IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1471

DWAYNE IRWIN PARKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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Ineffectiveness At Guilt-Innocence Phase

Contrary to Appellee's argument, Mr. Parker did not "simply allege ineffectiveness for failing to hire an expert" (Answer Brief at 10). Mr. Parker has specifically alleged that trial counsel could have - but failed to - present expert testimony that "the color of the bullet shown in the photographs presented by the State was subject to manipulation and did not necessarily reflect the true color or tint of the bullet" (PCR. 326; Amended Motion p.28). Mr. Parker has specifically alleged that trial counsel could have - but failed to - to present expert testimony in the areas of both photography and tool-marking that it cannot be established by a reasonable degree of scientific certainty that the bullet shown in photograph (Exh. 115)(lodged in the sacrum bone) is the same bullet that State claims to have been fired from Mr. Parker's gun (PCR 358; Amended Motion p.60). Mr. Parker has also specifically alleged that the State had provided trial counsel with a print of the negative of the photograph taken by Cerat showing the bullet in the sacrum (Exh. 115) in

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[1]The opinion on direct appeal (and the undersigned's initial brief) incorrectly recounts Mr. Parker's lesser included non-capital convictions. In addition to the robbery charges, he was convicted of aggravated assault with a firearm and attempted second degree murder, as opposed to two counts of aggravated battery with a firearm.

which the bullet appeared silver, however, when the State at trial introduced a different, redeveloped print in which the bullet appeared yellow or copper in color, trial counsel failed to introduce into evidence the silver colored print, and others, trial counsel had received from the State in discovery showing the bullet as silver (PCR 325-26; Amended Motion pp.27-28, para. 17 and 19). Mr. Parker also specifically alleged that counsel failed to investigate the issue of the slide photographs taken by Dr. Bell at the time of the autopsy and, as a result, was unable to present evidence that the slide photograph of the bullet lodged in the bone was not taken within the same sequence as the other slides taken during the victim's autopsy (PCR 327; Amended Motion p.29, para. 22). This evidence would have provided circumstantial support for the defense's theory of some form of evidence tampering and cover-up regarding the bullet.

Appellee also argues that the claim is procedurally barred because trial counsel - at nearly the end of the State's case-in-chief - asked the court to grant leave for trial counsel to obtain a photography expert to challenge the State's evidence but the request was denied (Answer Brief at 11)(R. 1743, 1752, 1806-07). The fact that the trial judge exercised its discretion to deny trial counsel's untimely request to put the trial on hold so trial counsel could hire and consult an expert

in photography in no manner means that Mr. Parker's claim that trial counsel was ineffective for failing to consult with and present testimony of a photography expert could have been raised on direct appeal and therefore is now procedurally barred. Trial counsel first moved the court to grant leave for counsel to obtain an expert in response to the State's proffered testimony of Dr. Besant-Matthews, a "surprise" witness who the State brought in near the end of its case to allegedly rebut the defense that the bullet Dr. Bell removed from the victim was not the same bullet Dr. Bell told the jury he had removed (*i.e.* the bullet in State Exh. 121) (R. 1743). Before the court ruled on whether it would allow Dr. Besant-Matthews to testify, trial counsel specifically moved for the appointment of an expert "in order to properly cross examine" Dr. Besant-Matthews (R. 1743). Counsel also urged the court to prohibit Dr. Besant-Matthews from testifying due to the State's untimely disclosure of the witness (R. 1743). The court thereafter ruled that the State could not call Dr. Besant-Matthews during the guilt-innocence phase because the State's notice of the witness was untimely, because, according to the trial court, his testimony would be cumulative to Dr. Bell's testimony (because Dr. Bell testified already that the bullet in evidence was the bullet he removed from the victim (R. 1731, 1744)), and because the comparison of

the photographs that Dr. Besant-Matthews proffered "doesn't really require an expert in forensic pathology or forensic photography" (R. 1743-44). Having so ruled, the court did not even address counsel's request for an expert. Because the court did not allow Besant-Matthews's testimony during the guilt phase, counsel's request for an expert to consult before cross-examining him during the guilt phase became a non-issue. (Of course, Besant-Matthews subsequently testified at the penalty phase on the bullet identification issue but, as asserted in Mr. Parker's penalty phase IAC claim, trial counsel still consulted no experts and did not even cross-examine him)(R. 2133-2144).

After the trial court ruled that the State could not call Besant-Matthews during the guilt phase, the State called Mr. Garland. Trial counsel argued that, in light of the newly created photographs taken by Dr. Besant-Matthews that Mr. Garland relied upon and testified about to support his conclusion that the bullet in Exhibit 121 was the same bullet shown in the photograph of the bullet lodged in the bone, counsel needed time to obtain expert assistance (R. 1752, 1806-07). In other words, counsel wanted expert assistance to examine the <u>new</u> photos that had not been in existence before the start of the trial (the State's discovery violation regarding

these two photos was addressed on direct appeal). Therefore, the court's denial of counsel's request for expert assistance in this limited area (to assist in crossing Garland on the two new photos) cannot constitute a procedural bar to Mr. Parker's current claims.

Appellee also argues that trial counsel's mid-trial plea for expert assistance to combat the new photographs establishes that counsel "may not be deemed deficient for not hiring an expert" (Answer Brief at 11). By no means does trial counsel's mid-trial request for an expert establish that counsel was not deficient for not presenting expert testimony on the origin of the bullet in Exhibit 121 and the color of the bullet in the State's photographs. As discussed already, counsel sought expert assistance to examine the new photos that had not been in existence before the start of the trial. Trial counsel himself stated on the record that, prior to that time, "We didn't need an expert because we had Dr. Bell, and Dr. Bell's testimony was locked in three times in his sworn testimony, and we didn't have any problem with that. It was on the eve of trial that we - well, not even the eve of trial, it was at least a month before trial, and I believe it was Mr. Satz that notified us that there was a change . . . ." (R. 1717). In other words, counsel felt an expert was not needed on this issue when he had every reason

to believe that Dr. Bell would tell the jury that the bullet he removed from the victim was silver in color and had little or no deformations. However, once Dr. Bell dropped his bombshell less than a month before trial and made it known that he was changing his testimony, the planned defense - that the victim was shot by a deputy - became a much more difficult endeavor for trial counsel to convincingly pursue. Despite this dramatic turn of events that dealt a serious blow to Mr. Parker's defense, counsel proceeded to trial without seeking out expert assistance to help the defense combat Bell's testimony[2]. Mr. Parker's claim is not that counsel was ineffective in failing to obtain expert assistance relative only to the two new photographs revealed by the State for the first time mid-trial, rather, the claim is that counsel was ineffective in failing to seek out and present expert testimony even if the State had not presented to the jury the two new photographs. Once trial counsel was informed of Dr. Bell's intent to change his intended testimony, counsel should have sought a continuance and sought the assistance of experts who would have been able to seriously undermine any notion that the photographs presented by the State proved that the bullet

[2]Trial counsel did ask for an continuance prior to the start of the trial but not for the purpose of consulting experts in light of Dr. Bell's changed testimony.(R. 390, 529, 1716-17).

that killed the victim was copper in color. Therefore, the fact that the court denied counsel's request for expert assistance with only the new photographs introduced during Mr. Garland's testimony (R. 1752, 1806-07) does not render the instant claim procedurally barred. Appellee fails to explain how or for what reason a defense expert's testimony on the science of photography would have been "inadmissible" and "unecessary" (Answer Brief at 11) except to suggest that because the trial court refused the State's mid-trial request to present the testimony of the previously undisclosed witness Dr. Besant-Matthews, the court would not have allowed trial counsel to call as a witness an expert to testify regarding the color of the bullet shown in the photographs ("Had the defense obtained an expert in photography, he would not have been permitted to testify as the State's expert was disallowed.")(Answer Brief at 12).

Appellee's argument has no merit. The trial court prohibited the State from calling Dr. Besant-Matthews because the State's disclosure of the witness was untimely (the defense had known of the witness for merely one day), because the court concluded that, based on the proffer, Besant-Matthews' opinion was based on a simple eye-ball comparison of the bullet in evidence (121) to the images in the photographs and therefore

did not require an expert in forensic pathology or photography, and because his testimony was cumulative to Dr. Bell's testimony (R. 1743-44). Nothing in Besant-Matthews' proffer indicated that he intended to testify regarding the relationship between the true color of an object and the image of such an object as it appears in a photograph or how photographic images can be manipulated in this respect. In fact, Dr. Besant-Matthews specifically disavowed having such an expertise in "color chemistry" (R. 1722). Given the circumstances involved in the trial court's decision to not allow him to testify, it simply is not reasonable to conclude, as Appellee urges, that the court would have ruled inadmissible the testimony of a defense expert in photography.

Appellee argues that "[t]here was nothing more an expert could have put forward which was admissible testimony that could have further impeached or undermined the [Dr. Bell] . . . as evident from the court's ruling excluding Dr. Besant-Matthews's expert testimony on the photos in part as cumulative and the fact the jury could resolve the evidence without expert help" (Answer Brief at 12). However, as discussed above, the court's ruling to exclude Besant-Matthews's testimony cannot be considered dispositive on the issue of the admissibility of a defense expert's testimony on the color of photographs relative

to the actual subject. Appellee effectively is asking this Court to believe that if trial counsel had called as a defense witness an expert on this issue, the trial court would have prohibited the witness from testifying. If the trial court could have properly and legally done this, then Appellee has a point. However, obviously the trial court would not have been able to properly preclude the defense from calling an expert to testify on this issue. To do so would have violated Mr. Parker's constitutional right to present a defense. *See Chambers .v Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967). Appellee's three-pronged "procedurally barred/inadmissible/cumulative" argument should be rejected.

Appellee further asserts that the claim is "rebutted conclusively" by the record because of the State's chain-of-custody testimony and urges that "the authenticity and color of the bullet in evidence were resolved based upon the actual projectile" (Answer Brief at 12-13). This is a hollow argument because Mr. Parker's defense was that state agents engaged in evidence tampering to the extent of replacing the true bullet removed from the victim with a substitute bullet that had been found at the scene and, therefore, necessarily had ballistic characteristics indicating it was fired from Mr. Parker's gun. Obviously, if the state agents perpetrated such a devious and

outrageous scheme, lying about the chain-of-custody reasonably would be part of the conspiracy. The defense at trial was that the "actual projectile" referred to by Appellee (the projectile in State Exh. 121), was in fact not the projectile that killed the victim.

In straining to argue that Mr. Parker should not be allowed an evidentiary hearing, Appellee ironically illustrates why an evidentiary hearing is required. Appellee claims that "the hiring of [a photography] expert was unnecessary" since "[t]here was nothing more an expert could have put forward which was admissible testimony that could have further impeached or undermined [Dr. Bell]" (Answer Brief at 11, 12). Because the lower court denied Mr. Parker the opportunity to present at an evidentiary hearing the evidence his trial counsel failed to present at trial, Appellee cannot point to anything in the record that establishes its contention that a photography expert was "unnecessary" and that "[t]here was nothing more an expert could have put forward which was admissible testimony that could have further impeached or undermined [Dr. Bell]."

Appellee's only argument in support of its contention that a photography expert was "unnecessary" is that trial counsel impeached Dr. Bell with his multiple affirmances that the bullet was indeed silver with little deformations and because the trial

court overruled the State's attempt to present Dr. Besant-Matthews (Answer Brief at 12). The fact that trial counsel impeached Dr. Bell based on his own observation of the actual bullet removed from the victim as being silver with little deformations in no way would have rendered a photography expert's testimony on the issue of the color of the bullet in the photographs cumulative. Such evidence would have constituted substantive evidence that corroborated Bell's initial descriptions of the bullet and cast doubt on the veracity of his trial testimony, as well as the testimony of other State witnesses. Dr. Bell was not an expert in photography and none of the other State witnesses in the guilt phase were declared experts in photography. Appellee's argument that "the record refutes the claim that a photography expert was needed" and that such evidence would be cumulative and "unnecessary" is without merit. Indeed, trial counsel's ineffective attempt to cross-examine Mr. Garland on the technical aspects of the science of photography and film processing illustrates the point. Due to his failure to prepare for trial by consulting an expert in the field, counsel tried in vain to attack the probative value of the State's photographs.

Appellee argues that Mr. Parker's claim that trial counsel failed to investigate and present evidence that there were

bullets fired from Mr. Parker's gun at the scene that were never accounted for is "wholly conclusory" (Answer Brief at 13). The lower court never even addresses this claim. Appellee argues that the Amended Motion "merely listed the names of person's alleged to live near the crime scenes who heard shots fired" (Answer Brief at 13). Appellee's argument is without merit as evident from a simple review of Mr. Parker's claim. Mr. Parker asserted the following facts in his Amended Motion:

> There existed evidence that Mr. Parker filed shots that were unaccounted for by the State. Evidence exists that two persons, Charles Thompson and Angela Hall, who lived near the area between the Pizza Hut and where Mr. Parker was apprehended, heard Mr. Parker fire his gun as he passed their apartment. The bullets and casings from these shots were never accounted for. This evidence would have supported Mr. Parker's defense that the State had recovered an errant bullet and switched it with the silver bullet Dr. Bell removed from Mr. Nicholson's body. Defense counsel failed to investigate and present this evidence to the prejudice of Mr. Parker.

(PCR 328-29; Amended Motion pp.30-31, para. 26). Appellee's argument is belied by text of Mr. Parker's claim. The State's law enforcement witness testified at trial that police recovered a total of 12 spent cartridge casings from the scene. The evidence also was that the nine millimeter gun carried by Mr. Parker was recovered containing 20 unfired cartridges and that the gun had the capacity to hold and fire a total of 33 bullets. The defense's theory was that either police moved one of the 12

spent cartridges that were officially accounted for and dropped it near the location in the area of 17th Avenue and 28th Court (the area near the victim) or that police secretly found and thereafter dropped an officially unaccounted for 13th spent cartridge found in the area of the apartment building that was the result of a shot fired as heard by Charlie Thompson or Ms. Hall. Trial counsel during his cross-examination of Deputy Kammerer attempted to imply that Thompson and Hall saw Mr. Parker shooting in that area. Kammerer denied that police found any spent cartridges there (R. 1442-44). Even though trial counsel neither elicited nor presented any evidence at trial that Parker fired his gun in that area, he argued it to the jury (over the State's objection)(R. 1927). Having heard no evidence of this, the jury likely summarily rejected this argument of a 13th spent cartridge. Mr. Parker has sufficiently alleged that this evidence was available and that counsel was ineffective for not presenting it. Appellee's argument is without merit.

Not surpassingly, at every turn the State has attempted to minimize the significance of Tammy Duncan's testimony that Mr. Parker was 60 to 70 feet from the victim when she heard the fatal shot (R. 1230-31). At trial, the prosecutor admitted in closing arguments that her testimony did not "fit" the "physical evidence" of the stippling on the victim that Dr. Bell and Mr.

Garland both testified proved that the victim was shot from a very close range (within two to three feet)(R. 1904, 1907). The prosecutor instead argued that Duncan was simply mistaken ("That doesn't mean that Tammy Duncan is a liar, she told you just what she viewed") (R. 1904). As Appellee agrees, "the jury chose not to believe the distance between Parker and the victim estimated by Duncan" (Answer Brief at 15). The significance of Duncan's testimony on this point cannot be overstated: Based on the testimony of both Dr. Bell and Mr. Garland, if Mr. Parker was more than 2 to 3 feet from the victim when the gun that killed the victim was fired, the physical evidence of the stippling and the angel of the path of the bullet establishes without dispute that Mr. Parker could not have fired the fatal bullet. Furthermore, if Mr. Parker was more than 2 to 3 feet from the victim, it would establish beyond question that the bullet removed from the victim was not fired from Mr. Parker's gun, thereby supporting Mr. Parker's defense that he was framed by state agents. Mr. Parker asserts that trial counsel was ineffective for failing to present evidence that Mr. Parker could have been no less that 20 feet from the victim at the time Duncan saw him get shot (PCR. 329, Amended Motion, p.31). The prejudice to Mr. Parker is fully established by the State's own witnesses.

As for Mr. Parker's claim that trial counsel was ineffective in cross-examining Duncan on this critical point (the distance between the victim and Mr. Parker at the time the fatal shot was fired), Appellee argues that Mr. Parker has "not shown how counsel's performance in questioning the witness[] was deficient" (Answer Brief at 15). However, Mr. Parker has specifically alleged that trial counsel failed to effectively impeach Duncan "with her prior sworn statements in which she stated that Deputy McNesby was in front of and close to Nicholson at the time she heard the fatal shot" in that trial counsel's attempt to impeach her could have done nothing but confuse the jury and that counsel "failed to effectively convey to the jury that Duncan's trial testimony was entirely inconsistent with and contradictory to her prior sworn statements" (PCR. 330-31; Amended Motion pp.32-32, para. 30). The record of counsel's attempted impeachment speaks for itself (R. 1220-31). In order to properly decide this claim, the fact-finder must review Duncan's prior statement (which is not part of the record) in order to determine for itself the competency of trial counsel's cross-examination. Counsel himself must be also examined at an evidentiary hearing in order to determine whether his disjointed and confusing examination of Ms. Duncan had any strategic basis. An evidentiary hearing is required in

order to evaluate counsel's performance in light of the content of the prior statement.

Appellee refers to Mr. Parker's "allegation related to the victim's criminal history" and contends the claim is procedurally barred because Mr. Parker did not challenge on direct appeal the trial court's granting of the State's motion in limine to prohibit the defense from making reference to the victim's prior record of arrests or convictions (Answer Brief at 16)(R. 2596, 2657). Appellee's argument completely ignores the merits of the claim. The claim has nothing to do with presenting the jury with evidence of the victim's prior arrests or prior convictions (*see* PCR. 332-33; Amended Motion pp.34-35, para. 34). The claim is that trial counsel failed to present evidence that police, including Deputy McNesby, knew that the victim was involved with a group of persons suspected by police to have committed other local robberies, that a description of one of the suspects resembled the victim, that the victim was with these persons on the night of the instant crime, and that the victim himself may have been running from police after he heard the sirens at the time he was shot. These facts, had they been presented at trial, would have supported the defense's theory that a deputy shot the victim, believing that the victim was involved in the Pizza Hut robbery. Appellee's argument that

this claim is procedurally barred because the trial court granted the State's motion to prohibit reference by the defense to the victim's prior arrest and convictions is without merit.

Appellee notably does not take issue with Mr. Parker's additional claims related to the guilt-innocence phase that trial counsel failed to present evidence that several people at the scene of the shooting reported that a deputy shot the victim and failed to present evidence that another deputy, other than Deputy McNesby, could have been the shooter (PCR 331, Amended Motion p.33, para. 31 and 32). The trial court never addressed these claims in its order. Appellee also does not attempt to defend the lower court's erroneous reasoning in support of its summary denial that the facts asserted in Mr. Parker's Amended Motion are "not supported by the record" (PCR. 1492). Of course they aren't. That is precisely why an evidentiary hearing is required.

Ineffectiveness at the Penalty Phase

Appellee ignores the dispositive, undeniable fact that this Court on direct appeal explicitly found that the trial court, in concluding no mitigation had been established, **"found that the *facts alleged* in mitigation were *not supported by the evidence*."** *Parker v. State*, 641 So. 2d 369, 377 (Fla. 1994). Based on and in light of this explicit finding by this Court on direct

appeal, Mr. Parker now alleges that effective counsel could and would have established the facts alleged. Appellee's and the lower court's assertion that this claim should be denied because the claim asserts facts that were asserted at the penalty phase cannot withstand the fact that this Court concluded that the facts trial counsel tried (but failed) to prove in mitigation were "not supported by the evidence". When significant and substantial mental health mitigation exists, as Mr. Parker maintains, there is no meaningful difference with respect to an ineffective assistance of counsel claim between an attorney's failure discover the mitigation (and, therefore, not even attempting to present it to the jury) and an attorney's awareness of the mitigation and trying but failing to present competent evidence to prove its existence to the court and the jury. Because of trial counsel's failure, the trial court concluded that the facts alleged were not supported by the evidence. *See Parker* at 377. Mr. Parker asserts that effective counsel would have established the facts alleged in mitigation.

Appellee oversimplifies and distorts Mr. Parker's claim when Appellee argues: "Because counsel attempted to show mitigation, but the court rejected it, does not open the door to a second attempt, though [sic] a claim of ineffective assistance, to

relitigate the issue" (Answer Brief at 20). Mr. Parker's ineffective claim is that due to trial counsel's deficient performance, trial counsel failed to establish not only the mitigation talked about by defense witnesses but additional mitigation never even mentioned at trial. Under Appellee's reasoning, if an attorney presents any evidence in an attempt to establish mitigation, no matter how deficient the attorney is in investigating and presenting the evidence, the defendant cannot claim that the attorney was ineffective for the sole reason that the attorney presented some evidence. Such an approach is an incorrect and unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Wiggins v. Smith*, 123 S.Ct. 2527, 156 L. Ed. 2d 471 (2003). Mr. Parker is not "relitigating" anything. He is intending to establish that, due to trial counsel's inadequate, deficient preparation and investigation, counsel failed to establish the existence of significant and substantial mitigation in a capital case in which the jury recommended death by a vote of only 8 to 4.

Appellee argues that the lower court correctly rejected Mr. Parker's claim that trial counsel was ineffective for failing to present mitigation that was not even attempted to be presented at trial because, according to Appellee's argument, "these areas [of mitigation] were covered at trial" (Answer Brief at 20).

Mr. Parker relies on his argument in his Initial Brief to refute Appellee's argument. While Appellee recounts the testimony presented at the penalty phase, Appellee does not contest the undisputable fact that many significant facts relating to Mr. Parker's own mental health, the mental health of his mother and its effect on him as a child, and the sexual abuse he suffered as a child were not presented (*See* Initial Brief at 25-27, 27-29, 29-30).

Appellee argues that trial counsel's failure to establish the mitigation asserted in the Amended Motion was not prejudicial because "the same evidence was rejected previously as not mitigating" (Answer Brief at 26). Again, Appellee ignores this Court's conclusion on direct appeal that the trial court rejected the mitigation evidence presented at trial because **"the *facts alleged* in mitigation were *not supported by the evidence*."** *Parker v. State*, 641 So. 2d 369, 377 (Fla. 1994). This Court's findings on direct appeal establishes that the trial court did not find that, if all the mitigation evidence alleged were true, the evidence was not mitigating. As this Court concluded on direct appeal, the trial court found that the facts alleged in mitigation were not supported by the evidence." *Id*. Appellee fails to acknowledge this distinction.

Appellee makes several arguments that the lower court did

not err in denying Mr. Parker's claim that trial counsel was ineffective by failing to present to the jury at the penalty phase the testimony of Brent Kissenger, who would have testified that he saw a sheriff's deputy appear to shoot the victim. Appellee does not defend the lower court's rationale that this claim is procedurally barred and, apparently, concedes that the lower court's rationale for denying the claim is erroneous. However, Appellee asserts that the order should be affirmed because, first, Kissinger's testimony, as well as evidence challenging the State's copper bullet theory, would have been inadmissible as "residual doubt" evidence. In making this argument, Appellee blatantly ignores the fact the State to presented further evidence on the origin of the fatal bullet during the penalty phase under the pretext of the establishing the great risk of death aggravator. Because the State opened the door, trial counsel had free reign to rebut the evidence presented by the State. *See Rodriguez v. State*, 753 So. 2d 29, 42 (Fla. 2000). Certainly any evidence which tended to show that all the bullets **did not** come from Mr. Parker's gun would rebut the contention that Mr. Parker created a great risk harm. Therefore, irrespective of whether absent the State's continued litigation of the bullet issue in the penalty phase, Kissenger's testimony and other evidence on the origin of the bullet would

have been inadmissible as “lingering doubt” evidence, it cannot be credibly disputed that, under the actual circumstances of Mr. Parker’s trial, such evidence was admissible because the State opened the door by presenting penalty phase evidence going directly to the issue of the origin of the bullet. *Cf. Rodriguez*. Appellee fails to explain why the defense would have been prohibited from presenting this evidence to rebut the State’s continued litigation of this issue in the penalty phase.

Furthermore, in denying the motion for a new guilt-innocence phase, the trial court certainly did not make any determination that the jury could not make their own credibility findings of Mr. Kissinger if called to testify during the penalty phase. In fact, when defense counsel announced that they did not intend on calling Mr. Kissinger during the penalty phase, the court responded "That's up to you. Whether you call him or not is completely up to you." (R. 2097-98). Clearly, contrary to Appellee’s “inadmissible” argument, the trial court would have allowed trial counsel to present the evidence of Kissinger’s testimony during the penalty phase had counsel elected to do so.

Appellee postulates that, since, according to Appellee, Brent Kissenger’s testimony would have been inadmissible in the penalty phase, “[c]ounsel professionally excluded inadmissible

evidence" (Answer Brief at 32). Appellee also argues that deficient performance was "not shown" and, therefore, "summary denial was proper" (Answer Brief at 32-33). This is an interesting - and revealing - argument since in effect Appellee is asserting as grounds for this Court to affirm the lower court's summary denial Appellee's theory as to why trial counsel did not present this evidence at the penalty phase. Mr. Parker has his own theory why counsel failed to present this evidence: counsel was deficient and ineffective. This question - why did counsel not present this evidence? - can only be answered by conducting an evidentiary hearing in which trial counsel is questioned by both parties on this issue.

As a second argument, Appellee argues that there is "no reasonable probability that the jury would have recommended life upon hearing his testimony" (Answer Brief at 32). Appellee's reliance on the trial court's ruling on the motion for a new guilt phase and this Court's affirmance of that ruling is misplaced because, in ruling that Mr. Parker was not entitled to a new guilt phase, the trial court, as this Court recognized on direct appeal, necessarily applied the more burdensome newly discovered evidence standard (whether the evidence was of such nature that it would probably produce an acquittal on retrial. *See Parker*, 641 So. 2d at 376 *citing Jones v. State*, 591 So. 2d

911, 915 (Fla. 1991)). However, at the time of the penalty phase, the evidence was no longer "newly discovered". Therefore, the determinative question on the issue of prejudice is whether, had trial counsel called Kissinger to testify at the penalty phase and considering all the other evidence not presented, there is a reasonable probability that 2 of the 8 jurors who voted for death would have instead voted for life. Highly significant is the fact that, in its written order summarily denying this postconviction claim, the lower court did not find that, based on the court's own assessment as a fact-finder of the credibility of Kissinger's testimony, there did not exist a reasonable probability that Kissinger's testimony would have altered the outcome of the jury's death penalty recommendation. Instead, the lower court rejected the claim based on its clearly incorrect and erroneous conclusion that this penalty phase ineffective claim was "litigated on direct appeal and therefore not cognizable through collateral attack" (PCR. 1495). While the lower court concluded at the time of trial that Kissinger's testimony did not rise to the level of evidence that would "probably produce an acquittal" *Jones* at 915, the court did not find in the order currently under review that his testimony did not meet the lower threshold of creating a reasonable probability of a different outcome in the penalty

phase. This Court cannot make that determination because this Court is not the fact finder. An evidentiary hearing is therefore necessary.

Appellee asserts that because the jury rejected Mr. Parker's guilt-innocence phase defense, there is no reasonable probability that the jury would have recommended a life sentence had the jury known that Brent Kissinger saw what appeared to be a deputy shooting the victim. Because the lower court denied Mr. Parker an evidentiary hearing, the real question is: Is there a reasonable probability that two (2) of the eight (8) jurors who voted for death would have instead voted for life had the jury (a) known that Brent Kissinger saw what appeared to be a deputy shoot the victim; (b) heard expert testimony that the color of the fatal bullet as represented in the photographs submitted into evidence by the State was subject to manipulation and did not necessarily represent the true color of the bullet; (c) heard expert testimony that it cannot be established by a reasonable degree of scientific certainty that the bullet shown in photograph (Exh. 115)(lodged in the sacrum bone) is the same bullet that State claims to have been fired from Mr. Parker's gun; (d) had seen for itself the print of the negative of the photograph showing the bullet in the sacrum in which the bullet appears silver (e) known that the State at trial introduced a

different, redeveloped print of the same negative in which the color of the bullet appeared yellow or copper in color; (f) known that Tammy Duncan gave a prior statement to police in which she reported that a deputy was close to the victim when the victim was shot; (g) known of the other evidence set forth in the Amended Motion indicating that a deputy and not Mr. Parker shot the victim, including evidence that persons on the scene reported that a deputy shot the victim (h) known of the myriad of additional facts and details about Mr. Parker's mental health and sexual abuse not presented at trial; and (i) heard the mitigation evidence from a competent expert who had performed a full evaluation of Mr. Parker and from witnesses who had first-hand, accurate knowledge as opposed testimony from investigators about what people told them, and in light of the fact that the jury also knew from the evidence presented at trial that (a) when Dr. Bell removed the bullet and looked at it during the autopsy, he described the bullet as silver in color with little deformations; (b) that Dr. Bell maintained this description of the bullet in his subsequent autopsy report, notes, and his sworn deposition; (c) that he changed his description of the bullet only after he was contacted by the prosecutor shortly before trial; (d) that his initial description, if accurate, exonerated Mr. Parker from being the

shooter and inculpated a deputy while his changed description implicated Mr. Parker and exonerated the deputy; (e) that Tammy Duncan's trial testimony that Mr. Parker was a relative great distance - 60 to 70 feet by her own description - from the victim when the victim was shot was completely incongruous with the physical evidence that established undisputedly that the person who shot the victim was no more that two (2) to three (3) feet from the victim at the time the fatal shot was fired. *See e.g. State v. Gunsby*, 670 So. 2d 920 (Fla. 1996)(cumulative effect of errors undermined confidence in outcome). In sum, given the evidence casting doubt on the origin of the bullet presented at trial and, assuming Mr. Parker establishes the facts alleged in his post-conviction motion going both to the bullet issue and to penalty phase mitigation, there is a reasonable probability that two of the eight jurors who voted for death would have voted for life.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Leslie T. Campbell, Office of Attorney General, 1515 N. Flagler Dr., Fl. 9, West Palm Beach, FL, 33401-3428, on Sept. 8, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font

requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
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