IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,374

J.B. PARKER,

Appellant,

-v-

STATE OF FLORIDA

Appellee.

On Appeal from Denial of Motion to Vacate Judgments and Sentences by the Circuit Court of the Nineteenth Judicial Circuit of Florida, in and for Martin County

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The facts are set forth in the Initial Brief of Appellant ("Parker's Initial Brief") and will not be repeated here.

ARGUMENT

POINT I

THE FAILURE OF PARKER'S TRIAL COUNSEL TO RAISE MERITORIOUS ARGUMENTS ON PARKER'S MOTION TO SUPPRESS CONSTITUTED INEFFECTIVE ASSISTANCE

In its answer brief, the State responds to J.B. Parker's claim that he was deprived of the effective assistance of counsel by contending that the factual and legal arguments his trial counsel, Robert R. Makemson, should have made were in fact raised by Makemson, are meritless and, in any event, would not have resulted in the suppression of Parker's taped statement because the trial court found, and this Court affirmed, that Parker made his taped statement voluntarily. None of these contentions has merit. As we show below, had this Court been presented on the direct appeal with the factual record and legal arguments now presented, it would not have concluded that Parker acted voluntarily and with the effective assistance of counsel, and it would not have upheld the admission into evidence of Parker's taped statement.

The record clearly demonstrates that the arguments which ought to have been asserted in support of Parker's motion to suppress were not raised by Makemson in his two-page written motion, R 1620-21,[1] at the pretrial suppression hearing, P 1100-91, or at the trial. Makemson's sole argument regarding the denial of Parker's right to counsel was that, under Miranda v. Arizona, 384 U.S. 436 (1966), Michigan v. Mosley, 423 U.S. 96 (1975), and related Florida decisions, the interrogation should have ceased when Parker requested to contact his mother. R 1620-21; P 1178-85. Regarding the ability of Steven T. Greene, the Public Defender's intern, to counsel and represent Parker effectively, Makemson only argued, without any legal support, that Greene, as an intern, was required to obtain Parker's written consent before representing him. R 1620-21; P 1178-85. Makemson declined the court's offer at the trial to hear additional arguments. R 761-62.

Having heard only these claims, the suppression hearing court ruled that Parker voluntarily made his statement and suggested that Greene satisfied Parker's right to an attorney by giving the "proper advice." P 1189. On the direct appeal, this Court heard the very same arguments, and

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1 As in Parker's Initial Brief, references to the record on the direct appeal of Parker's conviction and sentences are indicated by the initial "R" followed by the clerk's stamped page number, and references to the record on the appeal of Parker's Rule 3.850 motion are indicated by the initial "P".

concluded that Parker voluntarily waived his right to remain silent. See Parker v. State, 476 So. 2d 134, 138 (Fla. 1985). In reaching this conclusion, neither this Court, nor the trial court, considered Greene's inability to provide the effective assistance of counsel or any of the other arguments raised on Parker's Rule 3.850 motion and on this appeal.

On direct appeal, this Court clearly considered Greene's presence as Parker's attorney significant to its conclusion that Parker had voluntarily waived his right to remain silent. Id. This Court, however, failed to take into account, as a direct result of the failures of trial and appellate counsel, the fact that the Public Defender's office had a conflict of interest and could not, through Greene or anyone else employed in that office, provide the constitutionally mandated, non-conflicted assistance of counsel. As a direct consequence of the actual conflict, Greene was unable to counsel Parker effectively, thus drawing into question this Court's voluntariness determination.

Parker was prejudiced, within the meaning of Strickland v. Washington, 466 U.S. 668 (1984), by Makemson's failure to raise the most basic and meritorious legal and factual arguments concerning: 1) Greene's utter inability to give Parker effective assistance of counsel at a critical stage of the proceedings; and 2) the denial of Parker's right to counsel of his own choosing.

Additionally, as a result of Makemson's ineffectiveness, neither the trial court nor this Court addressed whether Sheriff Holt's comments to Parker exceeded the legitimate clarification of equivocal requests for counsel, and both courts were deprived of Parker's crucial testimony concerning the voluntariness of his statement and the relinquishment of his rights.

Although an attorney is not required to raise every "conceivable" issue, he or she "should raise any honestly debatable issue that may aid his client's position . . . ." Magill v. State, 457 So. 2d 1367, 1370 (Fla. 1984). A reasonable and proper analysis of the case law at the time of Parker's pretrial hearing and trial -- in conjunction with the facts which Makemson knew or ought to have known -- demonstrates that all of the issues which Makemson failed to raise were not merely honestly debatable, but highly meritorious.

A. Trial Counsel's Failure to Argue that an Actual Conflict of Interest Prevented Greene from Effectively Counseling Parker

Before Parker made his taped statement, the office of the Public Defender, on its own initiative, assumed responsibility for representing Parker and his co-defendants by sending letters to police officials, including Sheriff Holt, requesting that it be contacted before any statements

were taken from the defendants. R 1524-30. However, the Public Defender, Elton Schwartz, soon realized that his office would not be able to represent both Parker and co-defendant Alphonso Cave because of their conflicting interests. P 1156-57. On the basis of the obvious conflict, Schwartz decided to move for the appointment of private counsel for Parker. Id.

Having decided that his office could not ethically and effectively represent Parker, Schwartz at first properly declined to send a lawyer to counsel and represent Parker when Sheriff Holt called and asserted that Parker wanted to make a statement. P 1157. In ultimately agreeing to send Greene, Schwartz thought that he could avoid the conflict of interest by instructing Greene to represent Parker "a little" -- by simply advising him not to make a statement while avoiding any discussion of the facts or counseling Parker in any other way. See id.

An attorney who undertakes to counsel and represent a defendant cannot be a "partial" representative. Especially where, as here, both Greene and Sheriff Holt insisted to Parker that Greene was his appointed counsel, P 118; 204; 207-08; 987; 990-91; 1199-1201, and denied him the opportunity to attempt to contact another lawyer on that basis, Greene had a duty to represent Parker effectively, and Parker had the constitutional right to such representation. The

Public Defender may have avoided exacerbating an existing actual conflict by instructing Greene not to go into the facts or provide any counsel to Parker, other than to advise him not to make a statement. By doing so, however, he rendered it impossible for Greene -- a representative of his office -- to carry out his duty to provide Parker the effective assistance of counsel.

The State's argument ignores these undisputed facts: (i) Parker's right to counsel attached, at the latest, when the Public Defender's office entered an appearance and asserted, on his behalf, Parker's right to counsel during the taking of any statement; and (ii) before providing such counsel, as a direct result of an actual conflict of interest, the Public Defender decided not to provide the full panoply of representation to which Parker was constitutionally entitled. No mention is made in the State's brief of the fact that Greene attempted to "represent" Parker without being allowed to employ the tools essential to such representation. It is this fact alone that demonstrates Greene's failure to provide effective assistance to Parker and the actual prejudice to Parker as a direct result of the conflict.

Precedents existing at the time of Parker's trial, as well as cases decided since then, clearly show that an actual conflict of interest existed that adversely affected

Greene's ability to advise and represent Parker. This was not an obscure or difficult point for Makemson to have understood. The testimony adduced at the suppression hearing provides the factual basis for the argument and demonstrates that Makemson was aware of the actual conflict and the limitations imposed on Greene. See P 1156-57. Yet Makemson, for no apparent reason, utterly failed to raise this issue.

Contrary to the State's misinterpretation of the case law, the United States Supreme Court, this Court, and other courts have repeatedly emphasized that a conflict of interest exists where a lawyer represents co-defendants with inconsistent and divergent interests. In Glasser v. United States, 315 U.S. 60, 70 (1942), the Supreme Court held that "the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." See also Foxworth v. Wainwright, 516 F.2d 1072, 1077 (5th Cir. 1975) ("the trial court should have foreseen the substantial possibility that one of the [defendants] might be in a position to further his own defense by showing that a co-defendant . . . was solely responsible for the crime"); Belton v. State, 217 So. 2d 97, 98 (Fla. 1968), cert. denied, 395 U.S. 915 (1969); Turner v. State, 340 So. 2d 132 (Fla. 2d DCA 1976) (public defender relieved from representing one of three co-defendants with conflicting interests).

In Holloway v. Arkansas, 435 U.S. 475, 490 (1978), the United States Supreme Court emphasized that "[i]n a case of joint representation of conflicting interests the evil . . . is in what the advocate finds himself compelled to refrain from doing . . . ." (Emphasis added.) Although a possible conflict between co-defendants is not sufficient to demonstrate ineffective assistance of counsel, and a defendant must show that an actual conflict adversely affected his lawyer's ability to represent him, Cuyler v. Sullivan, 446 U.S. 335, 348 (1980)[2], both criteria have been met here -- the existence of an actual conflict precluded Greene from effectively counseling Parker.

It is indisputable that an actual conflict of interest existed between Parker and co-defendant Cave and that, as a result, the Public Defender sought to curtail its representation of Parker. With Cave accusing Parker of primary responsibility for the killing, it was obviously impossible for the Public Defender to represent both defendants.

It is also beyond dispute that the conflict had a direct and adverse affect on Greene's ability to effectively

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2 In accordance with this standard, the district courts of appeal in Washington v. State, 419 So. 2d 1100 (Fla. 3d DCA 1982) and State v. Oliver, 442 So. 2d 1073 (Fla. 3d DCA 1983), cited by the State, simply held that the appellants failed to show a divergency of interests among jointly-represented co-defendants which had an adverse affect on their lawyer's representation.

represent and counsel Parker at the time of his statement because the Public Defender's recognition of the conflict led directly to his decision to hamper Greene's ability to counsel Parker. Without any discussion with Parker concerning the facts, Greene was unable to fulfill the lawyer's functions of educating his client and attempting to persuade him to adopt the most desirable course of action.

> A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant.

Florida Code of Professional Responsibility EC 4-1 (Fla. Stat. Ann. 1983).[3] See also EC 7-8 ("A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations."). Here, Greene was unable even to learn what his client would tell the Sheriff.

Had Greene asked Parker to describe to him the underlying facts, he would have been able to explain to

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[3] These rules governed the conduct of members of the Florida Bar at the time of the pretrial hearing on Parker's motion to suppress.

Parker precisely why he should not make a statement. Due to his enforced ignorance of the facts, Greene was unable to advise Parker that, although Parker might believe his statement was exculpatory, admitting any involvement in the underlying felonies could well result in a death sentence upon conviction for felony murder. Greene may have told Parker, "I advise you not to make a statement because it could be used against you," but, without knowing Parker's version of the facts, he could not give that statement any content and was unable to inform Parker how statements Parker believed to be largely exculpatory could be the evidence upon which a conviction and sentence of death would be obtained.

Greene never told Parker of the conflict or the restrictions placed on him. Instead, in the face of Parker's repeated requests for other counsel, Greene insisted that such counsel was unnecessary because he represented Parker. See P 118, 204, 207-08, 987, 990-91, 1199-1201. Greene thus compounded his error of omission in failing to disclose the conflict to Parker by affirmatively misstating his ability to supply the legal representation to which Parker was entitled.

It cannot seriously be doubted that the conflict of interest adversely affected Greene's ability to counsel and represent Parker. Even if Parker initially insisted on making a statement after Greene advised him not to, Greene could not accept that at face value. Greene at least had the

obligation to hear and evaluate the statement, and then explain to Parker why he should not make it. Cf. Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983) ("Uncounselled jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better-informed advice."); Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986), cert. denied, 107 S. Ct. 1986 (1987) (a lawyer may not 'blindly follow' his client's commands, but should advise the client of his most meritorious option).

Not only did Makemson render ineffective assistance by failing to raise this issue on Parker's motion to suppress, but Greene also failed to supply the effective assistance of counsel mandated by the Constitution. Greene's ineffectiveness alone provides a basis for reversing the lower court's denial of Parker's Rule 3.850 motion. As a result of the conflict, the adverse effect of that conflict on Greene's ability to counsel and represent Parker effectively, and Greene's failure to disclose the conflict to Parker, it is beyond dispute that Greene violated Parker's constitutional right to the effective assistance of counsel. See, e.g., United States v. McLain, 823 F.2d 1457, 1463-64 (11th Cir. 1987); Ruffin v. Kemp, 767 F.2d 748, 750-52 (11th Cir. 1985). This violation itself mandates vacating Parker's convictions and death sentence.

B. Trial Counsel's Failure to Cite any Case Law or Facts in Support of the Claim that Parker Was Denied Counsel of His Own Choice

The State's contention that Makemson made legal and factual arguments in support of the claim that Parker's right to counsel of his own choosing was violated is conclusively refuted by the record of Parker's trial and post-conviction motion. Makemson did not emphasize any of the most significant facts underlying this claim, and cited no case law to support it.

By solely relying on the Miranda right to counsel, Makemson neglected to raise the equally significant issue of a defendant's right to attempt to secure counsel of his own choosing. As noted by the Fourth Circuit Court of Appeals in United States v. Inman, 483 F.2d 738, 739-40 (4th Cir. 1973), cert. denied, 416 U.S. 988 (1974):

> The Sixth Amendment right to counsel includes not only an indigent's right to have the government appoint an attorney to represent him, but also the right of an accused, if he can provide counsel for himself by his own resources or through the aid of his family or friends, to be represented by an attorney of his own choosing.

Makemson simply ignored crucial facts in the record that would have supported a claim that Parker's right to counsel of his own choosing was abrogated. The Magistrate's

notation that Parker told him that he wanted to hire a lawyer, R 1550, was concrete evidence of Parker's desires which Makemson completely failed to bring out in support of the suppression motion. Makemson likewise failed to stress Parker's comment in his taped statement that he wished to have "another one," P 1201, which, in context, could only mean that Parker did not want to be represented by Greene, but rather by the lawyer he believed his mother had retained for him.

Makemson similarly failed to demonstrate the significance of the assertions by Greene and Holt during the taping of Parker's statement that Greene was Parker's attorney. In response to Parker's repeated requests to try to contact the lawyer whom he thought his mother had retained, Greene insisted that he was representing Parker that day. P 1199-1201. Similarly, Holt responded to Parker's requests by insisting that Greene had already been appointed as Parker's counsel. Id. Quite clearly, both Greene and Holt understood that Parker wished to meet with other counsel, but denied him the opportunity, all the time knowing that, as a result of a conflict, the Public Defender could not provide Parker complete representation and intended to move for the appointment of new counsel. These facts plainly support the argument that Parker's right to counsel of his own choosing was violated. None of these facts were asserted in support of the suppression motion.

Makemson also failed to elicit any testimony from Greene regarding: 1) Parker's statements to him during their brief private conversation that he wanted another lawyer to represent him; and 2) Greene's acknowledgment that he may have contributed to the denial of Parker's rights by ignoring Parker's requests and insisting that he was Parker's counsel. See P 989-91, 1164-68. Makemson likewise failed to introduce Parker's testimony. As revealed at the evidentiary hearing below, Parker would have testified that he never regarded Greene as his attorney, and wanted only to contact the lawyer whom he had reason to believe his mother had retained. See P 206-08, 987-88.

If Makemson was not aware of these facts, it was because he was not interested in learning them. At the hearing below, Makemson testified that he did not seek to argue that Parker rejected Greene as his lawyer. P 299.

Given Makemson's exclusive reliance on the Miranda issue of whether Parker was entitled to "a lawyer" when he stated that he wished to call his mother, it is hardly surprising that the suppression hearing court quickly found that a lawyer -- Greene -- was present, and that none of Parker's rights were violated. Through Makemson's unexplained failure, however, this Court never considered whether Parker's right to counsel of his choice had been abrogated. This separate argument simply was never addressed.

C. Trial Counsel's Failure to Argue that the Sheriff's Comments to Parker Were Not Restricted to Legitimate Clarification

Even assuming that Parker's requests for counsel could be considered equivocal, Sheriff Holt's comments to Parker exceeded the limits of permissible clarification of a defendant's wishes. Makemson's failure to raise this legally and factually meritorious issue constitutes ineffective assistance.

The State cannot sidestep this issue by mechanically asserting that the circumstances indicate a voluntary waiver of Parker's rights. Even if Parker initiated contact with Sheriff Holt for the purpose of making a statement (which Parker categorically denies), he had the right to change his mind and invoke his right to counsel of his own choice. See, e.g., Miranda, supra, 384 U.S. at 474-75; Edwards v. Arizona, 451 U.S. 477, 486 n.9 (1981); Palmes v. State, 425 So. 2d 4, 6 (Fla. 1983). Cf. Singleton v. State, 344 So. 2d 911 (Fla. 3d DCA 1977) (even though defendant initially agreed to talk to police, the statement should have been suppressed where she subsequently sought to speak to her mother regarding obtaining an attorney).

Parker's isolated comment -- in the midst of his repeated requests to call his mother in order to determine whether she had found a specific lawyer to represent him --

that he wanted to "get this off my mind," P 1200, does not establish that he freely waived his rights. At most, this comment indicated that, in addition to desiring to contact a lawyer, Parker felt some need to make a statement, thus requiring the Sheriff to restrict his comments to clarification of Parker's intentions. This principle was firmly established in the case law at the time of Parker's suppression hearing and appeal, and has been consistently reaffirmed by federal courts and, most recently, this Court. See, e.g., Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979); Cannady v. State, 427 So. 2d 723 (Fla. 1983); United States v. Johnson, 812 F.2d 1329, 1331 (11th Cir. 1986); Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987); Long v. State, 517 So. 2d 664, 667 (Fla. 1987), cert. denied, 108 S. Ct. 1754 (1988); Kyser v. State, 13 FLW 633 (Supreme Court of Florida, October 27, 1988).

This Court's decision in Cannady v. State, 427 So. 2d 723 (Fla. 1983), does not support the State's position that Sheriff Holt merely engaged in proper clarification of Parker's desires. In fact, the important distinctions between Cannady and Parker's case demonstrate that the Sheriff's comments led to the violation of Parker's rights.

In Cannady, the defendant stated during a police interrogation, "I think I should call my lawyer." Id. at 726. Both before and after that single comment, however, he

continuously talked about the crime of which he was charged and confessed his guilt. Id. at 726. The police officer responded by placing a telephone in front of the defendant. Id. at 726. When the defendant failed to make a telephone call and kept repeating that he did not mean to kill the victim, the police officer simply asked whether the appellant wanted to talk about it. Id. at 726. This Court held that the officer's remark constituted legitimate clarification. Id. at 729.

Unlike the police officer in Cannady, Sheriff Holt did not provide Parker an opportunity to place the requested telephone call, and did not simply and forthrightly ask Parker whether he wanted to contact a lawyer or proceed to make a statement. Rather, the Sheriff ignored Parker's repeated requests to call his mother, did not provide Parker any opportunity to use the telephone, and launched into a speech in which he first assured Parker that he understood "where you're coming from," P 1201, and went on to remind him that "you felt like that there was something being put on you that wasn't right." Id.

The case law makes clear why it cannot be assumed that the Sheriff merely "accurately restated the circumstances," as the State urges. Answer Brief of Appellee ("State's Answer") at 48. The Fifth Circuit in Thompson stated that the sole purpose of clarification is to discern

and not to persuade or argue. Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979). Given the context in which the Sheriff made his remarks, it is apparent that his words and actions served to persuade Parker that he did not have a right to a lawyer other than Greene. Similarly, Sheriff Holt's reminder to Parker that he may wish to explain that he was being unjustly accused served to persuade, rather than clarify.[4] Parker's trial counsel never challenged the Sheriff's response to Parker's arguably equivocal requests for counsel, which clearly went beyond the scope of legitimate clarification.

D. Trial Counsel's Failure to Introduce Parker's Testimony at the Suppression Hearing

The State also contends that Makemson's decision not to introduce Parker's testimony at the suppression hearing was a reasonable strategy because: 1) Makemson was concerned that, if Parker testified that he initially desired

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[4] As cases decided since Thompson illustrate, Sheriff Holt went beyond the bounds of permissible clarification, and a court should not presume that Sheriff Holt was merely trying to be "helpful" by restating the circumstances. See, e.g., United States v. Johnson, 812 F.2d 1329, 1331 (11th Cir. 1986) ("[w]e will begin our review with suspicion, mindful of the fact that the inculpatory statement may have resulted from what has become known as 'the good guy routine.'"); Christopher v. Florida, 824 F.2d 836, 842 (11th Cir. 1987) ("The rule, however, permits 'clarification,' not questions that, though clothed in the guise of 'clarification,' are designed to, or operate to, delay, confuse, or burden the suspect in his assertion of his rights.").

to tell the Sheriff his version of the facts because he heard that co-defendant Bush had accused him of being the trigger-man, that would destroy any possibility of demonstrating involuntariness; and 2) Parker's testimony would have had little impact, given the contrary testimony of the State's witnesses.

Even if Parker had asked to speak to the Sheriff because he wished to make a statement (which he denies), he was free to change his mind at any time and invoke his right to counsel. See supra p. 15. As Parker's testimony at the hearing on his Rule 3.850 motion and his affidavit submitted with that motion demonstrate, whatever his initial reasons for asking to speak to the Sheriff, he later attempted to make clear his desire to seek to obtain counsel of his own choice before giving a statement. P 206-08, 987-88. In fact, the taped statement reveals that Parker repeatedly sought permission to call his mother to determine if she had obtained a lawyer for him, but ultimately ceased making that request and made a statement. P 1199-1201. Only Parker could have explained what impelled him to do so.

It was Makemson's responsibility to use Parker's testimony to demonstrate why Parker's statement was not voluntarily and intelligently made. If Makemson believed that Parker would testify that he gave a statement in order to tell his version of the facts, Makemson had the obligation

to elicit precisely what compelled him to forego further requests to call his mother and to make the statement.

The State's contention that Parker's credibility would be undermined in view of the testimony of the State's witnesses implies that Makemson properly abstained from presenting Parker's testimony because he would never have been believed. Similarly, at the evidentiary hearing below, James Midelis, an "expert" witness for the State, claimed that Parker would simply not have been believed because law enforcement officers -- "[o]ne being the same color as your client" -- would have testified against him. P 183-84. The State's argument is astounding in its brashness. Its suggestion that a criminal defendant would not be believed if contradicted by a law enforcement official is contrary to every principal of due process of law and fundamental fairness in our judicial system.

E. The Prejudice to Parker at Both the Guilt and Sentencing Phases of His Trial

To succeed on his claims that Makemson failed to provide the effective assistance of counsel, Parker need only establish that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, 466 U.S. at 694 (emphasis added). The taped statement was not "relatively exculpatory" as claimed by the State. As demon-

strated in Parker's Initial Brief (pp. 38-44), that statement was the centerpiece of the State's case against Parker and provided the sole support for virtually all of the findings contained in the trial court's decision to impose the death sentence. Parker thus has demonstrated more than a reasonable probability that, without the statement, the jury would not have convicted him and the trial court would not have imposed a sentence of death.

In the cases cited by the State in which the defendant was not prejudiced by the possibly wrongful admission of a statement, the other evidence of the defendant's guilt was either unassailable or left no doubt about the defendant's level of participation in the crimes. See, e.g., Zamora v. Dugger, 834 F.2d 956 (11th Cir. 1987) (evidence apart from confession attorney failed to suppress included a separate written confession, another oral confession to a friend, and eyewitness testimony directly linking defendant to the crime); Diaz v. State, 513 So. 2d 1045 (Fla. 1987), cert. denied, 108 S. Ct. 1061 (1988) (defendant who participated in armed robbery discharged a gun in a crowded bar); Garcia v. State, 492 So. 2d 360 (Fla.), cert. denied, 479 U.S. 1022 (1986) (evidence, including eyewitness testimony and defendant's three statements to police, established that defendant actively participated in armed robbery and killed one victim). These cases are clearly inapposite.

A defendant's own taped statement to law enforcement officers, coupled with the prosecution's highly inculpatory use of the statement in the defendant's cross-examination and summation, would normally have a strong impact on a jury and trial court. In Parker's case, this effect was significantly heightened because the taped statement served to link Parker to most of the other evidence. It was the strongest evidence from which active and culpable participation in the crimes could be inferred. The wrongful admission of the statement would not be considered harmless error, see Kyser v. State, 13 FLW 633 (Supreme Court of Florida, October 27, 1988), and clearly should be deemed prejudicial to Parker under Strickland because it assuredly "undermine[s] confidence in the outcome" of Parker's trial. 466 U.S. at 694.

POINT II

THE FAILURE OF PARKER'S TRIAL COUNSEL TO FORESEE, PREPARE FOR, AND RESPOND TO THE STATE'S IMPEACHMENT OF THE EXPERT WITNESS AT THE PENALTY PHASE CONSTITUTES INEFFECTIVE ASSISTANCE

Notwithstanding the State's mechanical attempt to show that Makemson's performance at the penalty phase of Parker's trial was based on reasonable strategic decisions, the facts and the law demonstrate that he rendered ineffective assistance. Makemson unreasonably failed to prepare for the inevitable impeachment of his expert witness through the

admission of evidence of Parker's prior criminal and juvenile acts. Only if Makemson had prepared to introduce additional mitigation witnesses would he have been able to balance the wholly negative image of Parker created by the State's rebuttal evidence. Parker was obviously prejudiced by Makemson's irreparable failures. Without additional mitigation evidence, it was practically certain that he would receive the death penalty.

Parker does not fault Makemson for introducing a psychologist on his behalf at the sentencing phase of his trial. The introduction of this testimony was consistent with the defense theory of the case and helpful in attempting to establish mitigating circumstances. Parker agreed to Makemson's strategy of using the psychologist, waiving reliance on the statutory mitigating factor of no significant prior criminal history, and not introducing any additional mitigating testimony about his character, because Makemson assured him that the State would thereby be precluded from informing the jury of his prior juvenile and criminal acts.

Makemson thus deprived Parker of advice which any reasonable lawyer would have given -- that introducing a psychologist's testimony that Parker was "passive" and "non-aggressive" could well permit the State to rebut that evidence through evidence of his prior criminal and juvenile

acts -- and a reasonable strategy at the sentencing phase based on that advice.

As the State acknowledges, Makemson relied heavily on Maggard v. State, 399 So. 2d 973 (Fla.), cert. denied, 454 U.S. 1059 (1981). Contrary to the State's contentions, Maggard was never meant to be an "absolute bar" to the appropriate use by the State of a defendant's criminal record at the sentencing phase of a capital trial to rebut the defendant's mitigation evidence. State's Answer at 60. In Maggard, this Court held that the State could not introduce evidence of a prior criminal record in order to rebut the existence of the mitigating circumstance of no prior criminal history where the defendant explicitly waived, and did not introduce any evidence to support, that circumstance. Maggard did not hold that the State could not impeach a defendant's witness -- expert or otherwise -- or rebut his or her testimony with evidence of prior criminal acts.

Makemson, in fact, realized that Maggard would not have barred the State from impeaching Elmira Parker or Douglas Smith (his only other mitigation witnesses) on the basis of Parker's prior acts if they had testified about Parker's character. Makemson explicitly instructed them not to mention Parker's character, thereby demonstrating his understanding that Maggard was not an absolute bar. Inexplicably, Makemson failed to discern that he presented the

State with exactly the same opportunity by introducing the expert's testimony that Parker was "passive" and "nonaggressive".

The fact that this Court's decision on Parker's appeal did not make "new law" or "expand" Maggard in an unforeseeable manner is evident from its reasoning in Muehleman v. State, 503 So. 2d 310 (Fla.), cert. denied, 108 S. Ct. 39 (1987). In Muehleman, the defendant waived reliance on the statutory mitigating circumstance of no prior criminal history, and then introduced the testimony of a psychiatric expert that he lacked substantial capacity to plan and execute the crimes of which he was charged. Id. at 315-16. On appeal, he argued that Maggard ought to have prevented the State from subsequently introducing three police officers who testified about the defendant's prior crimes. Id. at 315-16.

This Court held that Maggard did not bar the police officers from testifying because their testimony was relevant to rebut the psychiatrist's testimony. Id. at 316. Although the Court cited Parker v. State in support of its holding, the Court's reasoning rests on a fundamental principle of evidence which predates Maggard and Parker -- relevance. In Muehleman, this Court held:

> [W]e once again affirm the proposition that the bottom line concern in questions involving the admissibility of evidence

> is relevance. Ruffin v. State, 397 So. 2d 277 (Fla.), cert. denied, 454 U.S. 882, 102 S. Ct. 368, 70 L.Ed. 2d 194 (1981); Ashley v. State, 265 So. 2d 685 (Fla. 1972).

503 So. 2d at 315 (emphasis added).

Accordingly, it cannot be disputed that Makemson should have known that permitting the psychologist to testify that Parker was "passive" and "nonaggressive," and that Parker's involvement in the shooting would have been "out of character," opened the door to relevant impeachment and rebuttal by the State -- evidence of Parker's prior criminal acts. This result was firmly rooted in both the common law and the Florida evidence code at the time of Parker's trial. See, e.g., Fla. Stat. Ann. § 90.404(1)(a) (West 1979); McCormick on Evidence § 191 (E. Cleary 3d ed. 1984) (Good Character as Evidence of Lawful Conduct: Proof by the Accused and Rebuttal by the Government).

Once the State was foreseeably allowed to introduce evidence of Parker's prior criminal and juvenile acts, it was incumbent on Makemson to introduce the additional available mitigation testimony. By not doing so, and leaving the jury with a wholly negative portrayal of Parker, Makemson effectively signed Parker's death warrant.

The State simply ignores the quantity and probable impact of the rebuttal evidence introduced by the State when

it asserts that Makemson reasonably declined to introduce additional mitigation witnesses, since they would have been impeached to Parker's detriment with evidence of his prior acts. Cases cited by the State for this proposition are simply inapposite here because, in those cases, the defense attorney successfully prevented the State from introducing any evidence of the defendant's prior record.

By the conclusion of the psychologist's cross-examination at Parker's trial, the State had already introduced evidence of substantially all of Parker's prior acts numerous times by reading from offense reports in cross-examining the psychologist, and by presenting the testimony of police officers who described in intimate detail Parker's prior juvenile and criminal acts from personal knowledge. Logic and common sense dictate the conclusion that the jury and trial court were already familiar with Parker's prior criminal and juvenile acts, and impeachment of additional mitigation witnesses would not have caused significantly greater harm. See, e.g., Blake v. Kemp, 758 F.2d 523, 534-35 (11th Cir.), cert. denied, 474 U.S. 998 (1985) (regardless of possible impeachment, attorney should have introduced mitigating evidence because the jury had already heard about the damaging incident).

Given the relative weakness of the evidence supporting the statutory aggravating factors found by the trial

court, and the massive negative evidence about Parker which he foreseeably allowed into evidence, Makemson had an obligation to introduce the testimony of the additional available mitigation witnesses. Parker was clearly prejudiced by the absence of this evidence. See, e.g., Harris v. State, 528 So. 2d 361, 365 (Fla. 1988) (Barkett, J., dissenting and Kogan, J., concurring in dissent). Justice Barkett's reasoning in Harris applies equally to Parker's situation:

> I do not agree that because the state may have sought to introduce evidence of prior bad acts by [the defendant] Harris, Harris was not prejudiced by the absence of the character evidence. Harris stood convicted of the stabbing murder of an elderly woman. The jury already knew he was on parole at the time. Thus, the jury was aware of much that was damaging to Harris. The testimony of his family and friends, however, would have presented another side to Mr. Harris' character, demonstrating that he was not totally reprehensible and, even in prison, his life could serve some useful purpose.

Id. at 366.

POINT III

THE STATE'S FAILURE TO DISCLOSE ITS INCONSISTENT FACTUAL CONTENTIONS CONCERNING THE IDENTITY OF THE TRIGGERMAN VIOLATED PARKER'S DUE PROCESS AND EIGHTH AMENDMENT RIGHTS

For the State to argue that the fact of the State's inconsistent triggerman theories at the trials of Parker and two of his co-defendants is not "material", and therefore

need not have been disclosed to the Parker trial court and jury, demonstrates the State's fundamental misunderstanding of Parker's contention. It is not a question of whether sufficient evidence was presented at the three trials to justify a jury charge on premeditated murder and to support the State's contention at each trial that the defendant then on trial pulled the trigger. It is rather an issue of whether the failure to disclose the fact of these inconsistent positions, from which Parker's trial counsel could argue that even the State had a reasonable doubt as to whether Parker fired the shot, violated Parker's due process and eighth amendment rights.

Parker's claim on this appeal thus is not the same as that presented on co-defendant Alphonso Cave's appeal from the denial of his Rule 3.850 motion reported at 529 So. 2d 293 (Fla. 1988). On that appeal, Cave argued that the State had mischaracterized the evidence. Cave cited in support of this claim the fact that, at the separate trials of co-defendants Parker and John Earl Bush, the State had contended that the jury could conclude, beyond a reasonable doubt, that both Bush and Parker had pulled the same trigger to fire the single shot that killed Ms. Slater. 529 So. 2d at 295-96. Parker does not contend that it was impermissible for the State to argue that Parker pulled the trigger, but rather that the jury needed to be put in the position to be able to temper the State's argument with the reasonable inferences to

be drawn from the fact that the State purported to have proved beyond a reasonable doubt that two other individuals were guilty of the same act.

Unlike the arguments found to be procedurally barred in the cases cited in the State's brief, this contention could not have been raised on Parker's direct appeal. On the direct appeal, there was no record upon which to demonstrate that the State had in fact taken inconsistent positions. To provide the effective assistance of counsel, Parker's trial counsel bore a duty of investigation and yet had made no efforts to determine the proof adduced or the contentions put forth at the trials of Parker's co-defendants. Makemson, in violation of this obligation, thus failed to discover the inconsistent positions taken by the State and never presented to the trial court the record on which Parker's present argument is based. This Court thus could not address this issue on the direct appeal.

Makemson's ineffective assistance of counsel in this regard provides an independent basis for granting Parker's Rule 3.850 motion. Makemson's failure to make any efforts to learn what transpired at the trials of Bush and Cave, both of which preceded Parker's trial, left him ignorant of the State's inconsistent factual positions. Makemson thus was unable to argue to the Parker jury that at least a reasonable doubt of Parker's guilt of the act of

shooting Ms. Slater was demonstrated by the State's own contentions that it had produced sufficient evidence at two previous trials, before two other juries, to find two other individuals guilty of the same act. This failure clearly prejudiced Parker at his trial and on the direct appeal. As demonstrated in Parker's Initial Brief (pp. 56-65), the State's nondisclosure of this critical factual inconsistency deprived Parker of a fair trial. Makemson's ineffectiveness compounded this material nondisclosure to Parker's prejudice.