IN THE SUPREME COURT OF FLORIDA

Case No. _____

J.B. PARKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM DENIAL OF CONSOLIDATED MOTION TO VACATE JUDGMENT AND SENTENCES AND APPLICATION FOR STAY OF EXECUTION 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

Appellant, J.B. Parker, by his undersigned counsel, respectfully submits this reply memorandum in support of his appeal to this Court of the denial of his motion pursuant to Rule **3.850** of Florida Rules of Criminal by the Nineteenth Judicial Circuit Court, In and For Martin County.

ARGUMENT

Point I

UNDER STATE v. NEIL, THE TRIAL COURT VIOLATED MR. PARKER'S RIGHTS BY FAILING TO REQUIRE THE STATE TO JUSTIFY ITS PEREMPTORY EXCUSAL OF ALL BLACK POTENTIAL JURORS

In its Answer Brief ("AB"), the State claims that, following the objection by Mr. Parker's trial counsel to the State Attorney's third peremptory challenge of a black potential juror at the voir dire, the trial court act properly by: **1)** offering its own speculative analysis as to why the potential juror was excused; and 2) not shifting the burden to the State Attorney to offer non-pretextual and racially neutral reasons for his actions. AB at **18**. The transcript of the voir dire, however, conclusively demonstrates that, under the standards of State v. Neil, **457** So.2d **481** (Fla., **1984**), the State Attorney's peremptory excusals of all black potential jurors established a strong likelihood that the State had exercised those challenges solely on the basis of race. Under Neil, this required the trial court to do what he completely failed to do -- to require the State

Attorney to offer race-neutral and valid explanations for the challenges, and to himself evaluate those explanations.

The State Attorney exercised a peremptory challenge in order to exclude a third black potential juror -- Miss Johnson -- after the following voir dire:

MR. STONE: . . . Miss Johnson, how do you feel about the death penalty?

PROSPECTIVE JUROR, JOHNSON: Well, I don't know.

MR. STONE: Do you feel like you can go back in the jury room and vote to impose death on Mr. Parker?

PROSPECTIVE JUROR, JOHNSON: Yes, it's according to how the evidence turns out.

MR. STONE: If the State proved to you in this case, that certain aggravating circumstances existed and established beyond a reasonable doubt and they were not outweighed by any mitigating circumstances, could you consider imposing death?

PROSPECTIVE JUROR, JOHNSON: Yes.

MR. STONE: . . . I am going to be asking you to recommend to the Court to sentence Mr. Parker to death. Would that make you feel uncomfortable, the fact that you might be having to do that in this case? Would it cause you some hesitancy whatsoever.

PROSPECTIVE JUROR, JOHNSON: It's all according to what the evidence is.

MR. STONE: You would follow the evidence and put aside the issue that he is black and members of the family are here and the victim is white?

PROSPECTIVE JUROR,
JOHNSON: Yes.

R **430-33.**

When Mr. Parker's trial counsel objected to the State Attorney's peremptory excusal of Miss Johnson on this basis of race, the court did not require the State Attorney to justify his actions, but blithely dismissed the objection with the comment that:

> The Court, of course, since the last such motion has observed interrogation of Miss Johnson at this time and the Court noticed a hesitancy, . . . in answering questions about capital punishment.

R **444.**

The transcript of the entire voir dire reflects, however, a strong likelihood that the State was exercising its peremptory challenges improperly on the basis of race. Prior to the State Attorney's peremptory dismissal of Miss Johnson, the State Attorney conducted the following voir dire of a <u>white</u> prospective juror:

MR. STONE: . . . First, Mrs. Elmstrom, do you any feelings about the death penalty that would prohibit you from considering it as an appropriate penalty in this case?

PROSPECTIVE JUROR,
ELMSTROM: No.

MR. STONE: Do you feel that if you sat on the second phase jury and the State established aggravating circumstances beyond a reasonable doubt that were not outweighed by the mitigating circumstances that

could [sic] render an advisory sentence of death in this case?

PROSPECTIVE JUROR, ELMSTROM: Yes.

MR. STONE: . . . if the State proved to you that the aggravating circumstances established it and they were not outweighed by the mitigating circumstances, could you accept that responsibility even though it might be difficult and advise a sentence of death?

PROSPECTIVE JUROR, ELMSTROM: It miaht be difficult but I would if I were following the dictates of the Court and the evidence.

R 431-32 (emphasis added).

Like Miss Johnson, Miss Elmstrom exhibited a certain "hesitancy" in answering whether she could recommend the death penalty. Like Miss Johnson, Miss Elmstrom said she would still be able to obey the law. Yet, unlike Miss Johnson, Miss Elmstrom -- a white potential juror -- was not peremptorily challenged by the State Attorney.

Accordingly, the excusal of Miss Johnson, after the failure to excuse Miss Elmstrom, demonstrated a "strong likelihood" under Neil that the State had exercised its challenges in a discriminatory manner, given the virtual identity of their responses. Thus, Mr. Parker met his burden to require the prosecutor to come forward with race - neutral explanations for all of his challenges of the black veniremen.

In these circumstances, Neil required the judge to shift the burden to the State Attorney to justify his actions in excusing

each black potential juror. The judge at Mr. Parker's trial, however, had already expressed his belief that there was no "law that says that he [the State Attorney] couldn't systematically excuse them, if he wanted to." R 335.

Although this Court rendered its decision in Neil after the conclusion of Mr. Parker's trial, this Court expressly applied Neil to Mr. Parker's case on direct appeal. The State Attorney's peremptory dismissal of Miss Johnson -- its third peremptory dismissal of a black potential juror -- could only have been based on a pretext and demonstrated a strong likelihood of racially based challenges. Although Neil dictated that the State had the burden of justifying its actions, the trial court failed to require such a showing.

Point II

THE RECENT MENTAL HEALTH EVALUATION OF MR. PARKER ESTABLISHES THE INEFFECTIVENESS OF DR. EDDY

The State's assertion that Dr. Brad Fisher's recent evaluation and report on J.B. Parker's mental health is merely cumulative of Dr. Eddy's testimony, see AB at 22, is nonsense. Dr. Fisher's methodologies and findings -- based on a vastly greater quantity of information than that reviewed by Dr. Eddy -- go far beyond the simplistic analysis offered by Dr. Eddy and reach different conclusions. (Q 339-346). Dr. Fisher's conclusion that Mr. Parker's life history of exposure to neurotoxins strongly suggested organic brain damage (Q 344)

exemplifies the radically different conclusions reached by Dr. Fisher. The State's "cumulative" argument should be rejected.

The State's argument that a competent psychologist's review of Mr. Parker's co-defendant's statements (as was done by Dr. Fisher) would have "opened the door" to admission of those statements at sentencing, is a red herring. Obviously, a competent psychologist would review all the facts and circumstances of the case to obtain a complete overview of the defendant's involvement. Nowhere in his report, however, did Dr. Fisher ever indicate any reliance on those statements for his conclusions. The fact that he simply reviewed them forms no predicate for their admission into evidence, nor does it necessarily follow that the probative effect of the accusations by Cave and Bush that Parker was a "major player" in the crime would outweigh their prejudicial effect so as to permit the prosecutor to probe the substance of those accusations with Dr. Eddy.

The State cannot have it both ways: it cannot on the one hand impeach Dr. Eddy for failing to review co-defendants statements, see R 1275-76, and on the other hand now claim that a competent psychologist's mere review of those statements would entitle them to put the substance of those otherwise inadmissible statements before the jury.

CONCLUSION

For the foregoing reasons, appellant, J.B. Parker, respectfully requests that the order of the court below denying relief be reversed; that Mr. Parker's scheduled execution be immediately and indefinitely stayed; and that Mr. Parker's Motion pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure to vacate and set aside the judgments of conviction and sentence imposed by the trial court be granted, or, in the alternative, that the motion be remanded to the trial court for an evidentiary hearing and consideration of the claims on their merits.

October 27, 1989

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant has been furnished by hand delivery to Celia Terenzio, Esq., this 27th day of October, 1989.

Edward F. Merfield

Of Counsel