IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1379

NORMAN PARKER, JR.,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

Defendant was indicted in the Circuit Court of the Eleventh Judicial Circuit, case no. F78-11151, for the first degree murder of Julio Ceazar Chavez, the armed robbery of Chavez, the armed robbery of Silvia Arana, the armed robbery of Luis Diaz, the armed robbery of David Ortigoza, the sexual battery of Arana, the possession of a weapon during a criminal offense and the possession of a weapon by a convicted felon. (DAR. 11-15a)[1] The charge of possession of a weapon by a convicted felon was severed, and the matter proceeded to trial on the remaining counts on September 9, 1981. (DAR. 16, 74-75A, 509-13) On September 18, 1981, the jury found Defendant guilty as charged on all counts. (DAR. 397-403) The trial court pronounced sentence on November 18, 1981. (DAR. 443-48) The trial court found five aggravating circumstances: under a sentence of imprisonment, prior violent felony, during the course of a sexual battery, for pecuniary gain, and cold, calculated and premeditated (CCP). *Id.* The trial court found no mitigating circumstances, statutory or nonstatutory, had been established. *Id.*

The facts as found by this Court are:

[1] The symbol "DAR." will refer to the record on appeal and transcript of proceedings from Defendant's direct appeal, Florida Supreme Court Case No. 61,512.

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 said 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, 456 So. 2d 436, 439-40 (Fla. 1984).

Defendant appealed his conviction and sentences to this Court. On appeal, he claimed that the trial court erred in denying his motion to suppress statements, that his right to a venire drawn from a fair cross section of the community was violated, that the trial court abused its discretion in refusing his request for additional peremptory challenges and in denying his challenges for cause on two members of the jury venire, that his confession to the D.C. murder was not supported by a corpus delicti, that the evidence was insufficient to support his conviction, that evidence that he used aliases in D.C. was improperly admitted, that there was a break in the chain of custody of the bullet taken from Chavez's body, that the State made improper comments during its penalty phase closing argument, that the jury instructions during the penalty phase were erroneous and that his death sentence was disproportionate. This Court affirmed Defendant's conviction and sentence on September 6, 1984. *Parker*, 456 So. 2d at 439.

On January 2, 1987, Defendant filed a motion for post conviction relief in the trial court. (PCR1. at 27-91)[2] In this

[2] The symbol "PCR1." will refer to the record on appeal and transcript of proceedings in the appeal from the denial of

motion, Defendant raised 13 claims. The trial court granted Defendant an evidentiary hearing on the issue of the effectiveness of his counsel at the penalty phase. (PCR1. 245) On December 23, 1988, Defendant supplemented his original motion for post conviction relief with 7 additional claims. (PCR1. 1384-1452) After the evidentiary hearing, the trial court denied the motion and supplement on February 7, 1989. (PCR1. 1453-56)

During the pendency of the motion for post conviction relief in the trial court, on May 23, 1988, Defendant filed a Petition for Extraordinary Relief, for a Writ of Habeas Corpus, Request for Stay of Execution, and Application for Stay of Execution Pending Disposition of Petition for Writ of Certiorari in this Court. Defendant raised 7 claims. On December 1, 1988, this Court denied the petition. *Parker v. Dugger*, 537 So. 2d 969 (Fla. 1988).

Defendant then appealed the denial of his motion for post conviction relief. This Court affirmed the denial of the first motion for post conviction relief on October 15, 1992. *Parker v. State*, 611 So. 2d 1224 (Fla. 1992).

On June 7, 1993, Defendant returned to the trial court and

Defendant's first motion for post conviction relief, Florida Supreme Court case no. 73,935.

filed a second motion for post conviction relief. (PCR2. 28-78)[3] He raised 6 claims regarding the propriety of the instructions on the aggravating circumstances and consideration of alleged mitigation. The trial court denied this motion, finding all of the claims to be procedurally barred. (PCR2. 345-48)

Defendant appealed the denial of his second motion for post conviction relief, asserting that the trial court erred in denying the following claims:

> (1) the jury instruction on CCP was vague; (2) the jury's consideration of CCP constituted an ex post facto violation; (3) the "under sentence of imprisonment" aggravator was not proven; (4) the court failed to consider mitigation; (5) the court failed to instruct the jury that it could consider the imposition of consecutive sentences; (6) the felony murder aggravator is an automatic aggravator.

Parker v. State, 718 So. 2d 744, 745 n.3 (Fla. 1998). On May 28, 1998, this Court affirmed the denial of this motion, finding that all of the claims were procedurally barred. *Parker v. State*, 718 So. 2d 744 (Fla. 1998).

Defendant then sought certiorari review in the United States Supreme Court. The Court denied certiorari on May 3, 1999. *Parker v. Florida*, 526 U.S. 1101 (1999).

On September 4, 2002, Defendant filed his third motion for

[3] The symbol "PCR2." will refer to the record on appeal and transcript of proceedings in the appeal from the denial of Defendant's second motion for post conviction relief, Florida Supreme Court case no. 89,936.

post conviction relief, claiming that his sentence violated *Ring v. Arizona*, 536 U.S. 584 (2002). (PCR3. 19-44)[4] Defendant also filed a memorandum of law in support of the motion. (PCR3. 166-206) The State moved to strike the memorandum, given that the Fla. R. Crim. P. 3.851 required that the memorandum of law be included in the motion and that the pleading could not exceed 25 pages. (PCR3. 79-82) The State also responded to the motion. (PCR3. 61-78) Defendant moved for belated leave to file the oversized pleading, which the trial court granted. (PCR3. 83-88, 225)

After this Court issued its opinions in *King v. Moore*, 831 So. 2d 143 (Fla. 2002), and *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), Defendant was granted leave to file a supplement memorandum concerning those opinions, which he did on November 18, 2002. (PCR3. 207-22) The State filed a response to this memorandum. (PCR3. 47-59) The lower court held a *Huff* hearing on December 23, 2002. (PCR3. 226-41) The lower court finally issued its order denying the motion on November 24, 2003. (PCR3. 89-92)

Defendant appealed the denial of his *Ring* claim to this Court. This Court affirmed in an unpublished order. *Parker v.*

[4] The symbol "PCR3." will refer to the record on appeal and transcript of proceedings in the appeal from the denial of Defendant's third motion for post conviction relief, Florida Supreme Court case no. SC04-52.

State, 908 So. 2d 1058 (Fla. 2005).

While the appeal of the third motion for post conviction relief was pending rehearing, Defendant filed a motion for DNA testing. (PCR4. 2-12)[5] The motion asserted that the murderer of Chavez had also committed a sexual battery on Arana and sought DNA testing of "any and all items in the possession of the Miami-Dade Crime Laboratory which may contain DNA." (PCR4. 3) The motion alleged in conclusory terms that the testing would "bear 'directly on [Defendant's] guilt or innocence'" or at least mitigate Defendant's sentence. (PCR4. 4) The motion attached a lab report regarding the evidence, which stated that the evidence had been tested for the presence of semen and none had been found. (PCR4. 11-12)

On May 26, 2006, the State filed a response to the motion. (PCR4. 13-22) The State argued that the motion was insufficient in that it did allege how the result of DNA testing would exonerate Defendant or mitigate his sentence, particular given that the lab report attached to the motion showed that the evidence had been tested for semen with negative results. *Id.* The State further noted that the evidence did not even exist any longer. *Id.*

At a hearing on the motion held on May 30, 2006, Defendant

[5] The symbol "PCR4." will refer to the record on appeal and transcripts of proceedings in the instant appeal.

objected to the State responding to the motion without being ordered to do so. (PCR3. 46, 49-50) The lower court indicated that it found having a response helpful and would accept it. (PCR4. 49-50) The State indicated that it was prepared to show that the evidence not longer existed even though it was Defendant's burden to show it does exist. (PCR4. 51-52) Defendant indicated that he was unsure if the evidence still existed and did not wish to have the lower court order an evidentiary hearing on the existence of the evidence until it determined whether the motion was facially sufficient. (PCR4. 52-53) The lower court indicated that it would permit Defendant to file a reply and would reset the matter for hearing. (PCR4. 53-54)

In his reply, Defendant asserted that his conclusory allegations regarding the evidence to be test and the nexus between the evidence and his conviction and sentence were sufficient. (PCR4. 23-28) Defendant also insisted that alleging that the evidence was last known to be in the possession of the crime lab in 1978 was sufficient. *Id.*

At a hearing on June 6, 2006, the lower court indicated that it had reviewed the pleading and determined that Defendant's motion was insufficient. (PCR4. 57-60) As such, the lower court entered a written order denying the motion,

finding that Defendant had not sufficiently alleged a nexus between the items of which testing was sought and the facts of the case, particularly since testing showed no evidence of semen, the victim had testified the rapist did not ejaculate, the victim testified she cleaned herself before going to the rape treatment center and the evidence collected in D.C. showed Defendant committed these crimes. (PCR4. 29-31) This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied Defendant's motion for DNA testing. The motion was conclusory, did not establish a nexus between the testing sought and Defendant's exoneration and was based on pure speculation. Moreover, Defendant sought DNA testing to confirm that evidence did not exist, and the lower court could not have erred by holding that evidence no longer existed as it did not so hold. Moreover, Defendant waived any claim of entitlement to an evidentiary hearing regarding whether the evidence still existed by declining the invitation of the State and lower court for such a hearing.

ARGUMENT

THE MOTION FOR DNA TESTING WAS PROPERLY DENIED.

Defendant asserts that the lower court erred in denying his motion for DNA testing because his motion was facially sufficient. He asserts that the lower court erred in accepting the State's representation that the evidence no longer existed and that he is entitled to an evidentiary hearing on the existence of the evidence. He further asserts that the lower court should not have precluded DNA testing for evidence of a sexual battery based on the finding from prior testing that there was no semen available. He further asserts that DNA testing of a carpet for possible DNA in urine left there should have been ordered. However, the lower court properly denied this motion, as facially insufficient.

This Court has repeatedly held that a defendant must make more than conclusory allegations to state a facially sufficient post conviction claim. *Patton v. State*, 878 So. 2d 368, 380 (Fla. 2004); *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). In the context of motions pursuant to Fla. R. Crim. P. 3.853, this Court has required defendants "to explain, with reference to specific facts of the crime and the items to be tested, how the DNA testing will exonerate the defendant of the crime or will mitigate the defendant's sentence." *Cole v. State*, 895 So.

2d 398, 402 (Fla. 2004)(quoting *Robinson v. State*, 865 So. 2d 1259, 1264-65 (Fla. 2004)). This Court has required that defendants "demonstrate the nexus between the potential results of the DNA testing on each piece of evidence and the issues in the case." *Hitchcock v. State*, 866 So. 2d 23, 27 (Fla. 2004). It has also held that speculative claims are insufficient to support a request for DNA testing. *Id.* at 26. The requirements ensure that the evidence would be admissible and would create a reasonable probability of a different result. They have been imposed to prevent requests for DNA testing from being used as fishing expeditions. *Lott v. State*, 931 So. 2d 807, 821 (Fla. 2006); *Duckett v. State*, 918 So. 2d 224, 238 (Fla. 2005); *Cole*, 895 So. 2d at 403; *Hitchcock*, 866 So. 2d at 27.

Applying these principals here, the lower court properly denied the motion for DNA testing. Defendant's identified the evidence he sought to have tested as "any and all items in the possession of the Miami-Dade Crime Laboratory which may contain DNA, including but not limited to" eight specified items of physical evidence. (PCR4. 3-4) The only allegations regarding how this overly broad and speculative description of the evidence to be tested had any connection with the identity of the perpetrator of this crime was the statement that "[e]vidence presented at trial showed that the perpetrator of the murder of

Julio Chavez committed a sexual assault on Silvia Arana." (PCR4. 2) Having given an overly broad and speculative description of the evidence to be tested and a vague description of how testing would link the evidence to the issue of identity, Defendant then made conclusory statements that "[t]he DNA testing will bear 'directly on [Defendant's] guilty or innocence,'" or "[a]t the very least, the presence of DNA belonging to someone other than [Defendant] mitigates [his] sentence." Under these circumstances, the lower court properly determined that the motion was facially insufficient. *Lott*, 931 So. 2d at 821; *Duckett*, 918 So. 2d at 238; *Cole*, 895 So. 2d at 402; *Patton*, 878 So. 2d at 380; *Hitchcock*, 866 So. 2d at 26-27; *Robinson*, 865 So. 2d at 1264-65; *Ragsdale*, 720 So. 2d at 207. The lower court should be affirmed.

While Defendant asserts that the lower court accepted the State's assertions that the evidence to be tested no longer existed, this is not true. A review of the lower court's order shows that it did not discuss whether the evidence that had been previously tested for evidence of a sexual battery still existed. (PCR4. 29) Instead, the lower court found since the previous testing had shown that there was no semen and the victim had testified that Defendant did not ejaculate and she had cleaned herself before going to the rape treatment center,

the evidence had never existed. Since the lower court did not simply accept the State's assertion that the evidence no longer existed, it could not have erred by doing so. The lower court should be affirmed.

Moreover, the denial of the motion because of the prior testing for the presence of semen showed there was never any semen was appropriate. In *Lott*, the defendant sought DNA testing of materials for the presence of sperm. 931 So. 2d at 820. However, the items had been previously tested for the presence of sperm with negative results. *Id.* This Court determined that the lower court had properly rejected a request to DNA test these materials, stating that the defendant was "not entitled to DNA testing to confirm [the sperm's] absence." *Id.* Here, Defendant sought DNA testing of items to show the identity of the individual who committed a sexual battery at the time of the murder. He attached to his motion a report of prior testing of that evidence. The report showed that items had been tested for the presence of semen with negative results. As such, as was true in *Lott*, Defendant was seeking DNA testing to confirm the absence of evidence of semen. Thus, the lower court properly denied the motion under *Lott*. It should be affirmed.

To the extent that Defendant is asserting that the lower court should have conducted an evidentiary hearing to confirm

that the evidence no longer existed, he is entitled to no relief. First, the lower court denied the motion as insufficient to state a basis for DNA testing. As such, whether the evidence was available to be tested had there been a basis for testing did not need to be addressed.

Second, Defendant ignores that he refused the State's offer to have an evidentiary hearing conducted to determine whether the evidence still existed. At the May 30, 2006 hearing, the State offered to have an evidentiary hearing and to present evidence to show that the evidence no longer existed. (PCR4. 51) The lower court was willing to have such a hearing. (PCR4. 52-53) However, Defendant refused the offer of an evidentiary hearing and insisted that the lower court first determine whether the motion was facially sufficient.[6] (PCR4. 53) As such, Defendant waived any claim of entitlement to an evidentiary hearing. *See Ferrell v.* State, 918 So. 2d 163, 173-74 (Fla. 2005); *Owen v. State*, 773 So. 2d 510, 513-14 (Fla. 2000). The lower court should be affirmed.

Further, while Defendant asserts that his claim to testing of the urine in the carpet was sufficient even if there was no evidence of semen, Defendant is entitled to no relief.

[6] In fact, Defendant admitted he did not know if the evidence even existed anymore. (PCR4. 52) As such, it does not appear that Defendant even has a basis to carry his burden of showing the evidence still existed if an evidentiary hearing was order.

Defendant did not even mention the urine in his motion for DNA testing. (PCR4. 2-7) Instead, he only made the vague and conclusory allegations regarding a sexual battery mentioned above, which were facially insufficient. While Defendant did mention the urine in his reply, that pleading was not sworn and Defendant never attempted to amend his sworn motion. Even at that point, Defendant merely made a conclusory statement that DNA testing of urine was a possibility in a footnote. (PCR4. 26-27 n.1) Since the claim was not properly raised in the sworn motion and was speculative, the lower court properly denied the motion. *Lott*, 931 So. 2d at 821; *Duckett*, 918 So. 2d at 238; *Cole*, 895 So. 2d at 402; *Patton*, 878 So. 2d at 380; *Hitchcock*, 866 So. 2d at 26-27; *Robinson*, 865 So. 2d at 1264-65; *Ragsdale*, 720 So. 2d at 207. This is particularly since the State offered to prove that the evidence did not exist and Defendant refused the offer. The lower court should be affirmed.

Moreover, as the lower court also properly found DNA testing would not create a probability of a different result at retrial. Bullets from Mr. Chavez's body were ballistically matched to bullet removed from the body of a person Defendant murdered, and confessed to murdering, in Washington, D.C. a month after this crime. At the time of Defendant's arrest in D.C. he was in his possession of jewelry taken from the victims

during the murder. Defendant provided three different versions of how he came to be in the possession of the victims' jewelry. The surviving victims all identified Defendant as the murder. Many of Defendant's alleged alibi witnesses did not know where Defendant was in the days surrounding the murder. Moreover, Defendant had previously committed a murder in 1967, and had escape from incarceration at the time this crime was committed. The murder occurred during the course of a robbery and sexual battery. Moreover, both of the participants in this murder discussed using a pillow to muffle the sound of the shots before Mr. Chavez was killed. Given the other evidence showing Defendant's participation in this crime, his lack of a credible alibi for the time of the murder, the presence of two participant in this murder who both actively participant in the decision to kill Mr. Chavez and the extreme aggravation presented, there is no reasonable probability of a different result at retrial. *See Hildwin v.* State, 31 Fla. L. Weekly S857 (Fla. Dec. 14, 2006); *Diaz v. State*, 945 So. 2d 1136, 1147-48 (Fla. 2006); *see also Melton v. State*, 949 So. 2d 994, 1011 (Fla. 2006)(describing standard as stringent).

CONCLUSION

For the foregoing reasons, the order denying DNA testing should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **Rachel Day**, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this ___ day of April 2007.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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