction claim that there were unconstitutionally vague jury instructions on the CCP aggravator was found procedurally barred because: "We have made it clear that claims that the CCP instruction is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal. The objection at trial must attack the instruction itself, either by submitting a limiting instruction or by making an objection to the instruction as worded.""). In the instant case, Parker did not object to the jury instruction on CCP.



At the penalty phase charge conference there was no objection to the standard instruction. Contrary to the Appellant's claims, the record reflects that at the penalty charge conference, when the trial court inquired with respect to the CCP aggravator, defense counsel was silent:

**THE COURT:** Nine; I think there's evidence to support that.  
Are you requesting nine?

**[PROSECUTOR]:** Yes.

**THE COURT:** Is there any objection?

**[DEFENSE COUNSEL]:** What is it?

**THE COURT:** Cold, calculated, premeditated manner. No objection?

**[DEFENSE COUNSEL]:** I believe --

**THE COURT:** I think there is evidence of that. I would give --

**[DEFENSE COUNSEL]:** As to mitigating circumstances, I believe that none of the statutory mitigating circumstances apply.

...

(R. 129). Indeed, while trial counsel requested additional and expanded jury instructions on other penalty phase matters (R. 386-389; 118-123), there was no request for an additional or expanded instruction on the CCP aggravator. Moreover, at the conclusion of the trial court's penalty phase instructions to the jury, the trial court expressly inquired

whether there were any objections to the instructions, and trial counsel expressly responded in the negative:

**THE COURT:** Is there any objection to the instructions as read by the court?

**MR. VELAYOS [defense counsel]:** No.

(R. 141).<sup>3</sup>

Additionally, as seen in Parker's brief on direct appeal to the Florida Supreme Court, no issue with respect to the propriety of the jury instruction on the CCP aggravator was raised. Although the defendant in his direct appeal brief claimed that the trial court erroneously denied requested penalty phase instructions with respect to the weight of the jury recommendation, there was no mention of the CCP instruction. (R. 231-2). Instead, the Appellant challenged the sufficiency of the factual findings made by the trial court with respect to the CCP factor. (R. 233-35).<sup>4</sup> Attacks on the sufficiency of findings by the trial judge do not preserve a claim of unconstitutional jury instructions. See Roberts v. State, 626 So. 2d 168 (Fla. 1993), Hodges, supra. In light of the failure to object at trial and raise the claim of unconstitutional CCP jury instruction on direct appeal, this issue was properly found to be procedurally barred by the court below. James, Harvey, Pope, supra.

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<sup>3</sup> The Appellant's contention that prior to trial he filed a motion stating that the CCP aggravator itself was unconstitutionally vague, does not preserve the jury instruction claim either. There was no mention of jury instructions in said motion and such motions are insufficient to preserve instructional error. Hodges v. State, 619 So. 2d 272 (Fla. 1993).

<sup>4</sup> This Court upheld said findings. Parker v. State, at 456 So. 2d 444.

Finally, the Defendant's allegations of ineffective assistance of counsel for failure to properly object to the CCP jury instruction were also properly found to be procedurally barred, as they are untimely and successive. As noted in the statement of case and facts, Parker's convictions and sentences became final prior to 1985, and he thus had to raise all claims of ineffective assistance of counsel by January 1, 1987. Pope v. State, at 22 Fla.L.Weekly S744. Moreover, Parker alleged ineffective assistance of trial counsel with respect to both guilt and penalty phase issues in his prior motion for post conviction relief. See pp. 5-7 herein. Additional allegations and arguments of ineffectiveness are procedurally barred from consideration in a successive motion for post conviction relief. Pope v. State, at 22 Fla.L.Weekly S744:

A defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by filing successive motions. Jones v. State, 591 So. 2d 911 (Fla. 1991). Where a previous motion for post conviction relief raised a claim of ineffective assistance of counsel, a trial court may summarily deny a successive motion which raises an additional ground for ineffective assistance of counsel. Card v. Dugger, 512 So. 2d 849 (Fla. 1987).

Parker's allegations of ineffective assistance of appellate counsel are also in a successive posture and thus procedurally barred.<sup>5</sup> As noted at pp.5-6 herein, Parker previously filed a petition for habeas corpus in this Court alleging various instances of ineffective assistance of appellate counsel. Additional claims of ineffective assistance of

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<sup>5</sup> Said allegations were raised in the court below but not addressed by trial court, because claims of ineffective assistance of appellate counsel should be raised in this Court and not the trial court. Knight v. State, 394 So. 2d 992, 999 (Fla. 1981).

appellate counsel at this juncture are not permitted. Francis v. Barten, 581 So. 2d 583 (Fla. 1991); Lambrix v. Singletary, 641 So. 2d 847, 848 (Fla. 1994):

Although this present ineffective assistance of counsel claim is based on a different issue, Lambrix has already raised numerous claims alleging ineffective assistance of appellate counsel in a previous habeas petition. See Lambrix v. Dugger, 529 So. 2d 1110 (Fla. 1988). Because ineffective assistance of counsel claims have been considered and rejected in a previous petition, Lambrix is procedurally barred from raising such claims again in a subsequent habeas petition. [cite omitted].

It should additionally be noted that all allegations of ineffective assistance of counsel with respect to the CCP aggravator are also without merit in light of this Court's prior findings of lack of prejudice in the instant case. In the prior habeas corpus proceedings in the instant case, this Court held: "Moreover, in view of the five aggravating and no mitigating factors present here, we are satisfied that deletion of the cold, calculated, and premeditated factor would not affect the sentencing decision." Parker v. Dugger, 537 So. 2d at 972. In light of this prior holding of lack of prejudicial error, any alleged deficiency by trial or appellate counsel can not form the basis for further proceedings. State v. Salmon, 636 So. 2d 16, 17 (Fla. 1994).

## II.

### **THE TRIAL COURT PROPERLY FOUND THE CLAIM OF EX POST FACTO APPLICATION OF THE CCP AGGRAVATOR AND INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO LITIGATE THIS ISSUE TO BE SUCCESSIVE AND PROCEDURALLY BARRED.**

The Appellant claims that the application of the CCP aggravator in the instant case violated the prohibition against the ex post facto application of laws. The trial court found: “this claim was raised in the defendant’s first motion for post conviction relief and in his petition for writ of habeas corpus. It is untimely and successive and will not be reconsidered by the Court.” (R. 346).

The trial court’s ruling was proper. Pope v. State, supra; See also Card v. Dugger, 512 So. 2d 819, 830-1 (Fla. 1987)(successive petitions for the same relief are not cognizable and may be summarily denied where the circumstances of the alleged violation have not changed). This claim was raised in prior proceedings and this Court expressly found it to be procedurally barred for failure to preserve same at trial and pursue it on direct appeal; in the alternative, this Court also ruled the claim to be without merit and not prejudicial to the defendant:

Petitioner next claims that finding the murder cold, calculated, and premeditated based on a statutory amendment occurring after the murder took place violates the ex post facto clause. *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d

351 (1987). This issue is procedurally barred for failure to preserve at trial or raise it on direct appeal and is cognizable only under rule 3.850. The issue has also been previously decided contrary to petitioner's position. *Justus v. State*, 438 So. 2d 358 (Fla. 1983), cert. denied, 465 U.S. 1052, 104 S.Ct. 1332, 79 L.Ed.2d 726 (1994). Moreover, in view of the five aggravating and no mitigating factors present here, we are satisfied that deletion of the cold, calculating, and premeditated factor would not affect the sentencing decision.

Parker v. Dugger, *supra*, at 537 So. 2d 972. Nothing new has been alleged and this claim thus remains procedurally barred. The Appellant's claims of ineffective assistance of trial and appellate counsel with respect to this issue are also untimely and procedurally barred, as seen in the argument section with respect to the first issue on appeal. See pp.14-15 herein, and Pope, Lambrix, *supra*.

### III.

#### **DEFENDANT'S CLAIM OF INVALIDITY OF THE WHILE UNDER SENTENCE OF IMPRISONMENT AGGRAVATOR IS PROCEDURALLY BARRED.**

The Appellant has argued that the trial court erred in finding and instructing the jury on the under sentence of imprisonment aggravator, because there was no evidence that defendant was serving a sentence at the time he committed the capital offense. The Court below ruled that, “[T]his argument was raised unsuccessfully by the defendant on his direct appeal. He cannot raise it again.” (R. 347).

The trial court was correct. Parker v. State at 611 So. 2d 1226 (“We have repeatedly said that a motion under rule 3.850 cannot be used for a second appeal to consider issues that either were raised in the initial appeal or could have been raised in that appeal”); See also Pope, Card, *supra* (Summary denial of an untimely and successive motion for post conviction relief is proper.).

The State would note that, contrary to defendant's contention, the record clearly reflects that the prosecution entered into evidence a "Judgment and Sentence" which clearly reflects that defendant was convicted of first degree murder and sentenced to a term of imprisonment for the remainder of his natural life, in 1967. Record on direct appeal, at 409. More importantly, however, the sufficiency of proof of this aggravator was raised on direct appeal, in reliance upon the same evidence and case law cited by the Appellant herein. See

initial brief of Appellant on direct appeal, (R. 235-37). This Court expressly rejected this argument and found sufficient proof of this aggravator in the instant case:

Defendant's argument that there was no evidence that he was under a sentence of imprisonment at the time of the murder is meritless. The record shows that on August 10, 1967, defendant was adjudged guilty of first-degree murder and sentenced to life imprisonment. No evidence was introduced relative to a pardon or other legitimate termination of that incarceration nor did the defendant make any such argument.

Parker v. State, 456 So. 2d at 444. This claim was thus properly found to be procedurally barred. The allegations of ineffective assistance of counsel are likewise barred as successive and untimely, in accordance with the arguments set forth at pp. 14-15 herein, and Pope, Lambrix, supra.



#### IV.

### **DEFENDANT'S CLAIM OF FAILURE TO MEANINGFULLY CONSIDER MITIGATION IS PROCEDURALLY BARRED.**

The Defendant argues that the sentencing judge erroneously found that there were no mitigating circumstances in the instant case. The court below found this claim to be procedurally barred: “This claim was unsuccessfully asserted by the defendant in his earlier motion for post conviction relief. He cannot raise it here.” (R. 342). Indeed, this Court in affirming the denial of the first motion for post conviction relief expressly found this claim to be procedurally barred:

Parker raised thirteen claims in his rule 3.850 motion and seven in his supplement, some duplicating claims already made. We have repeatedly said that a motion under rule 3.850 cannot be used for a second appeal to consider issues that either were raised in the initial appeal or could have been raised in that appeal. *Jones v. State*, 446 So. 2d 1059, 1061-62 (Fla. 1984) (citing numerous cases). Most claims fall into this category. The procedurally barred claims are: . . . and 14) mitigating evidence was not considered fairly.

Parker v. State, 611 so. 2d at 1226. The above finding of procedural bar remains the law of the case at this juncture, and the Appellant has not cited any new grounds, or retroactive decisions to the contrary, since the prior determination. See Pope, Card, supra. With respect to the allegations of ineffective assistance of counsel, the State again relies upon its previous argument that same are procedurally barred as being successive and untimely, as set forth in pp. 14-15 herein, and Pope, Lambrix, supra.

V.

**DEFENDANT'S CLAIM THAT THE TRIAL COURT VIOLATED HIS CONSTITUTIONAL RIGHTS BY FAILING TO INSTRUCT THE JURY THAT IT COULD IMPOSE CONSECUTIVE SENTENCES IS PROCEDURALLY BARRED.**

The Appellant argues that his trial counsel requested<sup>6</sup>, but that the trial court erroneously failed to instruct the jury that she could sentence Mr. Parker to consecutive sentences for the capital murder and the underlying felonies herein, and that these sentences could have been ordered to be served consecutive to the two prior murder convictions. The trial court found this claim to be successive and untimely, as it had been raised both, “in [Parker’s] appeal of the denial of his first 3.850 motion and in his petition for habeas corpus. These claims, including the claim of ineffective assistance of counsel in this point, are untimely made and are procedurally barred.” (R. 347).

The trial court’s ruling was proper. In his "Amendment" supplementing the petition for writ of habeas corpus, the Defendant claimed that the jury was erroneously not informed that the trial court, "could sentence Mr. Parker to consecutive sentences of imprisonment

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<sup>6</sup> The State would note that trial counsel requested that the jury be instructed that the Court could impose the sentences on the noncapital offenses concurrently or consecutively, during the guilt phase jury instruction conference. (Record on direct appeal, T. 2344). The Court in accordance with Fla.R.Crim.P. 3.390 (1981) declined but did advise the jurors of the minimum and maximum penalties with respect to all the noncapital offenses. (R. 151-2). There was no request to instruct the jury as to concurrent or consecutive sentencing at the penalty phase.

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." (R. 310-311). This Court found this claim to be procedurally barred as it was, a) untimely raised; b) unpreserved at trial; and, c) not raised on direct appeal:

Petitioner's final claim is that the trial judge erred in not advising the jury that the sentences in the present case could be imposed consecutively to the sentences in the separate murders for which petitioner has been convicted. Petitioner attempts to raise this seventh issue by an untimely supplement to his first petition for habeas relief. Florida Rule of Criminal Procedure 3.851 specifies that petitions for collateral relief under the circumstances present here must be filed within thirty days of the warrant's signing. Petitioner has presented no valid reason for this untimely filing. The supplementary petition is barred by the terms of rule 3.851. Moreover, even if it were not, it is procedurally barred by rule 3.850 for failure to preserve at trial or raise it on direct appeal.

Parker v. Dugger, 537 So. 2d at 973; (emphasis added); see also, Parker v. State, 611 So. 2d at 1226:

Parker raised thirteen claims in his rule 3.850 motion and seven in his supplement, some duplicating claims already made. We have repeatedly said that that motion under rule 3.850 cannot be used for a second appeal to consider issues that either were raised in the initial appeal or could have been raised in that appeal. Jones v. State, 446 So. 2d 1059, 1061-62 (Fla. 1984) (citing numerous cases). Most claims fall into this category. The procedurally barred claims are: . . . 7) the jury was not instructed that sentences could be served consecutively; . . .

Thus, this claim remains procedurally barred. See Pope, Card, supra. Again, the Defendant's allegations of ineffective assistance of counsel with respect to this claim are

successive, untimely and thus procedurally barred as set forth in pp. 14-15 herein, and Pope,  
Lambrix, supra.

## VI.

### **DEFENDANT'S CLAIM WITH RESPECT TO AN AUTOMATIC AGGRAVATING CIRCUMSTANCE IS PROCEDURALLY BARRED.**

The Appellant argues that the felony murder aggravating circumstance is unconstitutional. The trial court found this claim to be successive and procedurally barred as it was raised in prior post conviction proceedings:

The defendant complains that the jury was instructed to automatically find an aggravator, that the murder was committed during a felony, if they found him guilty of committing a felony murder. This argument was made by the defendant and rejected by the court in both defendant's prior post conviction claims and in his habeas corpus proceeding. Further, the decision anticipated by the defendant on this issue is Tennessee v. Middlebrooks, 510 U.S. 124, 114 S.Ct. 651, 126 L.Ed.2d 555 (1993) was never issued since the U.S. Supreme Court dismissed the writ of Certiorari finding it was improvidentially granted.

(R. 347). The trial court's summary dismissal was proper and in accordance with Pope, Card, supra. This Court found this claim to be procedurally barred and, in the alternative, without merit, in both the prior habeas corpus proceeding, and the appeal from denial of the first motion for post conviction relief:

Petitioner's sixth claim is that his death sentence is for felony murder and that use of the underlying felony as an aggravating factor violates the eighth and fourteenth amendments. This issue was not presented at trial and is procedurally barred. Moreover, it is cognizable only under rule 3.850. Finally, the claim has been previously decided contrary to petitioner's position. *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); *Bertolotti v. State*, 534 So. 2d 386, 387

n. 3 (Fla. 1988).

Parker v. Dugger, 537 So. 2d at 973; See also, Parker v. State, 611 So. 2d at 1226:

Parker raised thirteen claims in his rule 3.850 motion and seven in his supplement, some duplicating claims already made. We have repeatedly said that a motion under Rule 3.850 cannot be used for second appeal to consider issues that either were or could have been raised in that appeal. Jones v. State, 446 So. 2d 1059, 1061-62 (Fla. 1984) (citing numerous cases). Most claims fall into this category. The procedurally barred claims are: . . . 6) the felony murder aggravator fails to narrow the class of persons eligible for the death penalty.

The above findings are the law of the case, and no new evidence or retroactive authority has been cited to alter same. This claim thus remains procedurally barred. Finally, the claims of ineffective assistance of counsel are again procedurally barred as being successive and untimely, in accordance with the arguments set forth at pp.14-15 herein and Pope, Lambrix, supra.

**CONCLUSION**

Based on the foregoing, the State respectfully submits that the trial court's summary denial of the defendant's claims based upon procedural bars should be affirmed.

Respectfully submitted,

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Attorney General

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by mail to **BILLY H. NOLAS, Esq.**, Capital Case Resource Center, 437 Chestnut Street, Suite 501, Philadelphia, Pennsylvania 19106, **TODD SCHER**, Assistant CCRC, 1444 Biscayne Blvd., Ste. 202, Miami, Fl. 33132-1422, on this 11th day of December, 1997.

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**FARIBA N. KOMEILY**  
Assistant Attorney General