# IN THE SUPREME COURT OF FLORIDA



**CASE NO. 00-1917**

**ERMON LEE LANE,**

**Petitioner,**

**-vs-**

**STATE OF FLORIDA,**

**Respondent,**

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## ON PETITION FOR DISCRETIONARY REVIEW

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## INITIAL BRIEF OF PETITIONER ON THE MERITS

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## INTRODUCTION

This is the brief on the merits of petitioner Ermon Lee Lane from a question certified to be of great public importance by the Third District Court of Appeal following petitioner's appeal from his judgment of conviction and sentence before the Honorable Alan Gold, Circuit Judge, Eleventh Judicial Circuit, Miami-Dade County, Florida.

The certified question is as follows:

> Should the decision in Parker v. State, 408 So.2d 1037 (Fla. 1982), be overruled in favor of the analysis of he evidentiary requirements for proof of convicted felon status in firearm violation cases established for federal courts in Old Chief v. United States, ___ U.S. ___, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

Citations to the record are abbreviated as follows:

(R) - Clerk's Record on Appeal, including transcripts of trial

(A) - Appendix attached hereto

## STATEMENT OF THE CASE AND FACTS

The petitioner was charged by amended information on December 8, 1995, with attempted second degree murder in count 1 in violation of 782.04(2), Florida Statutes (1993), and in count 2 with unlawful possession of a firearm by a convicted felon in

violation of 790.23(1). (R: 1-3) The two counts were severed and the petitioner proceeded to trial first on the possession of a firearm by convicted felon.

Jury trial on the possession of a firearm by convicted felon count began on December 13, 1995. (R: 5, 17) Prior to trial, the parties discussed the issue concerning the number of convictions the state would be allowed to introduce to prove the petitioner was a convicted felon. (R: 89-90) The petitioner announced he was willing to stipulate he was a convicted felon and that the state had proved that element of the case. (R: 90) The petitioner admitted the case of Parker v. State, 408 So.2d 1037 (Fla. 1982), held the state was entitled to refuse the defendant's offer to stipulate to prior felony convictions, but argued Parker did not apply and did not take away the court's discretion to accept a stipulation and denying admission of all the prior convictions. (R: 90) He argued that the state, in refusing to accept the stipulation to the four or five prior felony convictions, was acting in bad faith in order to prejudice the jury with an abundance of prior convictions to suggest the petitioner was a person of bad character who committed many prior bad acts.

> MR. KRAMER: [defense attorney] Let us talk briefly about what your honor just brought up, the stipulation. We are willing to stipulate he is a convicted felon. After the fingerprints were taken last night, I found out, I spoke to the finger print examiner and he told me it is a match. They have established that is the element of their case. Now, I am familiar with the Parker case. The case

states the State can refuse the stipulation.

THE COURT: On that issue.

MR. KRAMER: But we are confronted with a different issue than the Parker case. Now we are dealing with refusal to accept a stipulation made in good faith and the multiple priors that they want to admit. I believe in the Parker case it was a single prior conviction. So there is a difference. They are now refusing the stipulation and turning it into an affirmative batterage of some nature, so that they can put in front of jury the evidence of these several different priors.

Now, what would be the purpose of their refusal to accept a stipulation to something that is very obvious and just a time consuming matter to have the fingerprint technician and whoever else is necessary, to prove up these prior to come into court. What is the purpose of it? The purpose of it is they want to prove to the jury that the defendant actually has these documents in a court file somewhere that says he is a convicted felon. We agree that is the situation. But they want to refuse that and not only not put in just one, but now put in four or five. (R: 90)

* * *

Now we have a situation where we are agreeing. We are coming before the court and saying, 'Judge, the man is a convicted felon.' That is not what the case law is. That issue is pretty clear cut. I think, your honor, based on the fact that we are willing to make a stipulation to allow the State to introduce four or five or whatever, it may in fact be an abuse of discretion on your honor's part. (R: 91)

The state argued that it had the right to refuse the stipulation and to "prove its

case as it chooses." (R: 92) The state said that since the petitioner was a convicted felon, the probative value of placing before the jury his five prior felony convictions to prove its case outweighed any prejudice, and further, that there was no unfair prejudice because actually "everything that the State tries to do in trial is going to prejudice the defendant in some way." (R: 92-93) When the court asked the prosecutor what was the value of establishing to the jury there were five prior convictions, the state replied "it is probative of the fact it is a convicted felon" and that the state had the right "to introduce a substantial amount of evidence to prove a particular relevant point." (R: 94-95)

The petitioner disagreed and argued it was highly prejudicial to place before the jury evidence of five other crimes committed by the petitioner when it was unnecessary to do so to prove the state's case. (R: 94) The judge agreed it looked like the state was trying to let the jury know "that this guy is a lot worse egg, bad egg, than they may think," and that he did not see "a logical legal basis to establish more than one felony." (R: 95) The judge asked "where do we get past the stage where it is no longer just showing the jury he has done a crime, and where we are at the point where it is obviously prejudicial?" (R: 97) The state offered to "split the baby" and put in three convictions, but the petitioner objected and pointed out they were the three most egregious convictions and the result was just as prejudicial. (R: 97-98) The judge

allowed the state to place into evidence two of the petitioner's prior felony convictions, over petitioner's objection. (R: 99, 102-103)

The trial then began and the state presented the testimony of Officer Sosa from the Homestead Police Department who testified that on August 7, 1994, about 8:45 p.m., he was called to the scene of a shooting in Homestead in an area of housing projects and parking lots. (R: 111-112) He found no one and left after about ten minutes. (R: 112-113) Shortly thereafter, he was dispatched to the local hospital where he talked with the victim, Terrence Leon Cole, who was being treated for a bullet wound in his leg. (R: 114) He also examined the victim's car and found bullet holes in the driver's door. (R: 115) The officer admitted he did not find any projectiles and did not retrieve any gun. (R: 117)

The victim, Terrence Leon Cole, a five-time convicted felon with a bad gambling habit, testified the petitioner shot him that night following an argument after a dice game with the petitioner's brother, Jamie. (R: 120-121) Cole testified he spent the evening gambling at dice "shooting craps" in the housing project with the petitioner's brother; whenever Cole lost money, he went home and got more and returned to the gambling. (R: 121-124) When the game was over, the petitioner came up and called him names; Cole left to get more money and went to find another dice game. (R: 123-124) He was unable to find another game, so he returned to the housing project about

an hour later "to regain some of my money." (R: 125) According to Cole, the petitioner was "hiding between two parked cars," and when Cole drove up, he looked at the petitioner and petitioner "opened fire" with a revolver, firing five or six shots through the driver's side window, hitting Cole in the knee. (R: 125-127) Cole said he put his car in reverse and the defendant shot near the rear window of the car, then "jogged" away. (R: 127-128) Cole drove to his girlfriend's house and she drove him to the hospital. (R: 127-128) Cole said he did not have a gun, he did not threaten anyone and did not say anything to the defendant. (R: 128)

On cross examination, Cole admitted he was losing at dice "pretty bad" that day, that every time he lost he returned to his apartment for more money, and that he continued to gamble after he had the argument with the petitioner and the petitioner's brother. (R: 129-130) At the end of the game, only he and the petitioner's brother Jamie were left and Jamie won. (R: 137)

Cole admitted that after the petitioner was arrested for the shooting, Cole went to a liquor store to speak with the petitioner's mother and told her he would like to cooperate and help her son out if it was possible. (R: 142) He denied going there to "put the arm on her for some money." (R: 142)

The state placed into evidence, over the petitioner's objection, copies of the judgments and sentence from the petitioner's prior two convictions: a battery on a law

enforcement officer, an escape, curfew violation, and attempted robbery. (R: 45-54, 119) The state called the fingerprint technician to the stand, over the petitioner's objection, and he identified the fingerprints on the two prior judgments of conviction as matching the petitioner's. (R: 144, 147)

The state rested and the defendant called his mother, Betty Pollox, to the stand. (R: 148) She testified that she did not know Cole before this, but that prior to trial she learned his street name was "Head" and that he was trying to get in touch with her. (R: 149) She testified that several weeks before trial, Cole called the liquor store where she worked and left a message for her with his phone number to call him. (R: 15) She did not return his call because she did not know him. (R: 151) Then a week or so before trial, Cole came into the liquor store and told her he was the guy her son shot and that he "heard something about restitution." (R: 150) She told him she did not know what he was talking about and that she was not going to discuss this case with him. (R: 150)

The defense also called as a witness Rachelle McCray. (R: 155) Cole was her baby's father and Cole lived with her at the time of the shooting; she was the person who drove him to the hospital after he was shot. (R: 155) She testified that on the day of the shooting, she was home and noticed that Cole came in and out of their apartment four or five times throughout the day. (R: 155-156) She did not know what he was

doing because he would go into his bedroom without her and would leave without telling her where he was going; they had an "unwritten rule" that she did not like him gambling so he did not tell her he was gambling that day. (R: 156-157) Cole told her he had "a few words" with Jamie Lane, the petitioner's brother, and then the petitioner came up and there was an argument. (R: 157) After the argument, he came home then left again "to see his other child," but she denied calling the other child's mother, Helena Woods, to tell her that Cole was on the way over there with a gun. (R: 157-159)

The defense then called Helena Woods as a witness. (R: 159) Helena said she knew all three men - the petitioner, his brother Jamie and the victim Leon Cole - like brothers and Cole was her niece's cousin. (R: 159-160) She said she would always remember the day of the shooting because she had prepared a birthday party for her little girl (who was Cole's daughter) that afternoon and it was disrupted by "the commotion" caused by Cole threatening the petitioner with a gun. (R: 161) The party started about 4:00 that afternoon and "ended when the commotion started." (R: 161) The party took place in her apartment located in the second floor housing development above the parking lot where Cole and the petitioner's brother Jamie were playing dice and where the shooting took place. (R: 162) She said the petitioner supplied things for the party and stayed "practically during the whole party" and was not downstairs

playing dice. (R: 161-162)

Helena further testified that she first saw Cole that day "down shooting crap" and she did not see him again until the commotion started. (R: 162) She knew Cole had gone home to get a gun because Rachelle McCray called her and told her that Cole was "coming back to the house with a gun." (R: 168) It began to rain and the petitioner and his brother Jamie came up to her apartment and stood on the porch. (R: 162-163) Cole was downstairs in his car with his brother-in-law Marlon McCray "throwing threats upstairs." (R: 163) She said Cole threatened the petitioner and Jamie "that he would be back when it get through raining," that Cole, who was driving his car, then "stood up out of the car" with a gun in his hand and told the petitioner he would be back "when it done raining." (R: 163) Cole did not wave the gun or point it, but kept it in his hand and shouted threats up to the petitioner and Jamie. (R: 165-166) Helena told them all to leave her house because she was having a party. (R: 167-168) She admitted that in her deposition, she said Cole's brother-in-law had the gun, but said she probably did not know their names at the time. (R: 174)

Helena testified that Cole then left and came back about an hour later, parked in the parking lot and looked up at her and her apartment. (R: 166-167) Cole stayed there about five or ten minutes, then left and returned again and parked in the same spot, then left again. (R: 167-168, 184) Helena testified she knew he returned again

because when she heard the shots, she looked outside and saw him parked out in the parking lot with his lights on. (R: 170-171,184) She called the police, but did not see who was actually shooting. (R: 170-171, 184) She admitted that earlier that day, the petitioner told her that he had a gun. (R: 185)

Barbara Nichols, Helena's neighbor, also testified for the defense. (R: 188) She did not remember much about what happened that day but she did testify that she did not see the petitioner with a gun that day. (R: 191)

The petitioner then rested and renewed his motion for judgment of acquittal, which was again denied. (R: 194-195) During jury selection, the jury set out a note requesting the testimony of Helena Woods, Officer Sosa and Leon Cole, as well as the deposition of Helena Woods. (R: 244) The judge told them they would have to rely on their collective memory of the testimony. (R: 244)

At the conclusion of the trial, the jury returned a verdict of guilty as charged of possession of a firearm by a convicted felon. (R: 244-245) On December 15, 1995, the judge adjudicated the petitioner guilty. (R: 246)

On June 14, 1996, the petitioner was sentenced as a habitual violent offender to 20 years in prison with 10 years mandatory minimum. (R: 5, 264)

The petitioner appealed his judgment and sentence to the Third District Court of Appeal and raised the Parker issue, Parker v. State, 408 So.2d 1037 (Fla. 1982),

objecting to the state bringing in evidence of his many prior convictions to prove the convicted felon element. (A: 1) In his brief, petitioner also relied upon Old Chief v. United States, 117 S.Ct. 644 (1997), the decision by the United States Supreme Court on January 7, 1997, holding that a trial court abuses its discretion when it rejects a defendant's offer to admit the prior conviction element of possession of a firearm by convicted felon and instead allows into evidence the full record of the priors, raising the risk of prejudicial consideration by the jury. (A: 1) Petitioner argued that Old Chief overruled this Court's earlier decision in Parker. (A: 1)

On February 18, 1998, the Third District issued its decision in petitioner's case, affirming his adjudication and sentence, but certifying the Old Chief issue to the Florida Supreme Court as follows:

> As in Brown v. State, 700 So.2d 447 (Fla. 3d DCA 1997), we certify the same question as a matter of great public importance:
>
> Should the decision in Parker v. State, 408 So.2d 1037 (Fla. 1982), be overruled in favor of the analysis of he evidentiary requirements for proof of convicted felon status in firearm violation cases established for federal courts in Old Chief v. United States, ___ U.S. ___, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). (A: 1)

Petitioner's appellate attorneys failed to take petitioner's certified question to this Court and on September 1, 2000, this Court granted petitioner's petition for writ

of habeas corpus to file a belated notice to invoke discretionary jurisdiction in this Court. (Fla.S.Ct. Case No: SC00-178) Petitioner timely filed a belated notice to invoke discretionary review of the certified question in this Court.

Petitioner is now filing his initial brief on the merits on the certified question.

## SUMMARY OF ARGUMENT

The petitioner submits the certified question should be answered in the affirmative. This Court has already answered the identical certified question in the affirmative in Brown v. State, 719 So.2d 882 (Fla. 1998), and held that, "consistent with Old Chief, when a criminal defendant offers to stipulate to the convicted felon element of the felon-in-possession of a firearm charge, the Court must accept that stipulation, conditioned by an on-the-record colloquy with the defendant acknowledging the underlying prior felony conviction(s) and acceding to the stipulation." Id., at 884. Here, the petitioner timely objected to the introduction of his prior felony convictions into evidence, thus properly preserving this issue for appeal. The petitioner then argued this issue before the Third District and when the Third District ruled against him, he properly sought discretionary review in this Court on the Old Chief issue. Moreover, the erroneous introduction of the substance and number of the petitioner's prior felony convictions to the jury was not harmless beyond a reasonable doubt. Consequently, this Court should quash the decision of the Third District and remand this case to the trial court for a new trial. See also Pierce v. State, 734 So.2d 399 (Fla. 1999).

## ARGUMENT

THE CERTIFIED QUESTION WHETHER OLD CHIEF v. UNITED STATES OVERRULED PARKER v. STATE SHOULD BE ANSWERED IN THE AFFIRMATIVE, AND THE DECISION OF THE THIRD DISTRICT SHOULD BE QUASHED AND THE CASE REMANDED FOR A NEW TRIAL IN ACCORDANCE WITH BROWN V. STATE, 719 So.2d 882 (FLA. 1998).

The petitioner was charged with and convicted of possession of a firearm by a convicted felon in violation of 790.23(1), Florida Statutes (1993). During trial, the petitioner objected to the state bringing in evidence of all his prior convictions to prove the convicted felon element and offered to stipulate to the prior convictions and to the fact he was a convicted felon. The judge, relying on Parker v. State, 408 So.2d 1037 (Fla. 1982), overruled the objections, refused the stipulation and permitted the state to introduce petitioner's two prior convictions. The Third District Court of Appeal affirmed petitioner's conviction but certified the question as to whether Parker should be overruled in favor of the evidentiary requirements for proof of convicted felon status in firearm violation cases established in Old Chief v. United States, 117 S.Ct. 644 (1997):

> As in Brown v. State, 700 So.2d 447 (Fla. 3d DCA 1997), we certify the same question as a matter of great public importance:

> Should the decision in Parker v. State, 408 So.2d 1037 (Fla. 1982), be overruled in favor of the analysis of he evidentiary requirements for proof of convicted felon status in firearm violation cases established for federal courts in Old Chief v. United States, ___ U.S. ___, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). (A: 1)

The petitioner submits the certified question should be answered in the affirmative, the decision of the Third District should be quashed and the case remanded for a new trial.

This Court has already answered the identical certified question in the affirmative in Brown v. State, 719 So.2d 882 (Fla. 1998). In Brown, as in the present case, the state was allowed to introduce certified copies of two prior felony convictions into evidence to prove the convicted felon element of the crime, despite Brown's objection and offer to stipulate to the existence of that element of the crime. As in this case, the Third District followed this Court's precedent in Parker and held that the trial court did not abuse its discretion in rejecting the offer to stipulate and in admitting the copies of two prior convictions; the district court declined to apply Old Chief. The Third District, however, certified the question as one of great public importance in order to give this Court the opportunity to revisit the holding in Parker in light of Old Chief.

On review, this Court in Brown reconsidered its holding in Parker and concluded that, in view of the limited purpose for which evidence of prior convictions is offered in such cases, the concern is in the additional and unnecessary risk of prejudice that

comes with disclosure of the number or nature of the prior convictions. This Court found that in "the absence of a dispute that the prior conviction was indeed a felony, such an admission of the prior substantive offense can only prejudice the jury with absolutely no countervailing interest in its support." Id., at 888. This Court then held that, "consistent with Old Chief, when a criminal defendant offers to stipulate to the convicted felon element of the felon-in-possession of a firearm charge, the Court must accept that stipulation, conditioned by an on-the-record colloquy with the defendant acknowledging the underlying prior felony conviction(s) and acceding to the stipulation." Id., at 884. The state may then place the actual judgments of the prior convictions into the record, but neither these documents nor the number and nature of the prior convictions should be disclosed to the trial jury. This Court quashed the Third District's decision in Brown and remanded it for a new trial. In so doing, this Court observed that Brown timely objected to the introduction of his prior felony convictions into evidence, preserved this issue for appeal and argued it before the Third District, then sought review in this Court, and further, this Court was unable to conclude the error was harmless. Id., at 884, n.1.

The present case is identical to Brown and this Court should answer the certified question in the affirmative, quash the district court's decision and remand the case for a new trial. The record is clear the petitioner timely objected to the introduction of his

prior felony convictions into evidence, thus properly preserving this issue for appeal. The petitioner then argued this issue before the Third District, and when the Third District ruled against him, he properly sought discretionary review in this Court on the Old Chief issue.[1] Moreover, the erroneous introduction of the substance and number of the petitioner's prior felony convictions to the jury was not harmless beyond a reasonable doubt.[2] See also Pierce v. State, 734 So.2d 399 (Fla. 1999).

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[1] There is no retroactivity problem because this case was not final at the time Brown was decided. 719 So.2d at 884, n.1. Although the petitioner's case was decided by the Third District on February 18, 1998, and Brown was not decided by this Court until October 15, 1998, the Third District certified the Brown issue to this Court while Brown was still pending in this Court and, but for ineffectiveness of appellate counsel, this case would have been pending in this Court at the time Brown was issued. (See petitioner's petition for writ of habeas corpus and/or motion for leave to file belated discretionary review, Fla.S.Ct. Case No: SC00-178, and this Court's order of September 1, 2000, granting the petition for writ of habeas corpus and permitting belated discretionary review of the certified question)

[2] The evidence against the petitioner at trial was questionable and conflicting on whether he had a firearm. His defense was that he did not possess any firearm. (R: 215-230) The state argued he possessed the firearm while shooting Leon Cole in the parking lot of the housing project following a gambling dispute, but - other than the testimony of Cole, a five-time convicted felon with a gambling addiction - there were no eyewitnesses to the shooting and no one saw the petitioner with a gun. (R: 112-113, 120-121, 157, 170, 184, 191) It was undisputed the gambling dispute took place between the petitioner's brother and Cole and that Cole was beaten badly at dice by the petitioner's brother. (R: 121-130, 137, 157) The petitioner presented testimony in support of his claim that he did not possess a firearm, but that Cole actually possessed a firearm and threatened both petitioner and his brother with it following the dice game. (R: 161, 162-168) In addition, the petitioner presented testimony that Cole tried to "extort restitution" money from petitioner's mother following the incident. (R: 142, 148-151)

Consequently, this Court should quash the decision of the Third District and remand this case to the trial court for a new trial.

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The state carries the burden of showing beyond a reasonable doubt the error in refusing to stipulate to petitioner's felony status did not contribute to the verdict or there was no reasonable possibility that the error contributed to the conviction. Pierce v. State, 734 So.2d 399 (Fla. 1999); Williams v. State, 749 So.2d 587 (Fla. 5th DCA 2000). The state cannot meet its burden in this case. The evidence was questionable and the petitioner presented witnesses in his defense; the jury asked to hear the testimony of most of the witnesses a second time. (R: 244) Consequently, the error in refusing to stipulate to petitioner's felony status cannot be deemed harmless error as applied to the facts in this case.

## CONCLUSION

Based upon the foregoing, the petitioner requests that this Court quash the decision of the Third District Court of Appeal and remand the case to the lower court for a new trial.

Respectfully submitted,

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## CERTIFICATE OF FONT

I HEREBY CERTIFY that the type used in this brief is 14 point proportionately spaced Times New Roman.

By:_____
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, Criminal Division, 444 Brickell Ave., #950, Miami, Florida 33131, this _____ day of October, 2000.

By:_____
MARTI ROTHENBERG
Assistant Public Defender