IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FERNANDO MARTINEZ PARKER — APPELLANT

VS. — NO. 2008-KA-0409

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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VERSUS — NO. 2008-KA-0409-SCT

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STATEMENT OF THE CASE

Procedural History

Fernando Martinez Parker was convicted in the Circuit Court of Coahoma County on charges of possession of a firearm on campus (Count I), murder (count II), and aggravated assault (Count III). He was sentenced to terms of imprisonment of three years in Count I, life without parole in Count II, and 15 years in Count III. (C.P.45-46) Aggrieved by the judgment rendered against him, Parker has perfected an appeal to this Court.

Substantive Facts

Coahoma County Sheriff Andrew Thompson, Jr., testified that on October 26, 2004, he was dispatched to Coahoma Community College "[b]ecause there had been a shooting." When he arrived there, he ensured that the scene was secured. He then

notified the Mississippi Highway Patrol Investigating Unit and "request personnel from the Mississippi Bureau of Narcotics." (T.10-12)

While on campus, Sheriff Thompson "made some observations, ... collected witnesses and tried to develop a suspect... " Ultimately, the case was turned "over to the MBI because of the college and it was a State instutition." (T.12-13)

Officer Cedric Burton of the Marks Police Department testified that in October 2004, he was employed as a campus police officer at Coahoma Community College. On October 26, 2004, he responded to an incident at Moore Dormitory. As he was exiting his "patrol unit in front of the Union," he "heard some shots ring out on the north side of the campus." After he "burst through the crowd," he noticed two students "lying in front of Moore's, closer to the building with gunshot wounds." Officer Burton "secured the scene until the sheriff's department got there." (T.15-16)

Ketrick Buck[1] testified that on the date in question, he was a student at Coahoma Community College. At that time he was in his room in Friends Hall "playing the play station" and "having conversation" with his roommate Jonathan Haney and his friends Justin Moore and Jarvis Moore. At one point, the four men decided to borrow a game from Kendrick Harris, a high school friend in another dormitory. The four of them walked outside; Ketrick and Justin "went in the dorm room and Jarvis and Jonathan stayed outside." When Ketrick and Justin "came outside," they "heard words being passed" between Jarvis Moore and Vincent Cross. Jarvis "brushed him off" and he and his friends

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[1]To avoid confusion, the state will refer to the witnesses and victims by their first names.

"began to leave," but Vincent continued "talking to Jarvis," who then approached Vincent and "got like nose to nose with him." Vincent pushed Jarvis; Jarvis pushed him back; and Justin and Jarvis began fighting with Vincent. (T.21-23)

When the altercation escalated after "like 13 guys" on Vincent's side entered into it, Ketrick and Jonathan "jumped in the fight." According to Ketrick, "And then they kind of like thinned out. ... And then the guy Fernando came out of the room, and that's when Jarvis screamed that he had a gun and Jonathan jumped off the balcony." Parker "let off a couple of shots and then he paused for a minute. And that's when he let the rest of them off." After Parker "started letting off more rounds," Ketrick "hid behind a brick, like a brick wall, like a little entryway hall on the balcony–" Ketrick went on to testify, "Justin ran one way and me and Jarvis ran another way. And then we got tripped up and well fell down the stairs." When Ketrick and Jarvis "got to the end of the steps, that's when he collapsed." Jarvis had been shot "[n]numerous ... times." (T.23-24)

On cross-examination, Ketrick was asked whether he had seen Fernando "shoot the shots." Ketrick answerd, "Yeah. I seen [sic] him when he walked, when he first came up, he shot point blank range. I seen [sic] the fire come out of the barrel." (T.32)

Justin testified that he, too, was a student a Coahoma Community College, rooming with his brother Jarvis. He corroborated Ketrick's testimony about the events that occurred immediately prior to the fight and the shooting. Thereafter, he testified, "Fernando Parker had a gun and he shot my brother and me." Shooting rapidly, Parker hit Jarvis first, and then Justin was hit in his abdomen. At that point, Justin "fell" and "kind of played dead." (T.37-41) Justin testified additionally that Jarvis, Jonathan and Ketrick were not armed at the time. (T.48)

Jonathan testified that after the shots were fired, he saw Parker holding a gun. (T.59-60)

John Marsh, a special agent with the Federal Bureau of Investigation, testified that he and Sheriff Thompson interviewed Parker shortly after the shooting. Parker was advised of his rights and signed a waiver-of-rights form. (T.63-65) Thereafter, he gave a statement summarized as follows by Agent Marsh:

> He said he'd been sitting in the dorm room, heard some yelling and cussing outside, well, first he said he had been kind of into it, as he put it with some other guys. He heard some yelling and cussing going on outside his dorm room. He said he went to the door, opened the door and was immediately punch in the face. He said he then started fighting with, you know, they punched him, he punched back. He said he saw some of the other guys, the guy that had punched him that had been punching start to hit another guy, who is Vincent. He said that he'd been carrying a .380 pistol on his person for about a week. He said he pulled his gun out and aimed at the guy that had hit him and then fired, started shooting. And said he'd fired at least five rounds.
>
> (T.67)

Parker then stated that he had thrown the gun into "a lake behind the dorm." (T.67)

On redirect examination, Agent Marsh was asked whether the Parker had stated that he had seen anyone else with a gun that night. Agent Marsh replied, "No, sir. In fact, I specifically asked him if he, if anyone else had any weapons or anything else and he said he never saw anyone." (T.73)

Investigator Tracy Vance of the Coahoma County Sheriff's Department testified that performed an "ATF firearms trace of a grade handgun that was purchased by Fernando Parker." The ATF report showed that Parker had purchased a .380 handgun. (T.80)

Lieutenant Allen Thompson of the Mississippi Bureau of Investigations testified that

he was called to the scene of the crime the night of October 26, 2004. There, he talked with several witnesses and took statements. He also searched Parker's dorm room, where he found " a box of .... .380 cartridges," with "seven live cartridges still in the box." (T.83-84)

Dr. Steven Hayne testified that he performed the autopsy on the body of Jarvis Moore. (T.120) He went on to testify that the victim had "a total of seven gunshot wounds," two of which were lethal. (T.126)

The defense rested without presenting evidence. (T.149)

SUMMARY OF THE ARGUMENT

Parker has not shown that his trial counsel was constitutionally ineffective. First, he has not sustained his burden of showing that counsel's performance was so deplorable as to have required the trial judge to declare a mistrial *sua sponte*. Furthermore, he cannot establish unprofessional lapses or prejudice with respect to counsel's failure to make arguments which have no merit.

Furthermore, Parker's sentence of life without parole upon his conviction of murder was lawful. His second proposition lacks merit.

Additionally, the state submits the verdict is supported by sufficient– indeed, overwhelming– evidence. The trial court properly denied the motion for directed verdict.

Moreover, Parker cannot place the trial court in error for failing to order a competency hearing. He has failed to show that the record contains any evidence which would have required the court to do so on its on motion.

Next, the state contends Parker's double jeopardy argument is without merit inasmuch as it does not satisfy the test set out under *Blockburger*, infra. His fifth proposition should be rejected.

Finally, Parker's invocation of the cumulative error doctrine is procedurally and substantively without merit.

PROPOSITION ONE:

PARKER HAS NOT SHOWN THAT HIS TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE

Parker argues first that he was denied his constitutional right to effective assistance of counsel at trial. He faces formidable hurdles, summarized follows:

> The Mississippi Supreme Court has adopted the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) in determining whether a claim of ineffective assistance of counsel should prevail. . . . *Rankin v. State*, 636 So.2d 652, 656 (Miss.1994) enunciates the application of *Strickland*:
>
> > The *Strickland* test requires a showing that counsel's performance was sufficiently deficient to constitute prejudice to the defense. . . . **The defendant has the burden of proof on both prongs. A strong but rebuttable presumption, that counsel's performance falls within the wide range of reasonable professional assistance, exists. . . . The defendant must show that but for his attorney's errors, there is a reasonable probability that he would have received a different result in the trial court. . . .**
> >
> > Viewed from the totality of the circumstances, this Court must determine whether counsel's performance was both deficient and prejudicial. . . . Scrutiny of counsel's performance by this Court must be deferential. . . . If the defendant raises questions of fact regarding either deficiency of counsel's conduct or prejudice to the defense, he is entitled to an evidentiary hearing. . . . Where this Court determines defendant's counsel was constitutionally ineffective, the appropriate remedy is to reverse and remand for a new trial.

> **In short, a convicted defendant's claim that counsel's assistance was so defective as to require reversal has two components to comply with *Strickland*. First, he must show that counsel's performance was deficient, that he made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that counsel's errors deprived him of a fair trial with reliable results.**
>
> (emphasis added) *Colenburg v. State*, 735 So.2d 1099, 1102-03 (Miss.App.1999).

Because this point is raised on direct appeal, the defendant encounters an additional obstacle: the pertinent question

> **is not whether trial counsel was or was not ineffective but whether the trial judge, as a matter of law, had a duty to declare a mistrial or to order a new trial, sua sponte on the basis of trial counsel's performance.** "Inadequacy of counsel" refers to representation that is so lacking in competence that the trial judge has the duty to correct it so as to prevent a mockery of justice. *Parham v. State*, 229 So.2d 582, 583 (Miss.1969). **To reason otherwise would be to cast the appellate court in the role of a finder of fact; it does not sit to resolve factual inquiries.** *Malone v. State*, 486 So.2d 367, 369 n. 2 (Miss.1986). *Read [v. State*, 430 So.2d 832 (Miss.1983)] clearly articulates that the method that the issue of a trial counsel's effectiveness can be susceptible to review by an appellate court requires that **the counsel's effectiveness, or lack thereof, be discernable from the four corners of the trial record. This is to say that if this Court can determine from the record that counsel was ineffective, then it should have been apparent to the presiding judge, who had the duty, under *Parham*, to declare a mistrial or order a new trial sua sponte.**
>
> (emphasis added) *Colenburg*, 735 So.2d at 1102.

Accord, *Clayton v. State*, 946 So.2d 796 (Miss.796, 803 (Miss. App. 2006); *Madison v. State*, 923 So.2d 252 (Miss. App. 2006); *Jenkins v. State*, 912 So.2d 165, 173 (Miss. App. 2005); *Walker v. State*, 823 So.2d 557, 563 (Miss. App. 2002); *Estes v. State*, 782 So.2d

1244, 1248-49 (Miss. App. 2000).

Parker has not attempted to show that his trial counsel's performance was so deplorable as to require the court to declare a mistrial on its own motion. Because he has not sustained the particular burden he faces when raising this issue on direct appeal, the state submits his first proposition should be denied.

For the sake of argument, the state addresses the particular claims asserted by Parker. Specifically, he asserts that trial counsel was ineffective in failing to object to the illegal sentence and to raise a double jeopardy issue. For the reasons set out under Propositions Two and Five of this brief, the state submits these issues have no merit and that, therefore, Parker can show neither an unprofessional lapse nor prejudice with respect to counsel's failure to raise them. As to the claim that counsel was ineffective in failing to raise a competency issue, the state counters that this issue cannot be resolved on this record. Accordingly, it should be rejected at this point.

For these reasons, Parker's first proposition should be denied.

PROPOSITION THREE:

THE TRIAL COURT DID NOT ERR IN DENYING PARKER'S MOTION FOR DIRECTED VERDICT

Arguing that the trial court erred in denying his motion for directed verdict, Parker challenges the sufficiency of the evidence undergirding the verdict. See *May v. State*, 460 So.2d 778, 781 (Miss.1984). When defense counsel moved for a directed verdict, the prosecutor responded as follows:

> Your Honor, in Count I for possession of a firearm on educational property, we had Ketrick Buck, Justin Moore and Jonathan Haney that all testified to seeing Mr. Parker with a weapon on campus. Cedric Burton, a campus police officer

testified to the address for Coahoma Community College.

In Count II for murder, also the testimony of Ketrick Buck, Justin Moore, and they saw Fernando Parker shoot and kill Jarvis Moore.

And in Count III, the aggravated assault charge, that they saw him shoot and injure Justin Moore.

(T.145-46)

The court denied the motion. (T.146)

To succeed in his challenge to this ruling, Parker must satisfy this stringent standard of review:

> In order to succeed on a challenge to the sufficiency of the evidence supporting his conviction, [the appellant] must prove that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [citations omitted] Challenges to the sufficiency of the evidence are viewed in the light most favorable to the State. ... **Therefore, we "must accept as true all evidence consistent with the defendant's guilt, together with all favorable inferences that may be reasonably drawn from the evidence, and disregard the evidence favorable to the defendant."** [citations omitted]. The trial court's decision is reviewed under an abuse of discretion standard. [citations omitted] "As long as 'reasonable fair-minded men in the exercise of impartial judgment might reach different conclusions on every element of the offense,' [then] the evidence will be deemed to have been sufficient."
>
> (emphasis added) *Moffett v. State*, 3 So.2d 165, 174 (Miss. App. 2009)

We submit the prosecution put on overwhelming evidence, including eyewitness testimony and Parker's statement, that the defendant possessed a firearm on educational property and that he deliberately fired shots which killed Jarvis Moore and injured Justin Moore. Parker's challenge raises issues of weight of the evidence which is not relevant

to a discussion of the sufficiency of the evidence. See *May*, 460 So.2d at 781. Finally, the state points out that "[m]alice... may be proved or inferred from the use of a deadly weapon." *Wilson v. State*, 574 So.2d 1324, 1337 (Miss.1990), cited in *Page v. State*, 989 So.2d 887, 893 (Miss. App. 2007).

For these reasons, Parker's third proposition should be denied.

PROPOSITION TWO:

PARKER'S SENTENCE TO LIFE WITHOUT PAROLE UPON HIS CONVICTION OF MURDER IS LEGAL

Parker next contends his sentence of life without parole is illegal. The state counters that MISS. CODE ANN. § 47-7-3 (1972) (as amended) authorizes the sentence imposed by the trial court. [2] This assignment of error lacks merit.

[2]That subsection is set out below:

> No person shall be eligible for parole who is convicted or whose suspended sentence is revoked after June 30, 1995, except that an offender convicted of only nonviolent crimes after June 30, 1995, may be eligible for parole if the offender meets the requirements in subsection (1) and this paragraph. In addition to other requirements, if an offender is convicted of a drug or driving under the influence felony, the offender must complete a drug and alcohol rehabilitation program prior to parole or the offender may be required to complete a post-release drug and alcohol program as a condition of parole. For purposes of this paragraph, "nonviolent crime" means a felony other than homicide, robbery, manslaughter, sex crimes, arson, burglary of an occupied dwelling, aggravated assault, kidnapping, felonious abuse of vulnerable adults, felonies with enhanced penalties, the sale or manufacture of a controlled substance under the Uniform Controlled Substances Law, felony child abuse, or exploitation or any crime under Section 97-5-33 or Section 97-5-39(2) or 97-5-39(1)(b), 97-5-39(1)(c) or a violation of Section

PROPOSITION FOUR:

PARKER HAS NOT PLACED THE TRIAL COURT IN ERROR FOR FAILING TO ORDER A COMPETENCY HEARING

Parker contends additionally that the trial court committed reversible error in failing to order a competency hearing. At the outset, the state points out that the defense never requested such a hearing.

URCCC Rule 9.06 provides in pertinent part that

> [i]f before or during trial the court, of its own motion or upon motion of an attorney, has reasonable ground to believe that the defendant is incompetent to stand trial, the court shall order the defendant to submit to a mental examination by some competent psychiatrist selected by the court in accordance with § 99-13-11 of the Mississippi Code Annotated of 1972.

Implicitly acknowledging his failure to request this examination, Parker makes the cursory assertion that "[t]he trial testimony indicated that a question of competency of the defendant, at the time of the alleged crime, was an issue." The state responds initially that the question of competency to stand trial whether the defendant is competent at the time of trial, not at the time of the crime. See *Rodgers v. State*, 961 So.2d 637, 638 (Miss. App. 2008).

In any case, this issue is procedurally barred by Parker's failure to raise it below and by his failure to cite authority in support of his proposition. *Poindexter v. State*, 856 So.2d

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> 63-11-30(5). An offender convicted of a violation under Section 41-29-139(a), not exceeding the amounts specified under Section 41-29-139(b), may be eligible for parole. In addition, an offender incarcerated for committing the crime of possession of a controlled substance under the Uniform Controlled Substances Law after July 1, 1995, shall be eligible for parole.

296, 302 (Miss.2003). Furthermore, while Parker asserts that "the trial testimony indicated" a question of competency, he has failed to sustain his burden of citing to the record to support his argument and the parts of the record relied upon. *Jordan v. State*, 995 So.2d 94 (Miss.2008), citing *Conley v. State*, 790 So.2d 774, 784 (Miss.2001), and M.R.A.P. (28) (a) (6).

For these reasons, the state submits Parker's fourth proposition plainly lacks merit.

PROPOSITION FIVE:

PARKER'S DOUBLE JEOPARDY ARGUMENT HAS NO MERIT

Parker contends additionally that his right not to be twice put in jeopardy for the same offense has been violated inasmuch as "the charge in count one encompassed the charge in count II."[3] (Brief for Appellant 28) Implicitly, he argues that he was improperly subjected to multiple punishments for the same offense.

The standard for analysis of this issue was set out recently as follows in *Graves*:

> To determine whether double-jeopardy protections apply, we look to the "same-elements" test prescribed by the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The *Blockburger* test instructs us to determine whether each offense contains an element not present in the other; if not, they are labeled the same offense for double-jeopardy purposes, and successive prosecutions and/or punishments are constitutionally barred. *Powell v. State*, 806 So.2d 1069, 1074 (Miss.2001).

[3]This argument is presented for the first time on appeal. However, in light of *Graves v. State*, 969 So.2d 845, 846-47 (Miss.2007), the state proceeds directly to a discussion of the merits.

The defendant in *Blockburger* was tried and convicted on two counts, the sale of a drug not in or from the original packaging and the sale of a drug without a written order, both charges arising from one specific drug sale. *Blockburger*, 284 U.S. at 301, 52 S.Ct. 180. Rejecting the defendant's claim that the two counts on which he was convicted constituted one offense, the Supreme Court stated:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.
>
> Id. at 304, 52 S.Ct. 180 (citations omitted).

The Court went on to say:

> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.
>
> Id.(citations omitted).

The Supreme Court affirmed the defendant's conviction, holding that, even though both sections were violated by one sale, two offenses were committed.

969 So.2d at 847.

As shown by the foregoing excerpt, a conviction withstands double jeopardy scrutiny if each offense contains an element not contained in the other. To establish the defendant's guilt of possession of a firearm on campus under Count I, the state was required to prove that Parker

> did unlawfully,, willfully, and feloniously possess a firearm, to-wit: a pistol, [and] ...(2) said Defendant was a student in possession of the pistol while on the campus of Coahoma

County Community College ...

(C.P.69)

To prove Parker guilty of murder under Count II, the state had to prove that he

> did ulawfully, willfully, and with deliberate design to kill Jarvis Moore, ...shoot and kill Jarvis Moore with a pistol.
>
> (C.P.69)

Obviously, each offense required proof of a fact that the other did not. To prove possession of a firearm on campus, the state was not required to establish that the defendant committed murder. To prove murder, the state was not required to show that the defendant possessed a firearm on campus. Thus, these offenses were not the same for double jeopardy purposes.[4] *Graves*, 969 So.2d at 848. See also *Shook v. State*, 552 So.2d 841, 848-49 (Miss.1989). Parker's fifth proposition has no merit.

PROPOSITION SIX:

PARKER'S INVOCATION OF THE CUMULATIVE ERROR DOCTRINE IS PROCEDURALLY BARRED AND SUBSTANTIVELY MERITLESS

Parker finally contends that the cumulative errors of the trial court mandate reversal of the judgment rendered against him. He did not present this argument below and may not raise it for the first time on appeal. *Maldonado v. State*, 796 So.2d 247, 260-61 (Miss.2001); *Gibson v. State*, 731 So.2d 1087, 1098 (Miss.1998). His sixth proposition is

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[4]It matters not "that these two crimes took place at the same time" or " that the same evidence was used to convict" Parker "of both of these crimes." *Graves*, 969 So.2d at 848.

procedurally barred.

In the alternative, the state incorporates its arguments under Propositions One through Five in asserting that the lack of merit in Thomas's other arguments demonstrates the futility of his final proposition. *Gibson*, 731 So.2d at 1098; *Doss v.* State, 709 So.2d 369, 400 (Miss.1997); *Chase v. State*, 645 So.2d 829, 861 (Miss.1994). See also *Brown v. State*, 682 So.2d 340, 356 (Miss.1996) ("twenty times zero equals zero"). Parker's invocation of the cumulative error doctrine lacks substantive merit as well.

CONCLUSION

The state respectfully submits the arguments presented by Parker are without merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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