IN THE SUPREME COURT OF FLORIDA
Case No. 89,469

STATE OF FLORIDA,

Appellant/Cross-Appellee

v.

J.B. PARKER,

Appellee/Cross-Appellant

On Appeal From the Order Vacating Sentence and Denying Motion to Vacate Judgment Entered by the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County

Initial Brief of Appellee/Cross-Appellant J.B. Parker

PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036
Attorneys for Appellee/Cross-Appellant J.B. Parker

Of Counsel:

Francis D. Landrey
Mia Franklin
Francine Miller

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PRELIMINARY STATEMENT

In May 1993, more than ten years after Appellee/Cross-Appellant J.B. Parker's conviction and death sentence for the 1982 murder of Frances Julia Slater, the State contended at a re-sentencing hearing that it had established beyond a reasonable doubt that one of Parker's co-defendants, Alphonso Cave, had confessed in 1982 that he had shot and killed Ms. Slater. Never before had the State revealed this evidence of a confession by Cave and at no point prior to May 1993 was counsel for Parker aware of Cave's 1982 admission that he had shot and killed Ms. Slater. The State cannot plead that it was also ignorant of this evidence critical to Parker's defense. It is undisputed that the State had been aware of Cave's confession, which had been overheard by a fellow inmate, Michael Bryant, since July 1982, six months before Parker's January 1983 trial, and that no disclosure of this fact was made to Parker or his trial counsel. This information came to the attention of Parker's counsel in 1993 not because the State finally decided to disclose these facts but because the State used this evidence of Cave's confession at Cave's 1993 re-sentencing hearing.

In its presentations to the 1993 Cave re-sentencing jury and trial judge, the State flatly claimed, based solely on Bryant's testimony, that the State had proved, beyond a reasonable doubt, that Cave fired the single shot that killed Ms. Slater: "the testimony of witness Michael Bryant, which is credible and believable, was that [Cave] himself shot the victim." PCR 1421.[1] In its argument to the court at Cave's 1993 re-sentencing hearing, the State did not mince words but

[1] Parker adopts the State's terminology for citations to the record. References to "PCR ___" are to the record of the proceedings in the court below and to "PCT ___" are to the transcript of the evidentiary hearing held in connection with those proceedings. References to "R ___" are to the record on Parker's original appeal from his conviction and sentence.

acknowledged the clear import of the Bryant testimony for what it is: Bryant heard "an actual confession." PCR 1453. Based on Bryant's testimony alone, the State implored the Cave re-sentencing jury to find that Cave "was a major participant in the felonies committed and the actual trigger man in the death of Frances Julia Slater." PCR 1421. The State thus has demonstrated its firm belief in the materiality of the Bryant testimony to prove that Cave (not Parker) is guilty of shooting Ms. Slater and that Cave is therefore deserving of a death sentence. In complete contradiction of its position at the 1993 Cave re-sentencing hearing, the State now seeks to convince this Court on this appeal that the same evidence is somehow not material to Parker's efforts to establish his innocence of this same crime and that, at the very least, a death sentence should not have been imposed on him.

At the time of his discovery of the State's suppression of this critical evidence, Parker was pursuing his claims for relief from his conviction and sentence in federal court. Having obtained no relief from the sentence and judgment on his direct appeal to this Court, *Parker v. State,* 476 So. 2d 134 (Fla. 1985), and on his subsequent Rule 3.850 motions, *Parker v. State,* 542 So. 2d 356 (Fla. 1989); *Parker v. Dugger,* 550 So. 2d 459 (Fla. 1989), Parker was, in May 1993, seeking a rehearing and rehearing en banc of the decision of the Eleventh Circuit Court of Appeals affirming the denial of his federal habeas corpus petition. *Parker v. Singletary,* 974 F.2d 1562 (11th Cir. 1992). In light of the apparent violation of Parker's constitutional rights under the principles established in *Brady v. Maryland,* 373 U.S. 83 (1963), by the suppression of the Cave confession, Parker sought and obtained an order from the Eleventh Circuit holding further proceedings in that court in abeyance pending presentation of Parker's new claims for post-conviction relief to the Florida State Courts. PCR 95-100.

Parker having presented and prevailed, in part (to the extent of obtaining vacature of his death sentence), on his Rule 3.850 motion for post-conviction relief based on the State's admitted suppression of the Cave confession, the State now appeals to this Court seeking reinstatement of Parker's death sentence. Parker respectfully submits this brief in opposition to the State's appeal and in support of Parker's cross-appeal challenging the lower court's denial of his request that the judgment of conviction be vacated as well.

STATEMENT OF THE CASE

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." A *Brady* violation is established when (a) the prosecution suppresses evidence after a request by the defense, (b) the evidence is favorable to the defense, and (c) the evidence is material. *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972); *Garcia v. State*, 622 So. 2d 1325, 1330 (Fla. 1993).

It is undisputed that on July 21, 1982, Michael Bryant was incarcerated in the Martin County Jail and shared a cell with Parker's co-defendant, Alphonso Cave, and that John Earl Bush, another of Parker's co-defendants, was incarcerated in a cell nearby. It is also undisputed that, on that same day Bryant informed the Martin County Supervisor of Corrections, Art Jackson, that Bryant had overheard a conversation between Cave and Bush in which Cave admitted to shooting Ms. Slater.

On these facts, that Parker has established the first two elements of his *Brady* claim is not at issue. The State has conceded that: 1) the State is charged with the knowledge gained by

Art Jackson, an employee of the Martin County Sheriff's Department, concerning the overheard confession by Cave; 2) this evidence was never disclosed to Parker's trial counsel, Robert Makemson; and 3) the suppressed evidence, identifying someone other than Parker as the shooter, is favorable to the defense. In addition, the State makes no claim that Parker's counsel could, with reasonable diligence, have discovered the suppressed evidence, and thus does not dispute the timeliness of Parker's motion under Rule 3.850 or that the Bryant statements constitute newly discovered evidence.

The only issue before this Court on Parker's *Brady* claim is the materiality of the suppressed exculpatory evidence at both phases of Parker's trial. As we show below, the undisputed facts concerning the Bryant statements and the evidence adduced at the hearing on Parker's most recent Rule 3.850 motion (the "evidentiary hearing") conducted by the lower court establish that Bryant's statements are material and should have been disclosed. The lower court therefore properly vacated Parker's sentence but erred in denying Parker's motion to vacate his conviction.

Parker's 1983 Trial

Parker was tried in January 1983 on charges arising out of the April 1982 robbery, kidnaping and murder of Frances Julia Slater. The evidence at Parker's trial established that Parker, John Earl Bush, Alphonso Cave and Terry Wayne Johnson were in Bush's car on the evening of April 26 and the early morning of April 27, 1982. During the early morning hours of April 27, Ms. Slater was robbed while working at the L'il General Store in Stuart, Florida, R 560-63, 574-78, placed in Bush's car, R 849-63, and driven to a remote area of Stuart, R 580-88, where she was stabbed superficially in the abdomen and fatally shot in the head. R 648-72. Bush and Cave were both convicted of all offenses charged and sentenced to death. *See Bush v. State,* 461 So. 2d 936 (Fla. 1984), *cert. denied,* 475 U.S. 1031 (1986); *Cave v. State,* 476 So. 2d 180 (Fla. 1985), *cert. denied,* 476 U.S. 1178 (1986). Johnson, who was also found guilty of murder, kidnaping and robbery, received a life sentence. *See Johnson v. State,* 484 So. 2d 1347 (Fla. 4th Dist. Ct. App.), *review denied,* 494 So. 2d 1151 (Fla. 1986).

Parker's principal defense was that, although present, he had no knowledge of the felonious intentions of his co-defendants, and had not participated in the killing of the victim or in the commission of any of the underlying felonies. R 959-98. Parker's uncounseled taped statement made to the Martin County Sheriff on May 5, 1982 (the "May 5 statement"), shortly after his arrest, was critical to the State's efforts to convince the jury otherwise. The prosecution's case against Parker was primarily based on inferences and arguments drawn from that statement, and the testimony of co-defendant Bush's girlfriend, Georgeanne Williams. Williams testified that, while she was visiting Bush in prison, Parker told her, through a crack in the door of his jail cell,

that he shot the victim. R 878-86. Williams's uncorroborated, highly interested testimony is the only evidence introduced at Parker's trial of his direct involvement in the murder.[2]

At the prior separate trials of co-defendants Bush and Cave, the State contended, and the juries might have found, that the defendant then on trial fired the single shot that killed Ms. Slater. *See Parker v. Singletary*, 974 F.2d 1562, 1577-78 (11th Cir. 1992) . At Cave's 1982 trial the State did not rely on the Bryant testimony to support its contention that Cave was the shooter. Rather, the State asked the jury to reach this conclusion based on its assertion that the level of Cave's involvement in the felonies and the circumstances proved at Cave's trial led to a logical inference that Cave was the shooter. *Id.* at 1578. No disclosure of the State's contradictory assertions as to the identity of the shooter was made to Parker. At Parker's trial, the State contended that yet a third person, Parker, could be found, beyond a reasonable doubt, to have fired that single shot. R 503, 1145-46. This assertion of mutually exclusive propositions — that each of three individuals committed an act that only one could have accomplished — resulted in three convictions and three death sentences and was presented to three separate juries without disclosure of the Bryant statement establishing that Cave had confessed to being the killer.

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[2] The prosecutor at Parker's original trial also improperly referred during his closing argument to Bush's statement implicating Parker. R 1153-56. The Eleventh Circuit concluded that even if this presentation to the jury of Bush's statement violated Parker's Sixth Amendment right to confront the witnesses against him, the error was harmless. *Parker v. Singletary*, 974 F.2d 1562, 1571 (11th Cir. 1992).

Parker was found guilty on each count. The jury recommended the imposition of a death sentence by a vote of eight to four. R 1504. The trial judge accepted the jury's recommendation and imposed a death sentence on Parker without rendering the statutorily required contemporaneous findings of facts in support of the death sentence. In his findings rendered almost a year after imposition of sentence, the trial judge expressly concluded, apparently based on what he viewed as the strength of the Williams testimony, that Parker was the shooter. PCR 1582-83. Indeed, in rejecting a prior challenge to Parker's conviction and sentence on appeal from the denial of Parker's first Rule 3.850 motion, this Court expressly acknowledged the significance of the Williams testimony to distinguish the case against Parker from the evidence at the separate trials of Cave and Bush:

> Further, and more important, Parker's case was the only one with direct evidence concerning the identity of the triggerman. At Parker's trial, the state presented testimony of Georgeanne Williams, co-defendant Bush's girlfriend, who stated that, while she was visiting Bush at prison, Parker confessed that he shot the victim after Bush stabbed her.

Parker v. State, 542 So. 2d 356, 358 (Fla. 1989).

The Suppressed Evidence

Despite the critical importance to Parker's defense that there was direct and credible evidence that someone other than Parker had confessed to killing Ms. Slater, as a consequence of the State's suppression of Cave's confession, the Parker trial court and jury never had the opportunity of assessing the weight of the Williams testimony in light of Cave's conflicting confession. On this appeal, as it did in the lower court, the State consistently misstates the material evidence suppressed by the State. It is therefore critical to understand the entirety of the evidence that Parker contends the State was obligated to disclose prior to Parker's January 1983 trial. The evidence concerning the precise statements suppressed by the State is not in

dispute — both Bryant and Jackson have provided sworn testimony in connection with the 1993 Cave re-sentencing proceeding concerning what Bryant overheard Cave say. As that sworn testimony plainly demonstrates, contrary to the State's assertion, State's Brief at 26[3]; PCT 20-21, 89; PCR 679, Bryant's suppressed statements do not merely evidence an adoptive admission by Cave to the shooting of Frances Slater.[4]

Bryant's deposition testimony and Jackson's hearing testimony in connection with Cave's 1993 re-sentencing hearing reveal that Cave directly confessed to shooting Ms. Slater. At one point during the conversation between Cave and Bush, Bryant heard Cave say, "I just popped a cap in her head," meaning that he, Cave, shot Frances Slater. PCR 1266. At another point, Bryant overheard Bush say to Cave, without a denial by Cave, "you shouldn't have shot her in the back of the head." PCR 1285. Jackson's recollection of what Bryant told him about the Cave/Bush conversation is consistent with Bryant's deposition testimony that Bryant heard Cave directly admit to being the shooter. Jackson testified at Cave's 1993 re-sentencing hearing that, "Mr. Bryant advised me that Mr. Cave was stating . . . he [Cave] got sick of hearing her hollering and he shot her." PCR 1533.

The State thus submitted to the Cave court and jury evidence of a direct, not tacit, admission by Cave. Indeed, in its submission to the 1993 re-sentencing court urging the imposition of a death sentence, the State did not water down the Bryant testimony by belittling it as a mere tacit admission. The State instead characterized the Bryant testimony as direct evidence

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[3] References to "State's Brief at __" are to the State's Initial Brief on this Appeal.

[4] The State bases its argument that Bryant only overheard Cave tacitly admit to shooting Frances Slater on Bryant's hearing testimony, in which Bryant only mentions Cave's tacit admission. PCR 1332-33. The State wrongly presumes that Parker is bound by the State's failure at Cave's resentencing to elicit the entirety of what Bryant overheard.

that Cave was the shooter: "In fact, the testimony of witness Michael Bryant, which is credible and believable, was that [Cave] himself shot the victim." PCR 1421.

It is the entirety of Bryant's and Jackson's statements that Parker argues the State was obligated to disclose — statements that clearly demonstrate a direct admission by Cave. Had the State satisfied its obligations under *Brady*, it would have listed both Bryant and Jackson as witnesses.[5] Parker's trial counsel, Robert Makemson,[6] would have deposed both, PCT 33-34, and thus would have had available for possible use at trial both statements — Bryant's statement that Cave directly admitted that he was the shooter and Bryant's statement that he overheard Bush

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[5] Contrary to the State's assertion, State's Brief at 14 n. 4, the transcript of Jackson's testimony was not submitted in the court below solely to prove that the State suppressed the Bryant statements. *See* PCT 162-71. Jackson, having heard Bryant's statements concerning the overheard conversation between Cave and Bush, also is a witness whose identity should have been disclosed had the State complied with its *Brady* obligations. The State's sole opposition to the introduction of the Jackson transcripts was based on relevancy concerns. Surely what Jackson knows concerning both the substance of what Bryant told him and the circumstances surrounding Bryant's statements and what he could have stated at a deposition prior to Parker's 1983 trial is relevant to understanding both the full scope of the evidence the State suppressed and how Parker's trial counsel might have effectively employed that evidence to Parker's advantage.

[6] Robert Makemson who is now a Circuit Court Judge in the 19th Judicial Circuit, testified at the evidentiary hearing concerning the uses he would have made of the suppressed evidence

state that Cave was the shooter, without a denial from Cave. In considering the materiality of the Bryant statements, therefore, the Court must address the entirety of the evidence suppressed by the State, which included evidence that Cave directly confessed to the shooting, not just the piece of that evidence on which the State chooses to focus.

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had the State satisfied its disclosure obligations under *Brady*.

Proceedings in the Eleventh Circuit

Prior to the discovery of the Bryant statements on which the current proceeding is based, Parker was pursuing his claims for relief from his conviction and sentence in the Eleventh Circuit Court of Appeals. A principal issue on that appeal was whether Parker's May 5 statement — in Parker's view, the centerpiece of the State's case against him — had been obtained in violation of his Fifth Amendment right to counsel. Although the Eleventh Circuit agreed that the May 5 statement was inadmissible as a result of the violation of Parker's Fifth Amendment right to counsel, that court nevertheless affirmed the dismissal of Parker's federal habeas corpus petition on the ground that the error was harmless. *Parker*, 974 F.2d at 1576-77.[7] In light of the need to present Parker's claims based on the newly discovered evidence of the State's suppression of the Bryant statements and its reliance on the Bryant testimony at Cave's 1993 re-sentencing hearing to the state courts, the Eleventh Circuit has held proceedings in that court in abeyance.

As a result of the Eleventh Circuit's ruling, the potential impact of the Bryant statements (had they been disclosed) at Parker's trial must be assessed without reference both to Parker's inadmissible May 5 statement and to his trial testimony. The statement was obtained in violation of Parker's Fifth Amendment rights and thus should never have been heard by the Parker jury. And, as the Eleventh Circuit held, Parker's trial testimony would not have been introduced but for the erroneous introduction of the May 5 statement. *Parker*, 974 F.2d at 1575.

The Decision of the Court Below

[7] The Eleventh Circuit has yet to address Parker's rehearing application in which, among other issues, he contends the court should reconsider its harmless error determination.

By order dated November 6, 1996, Judge S. Joseph Davis granted Parker's Rule 3.850 motion to the extent of vacating his death sentence but denied Parker's request that the judgment of conviction be vacated as well. As Judge Davis properly concluded, the only disputed issue on Parker's *Brady* claim was the materiality of the suppressed evidence at both phases of Parker's trial:

> This Court concludes and determines that the newly discovered evidence, the Bryant statement, was suppressed by the State; that the statement was favorable to Parker; and that neither Parker nor his defense counsel, Makemson, could have obtained the information with the exercise of due diligence.

PCR 1210-11. Based on these determinations, Judge Davis properly concluded that the only issue left for resolution on Parker's *Brady* claim was "whether the statement was material either to guilt or penalty, depriving Parker of due process and a fair trial." [8] PCR 1211.

As we show below, Judge Davis properly concluded, based on the appropriate legal standard, that:

> In the present case, the State suppressed evidence favorable to Parker, by failing to disclose Bryant's statement. The statement was material and the Court finds that it could with a reasonable probability, result in a different recommendation by the jury in the penalty phase.

PCR 1212. Judge Davis, however, rejected Parker's claim that the suppressed statement was also material to the guilt/innocence phase of Parker's on the ground that the evidence was sufficient to establish that Parker was guilty of felony murder:

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[8] The lower court neglected, however, to address Parker's independent claim that his due process rights had been violated by the State's reliance at the separate trials of Cave and Parker of mutually contradictory evidence. *See* Point IV, *infra.*

> The Court accepts the opinion of the Eleventh Circuit that, notwithstanding the inadmissibility of Parker's first statement to law enforcement officers, he was guilty of felony murder.

PCR 1212-13

The Materiality of the Suppressed Evidence

As the State concedes on this appeal, contrary to its contention in the court below, *see* PCT 26-27, and the testimony of its witnesses presented at the evidentiary hearing, *see* PCT 212, 216, Bryant's credibility is not at issue. Indeed, in light of its vigorous assertion at the 1993 Cave re-sentencing hearing that, Bryant is "credible and believable," PCR 1421, the State seems to realize that it can hardly now be heard to dispute Bryant's credibility as a witness. As Judge Davis plainly recognized in dispelling any issue regarding Bryant's credibility: "The State has vouched for the credibility and trustworthiness of Bryant's testimony by using it in the Alphonso Cave proceedings." PCR 1212; *see Green v. Georgia*, 442 U.S. 95, 97 (1979) (the most important factor in determining the trustworthiness of a witness's hearsay statement recounting a co-defendant's confession was the fact that the State had used the statement against the co-defendant and based a death sentence upon it).

As we show below, the admittedly credible Bryant statements are plainly "material," as that term is understood in the context of a *Brady* claim, because the suppression of evidence that a co-defendant was the shooter undermines confidence in the verdict and sentence. Contrary to the State's contention, the Bryant statements would have been admissible at the guilt/innocence phase of Parker's trial as statements against Cave's interest. As to the penalty phase, the State entirely ignores this Court's repeated admonitions that evidence that someone other than the defendant was the killer is plainly material. *See Garcia*, 622 So. 2d at 1331; *Cooper v. State*, 581 So. 2d 49, 51 (Fla. 1991); *Hawkins v. State*, 436 So. 2d 44 (Fla. 1983);

Malloy v. State, 382 So. 2d 1190 (Fla. 1979). As these cases make plain, it is almost inconceivable that such evidence could be deemed immaterial to the sentencing determination under the Florida death penalty statute. The prosecutor's belief that the case against Parker was the State's strongest precisely because it was the case in which the State could present direct evidence that the defendant then on trial was the shooter, PCT 204-05, only serves to emphasize the critical importance at a murder trial of evidence such as that Bryant could have provided had the State simply complied with its disclosure obligations.

At the guilt/innocence and penalty phase the suppression of Bryant's statements unfairly handicapped the ability of Parker's trial counsel, Judge Makemson, to prepare and present Parker's defense. Most significantly, at both phases, Judge Makemson was prevented from effectively rebutting the testimony of Georgeanne Williams, acknowledged by the State to be its strongest evidence against Parker, and the only admissible evidence of Parker's active participation in the crimes. PCT 53-54. At both phases of Parker's trial, the State's suppression of Bryant's statement further resulted in Judge Makemson's inability to present independent testimony to support Parker's defense of lack of active participation in the crimes with which Parker was charged. At the penalty phase, Judge Makemson was prevented from introducing disinterested testimony[9] demonstrating that Parker was not the triggerman — a factor that is critical to the judge's and jury's sentencing deliberations.

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[9] The Bryant statements are not simply evidence of a co-defendant pointing the finger at another defendant. They constitute a direct admission by Cave that he, not any of the other co-defendants, was the shooter. Despite this irrefutable fact, the State seems to believe that the Bryant statements would have been useless to Parker's defense because they would have provided an advantage to the prosecutors by introducing yet another individual as the person who shot Ms. Slater. PCT 261-63. This argument is rank, irrational speculation by the State which should be rejected out of hand. Parker had strong arguments to support his claim that the Williams

The State's Reliance on Inconsistent Evidence in Violation of Parker's Due Process Rights

Even if the suppression of the Bryant statements did not constitute a violation of Parker's rights under *Brady*, the State's use of this evidence, which contradicts the evidence it relied upon at the Parker trial, constitutes prosecutorial misconduct entitling Parker to a new trial. As the Eleventh Circuit recognized in addressing Parker's claims on his appeal from the denial of federal habeas corpus relief, the State's use of mutually contradictory evidence at successive trials of co-defendants constitutes prosecutorial misconduct in violation of the defendants' due process rights. *Parker*, 974 F.2d at 1578. As we show below, the conflicting uses by the State of the Williams and Bryant testimony constitutes a direct violation of the principles set forth in *Parker*.

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testimony was a complete fabrication. Evidence that Cave admitted that he was the shooter would have greatly aided Parker's efforts to have the jury disregard the Williams testimony.

I.

THE BRYANT STATEMENTS ARE MATERIAL IF THEIR SUPPRESSION RENDERS THE TRIAL UNFAIR AND THE VERDICT UNWORTHY OF CONFIDENCE

A0 The Materiality Standard Under *Bagley* and *Kyles*

Among the most essential and fundamental rights guaranteed by the Constitutions of the United States and the State of Florida is an individual's right to a fair trial. In *United States v. Bagley*, 473 U.S. 667 (1985), the Supreme Court reconfirmed, as a fundamental tenet of due process, that the "prosecutor's role transcends that of an adversary: he 'is the representative not of an ordinary party to a controversy, but of a sovereignty. . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Id.* at 676 n.6 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). At the very core of this role is the prosecutor's constitutional duty to disclose exculpatory evidence that favors the defense. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).

It is well established under *Brady* that constitutional guarantees of due process are violated when the prosecution suppresses or withholds favorable evidence that is material to either guilt or punishment. *Id*. at 87; *Kyles v. Whitley*, 514 U.S. 419, 432 (1995). In *Kyles*, the Supreme Court addressed the appropriate standard of materiality under *Brady*. Relying on its decision in *Bagley*, the *Kyles* Court held that suppressed exculpatory evidence is material whenever there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. 514 U.S. at 433-34 (citing *Bagley*, 473 U.S. at 678); *Duest v. Dugger*, 555 So. 2d 849, 851 (Fla. 1990). In applying the materiality standard, the proper inquiry is whether in the absence of the suppressed evidence, the defendant

"received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.

Most important in addressing the issues presented on Parker's motion is to understand what the standard of materiality is *not*. As is firmly established under *Kyles*, materiality "is not a sufficiency of evidence test." *Id.* A showing of materiality thus does not require that the defendant demonstrate by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted in the defendant's acquittal. *Id.* at 434-35. As the Supreme Court explained in *United States v. Agurs*, 427 U.S. 97, 111 (1976), a lesser burden is imposed on the defendant in establishing the materiality of *Brady* material because: "[i]f the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession [and suppressed] as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice." Accordingly, the State cannot prevail on this appeal simply by demonstrating that there would still have been adequate evidence to convict even if the exculpatory evidence had been disclosed.

B0 The Lower Court's Determination that the Suppressed Evidence Was Not Material to the Guilt/Innocence Phase Of Parker's Trial Was Based on the Wrong Standard

Although concluding, based on the correct standard, that the suppressed evidence was material at the sentencing phase because it could "with a reasonable probability, result in a different recommendation by the jury in the penalty phase," PCR 1212, the lower court nevertheless found that Bryant's testimony was not material to the guilt/innocent phase at Parker's trial. The basis for this different materiality determination as to the guilt/innocence phase of Parker's trial was that, in the opinion of the lower court, the Eleventh Circuit had already

determined that Parker "was guilty of felony murder" and this should end the analysis. The lower court thus expressly based its materiality determination as to the guilt/innocence stage on its conclusion that there was sufficient evidence to support the verdict, a materiality standard expressly rejected by the Supreme Court in *Kyles*.

As established in *Kyles*, *Bagley*, and *Agurs*, whether or not there was sufficient evidence, however, is *not* the standard to be met to determine a *Brady* violation. While the evidence against the defendant may be a factor in the court's determination, it is not the end of the analysis. *Brady* imposes an obligation on the State to disclose material evidence that tends to exculpate the accused. In deciding whether to make such disclosure, the State is not at liberty to assess the strength of its other evidence and to determine, when presented with a strong case, that it need not disclose exculpatory evidence in light of the other evidence of guilt. Rather, the inquiry is whether the evidence, standing alone and viewed against the background of the crime charged, is such that its non-disclosure would render the verdict unworthy of confidence.

The lower court's reliance on the Eleventh Circuit's opinion makes plain that it applied, contrary to *Kyles*, a sufficiency of the evidence standard. The basis for the Eleventh Circuit's conclusion was that "there was sufficient evidence to support Parker's conviction under a felony murder theory, even without Parker's original statement." *Parker v. Singletary*, 974 F.2d 1562, 1576 (11th Cir. 1992). The State directly contributed to the lower court's error by expressly arguing, in reliance on the Eleventh Circuit opinion, that the evidence of Parker's guilt of felony murder was sufficient to defeat Parker's *Brady* claim as to the guilt/innocence phase of his trial. *See* PCR 682; PCT 22-23.

The State's arguments and the lower court's conclusion could not be more contrary to the express statement in *Kyles* that materiality, in the context of a *Brady* claim "is not a sufficiency of evidence test." 514 U.S. at 434. In *Kyles*, the Supreme Court specifically rejected the assumption in the dissenting opinion that "Kyles must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed." *Id.* at 435 n.8. This Court must therefore reject the lower court's conclusion that Parker's *Brady* claim as to the guilt/innocence determination must fail because there would still have been adequate evidence to convict him of felony murder.

II.

BRYANT'S SUPPRESSED STATEMENTS ARE ADMISSIBLE AND MATERIAL AT THE GUILT/INNOCENCE PHASE OF PARKER'S TRIAL

A. There Is More than a Sufficient Basis in the Record and in the Law Supporting Judge Davis' Finding that Bryant's Statements Would Have Been Admissible at the Guilt Phase of Parker's Trial

The lower court's conclusion that Bryant's testimony would have been admissible at the guilt/innocence phase of Parker's trial, PCR 1209 should be affirmed because it is supported by the record and the applicable case law. There are two independent grounds for finding Bryant's testimony admissible at the guilt phase. First, Bryant's testimony would have been admissible under the statement against penal interest exception to the hearsay rule. Second, Bryant's testimony would have been admissible as a matter of fundamental fairness and due process under *Chambers v. Mississippi*, 410 U.S. 284 (1973). Because each of the State's arguments challenging the admissibility of Bryant's testimony under the statement against interest

exception and under *Chambers* depends, in whole or in part, on the State's deliberate mischaracterization of the statements to which Bryant would testify, it bears reiterating at the outset that the record firmly establishes that Cave made a direct admission to being the shooter and not merely an admission by silence. *See* PCR 1266 (Bryant testified that Cave stated "I just popped a cap in her head").

1 Bryant's Testimony Would Have Satisfied
All of the Requirements for Admission
Under the Statement Against Penal Interest Exception

The statement against penal interest exception "contemplates the . . . situation where a person accused of a crime seeks to exculpate himself by offering the statement of a declarant in which the declarant admits the crime." *Peninsular Fire Ins. Co. v. Wells*, 438 So. 2d 46 (Fla. 1st Dist. Ct. App. 1983). This is exactly the situation in Parker's case. As Judge Makemson testified at Parker's evidentiary hearing, if the State had not suppressed the evidence that Bryant overheard a conversation in which Cave admitted to shooting Ms. Slater, he would have sought to introduce Bryant's testimony under this exception. PCT 53, 103.

The statements that come within this exception are defined as follows:

> **A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corr**

> **obo rat ing c ircum st anc es sho w t he t rust wo rt h ine ss o f t he st at eme n t .**[10]

Fla. Stat. § 90.804(2)(c) (1996). The required elements of the statement against penal interest exception are: 1) the unavailability of the declarant; 2) the tendency of the statement to subject the declarant to criminal liability so that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true; and 3) the existence of corroborating circumstances that clearly indicate the trustworthiness of the declarant's statement. *Maugeri v. State*, 460 So. 2d 975, 977 (Fla. 3d Dist. Ct. App. 1984).

The first two elements of the statement against penal interest exception are non-issues in this case. At the time of Parker's trial it was understood that the co-defendants would not testify at each other's trials. Indeed, as the record evidences, Parker's trial counsel made a motion to sever the trials of the defendants, which the court granted, and each defendant was tried separately. R 1608-09, 1616. This severance motion was made and granted as a matter

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[10] By way of tortuous reasoning, the State argues that Bryant's testimony is not admissible under the statement against interest exception because the only relevant "statement" to which Bryant could testify is Bush's accusation that Cave was the shooter. State's Brief at 32, 37. This argument is one of many red herrings raised by the State. As the record unambiguously shows, Bryant could testify to Cave's statement that, "I just popped a cap in her head." PCR 1266. As Jackson confirms, Bryant told him that "Mr. Cave was stating . . . he [Cave] got sick of hearing her hollering and he shot her." PCR 1533. In any event, to the extent that through his silence Cave expressed his agreement with Bush's accusation and acknowledged his guilt, Cave's silence was a statement.

of routine because each of the co-defendants' statements could be introduced as evidence against the declarant but could not, without violating the co-defendants' Sixth Amendment Confrontation Clause rights, be introduced as to any other defendant. The entire severance motion thus proceeded on the plain understanding that each of Parker's co-defendants would not be taking the stand because, if called, each defendant would assert his privilege against self-incrimination. Cave therefore would have been deemed unavailable. *See* Fla. Stat. § 90.804(1)(a) (1996); ***State, Dept. of Health & Rehabilitative Servs. v. Bennett*, 416 So. 2d 1223, 1224 (Fla. 3d Dist. Ct. App. 1982) (assertion of the privilege against self-incrimination rendered declarant unavailable); *Brison v. State*, 382 So. 2d 322, 324 (Fla. 2d Dist. Ct. App. 1979)** (same).

That Cave and Bush [11] were not called at the evidentiary hearing before Judge Davis in 1996 has no bearing on the issue of the admissibility of Bryant's testimony. The issue is whether Cave's statements against interest would have been admissible at Parker's trial in 1983 because Cave was <u>then</u> unavailable to testify. Parker was not required to cause Cave to appear at his evidentiary hearing in order for the court to rule on his past unavailability since it is patently clear that at the time of Parker's trial in 1983, Cave had valid grounds to assert his privilege against self-incrimination. *See United States v. Young Brothers, Inc.*, 728 F.2d 682, 691 (5th Cir. 1984) (*requirement that the court rule upon the validity of a witness's assertion of the privilege against self incrimination need not be met when its fulfillment would be a mere "formalism"*)

[11] There was certainly no reason to cause Bush to appear at Parker's evidentiary hearing and invoke his privilege against self-incrimination since Parker does rely on Bush's accusation, but rather relies on Cave's direct and tacit admissions.

(emphasis added), *cert. denied,* 469 U.S. 881 (1984); *United States v. Thomas,* 571 F.2d 285, 288 (5th Cir. 1978) (co-defendant's failure to make formal claim of privilege did not make statement inadmissible; it would be "mere formalism" to insist on formal claim, since co-defendant's right to assert privilege and unavailability were patent); *see also United States v. Georgia Waste Sys. Inc.*, 731 F.2d 1580, 1582 (11th Cir. 1984) (witness not called to testify but who would have refused to do so absent a grant of immunity held "unavailable").

The State's reliance on *Jones v. State,* 678 So. 2d 309 (Fla. 1996), *cert. denied,* 117 S. Ct. 1088 (1997) in support of its contention that Parker was required to call Cave and Bush at the evidentiary hearing in 1996 is misplaced. At Jones's evidentiary hearing on remand, the declarant was not deemed unavailable because the State had transported the declarant from jail to the courthouse for Jones' hearing and throughout the hearing the declarant was "ready, willing and able to testify." *Id*. at 313.

There also can be no serious dispute that the second requirement for admissibility is present here. Cave's statements both directly and tacitly admitting to shooting the victim were unquestionably against his penal interest.[12] *See Perry v. State*, 675 So. 2d 976, 979 (Fla. 4th Dist. Ct. App. 1996) (statements of defendant's companion to other people that she had done the shooting were admissible as statements against penal interest). At the time Cave made the statements at issue, he was being held pending trial on charges of robbery, kidnaping and murder. His statements admitting to the murder thus directly exposed him to criminal liability. As has

[12] The State's argument that Bryant's testimony is not admissible under the statement against penal interest exception because Parker failed to show that Bush's accusation exposed Bush to criminal liability, is another example of the State's efforts to divert the Court's focus from the real issues on this appeal. State's Brief at 35. Cave, not Bush, is the declarant whose statements are at issue.

long been recognized, "no other statement is so much against interest as a confession of murder." *Donnelly v .United States*, 228 U.S. 243, 278 (1913) (Holmes, J. dissenting).

Relying exclusively on *United States v. Seabolt*, 958 F.2d 231 (8th Cir. 1992), *cert. denied*, 507 U.S. 971 (1993), the State argues that Cave's statements are an example of one inmate bragging to another about crimes committed and, as such, were not against his penal interest. In *Seabolt*, however, Seabolt proffered that a fellow inmate, Morris, would testify that a man named "Dewey" or "Dooly" told him that another unnamed man "from Kentucky" told Dewey that he had committed the robbery for which Seabolt was charged. *Id.* at 232. The district court excluded the evidence. It was in response to these facts that the Eighth Circuit Court of Appeals stated that "a statement by one criminal to another criminal (translated by the second criminal to a third criminal) about a heist the first criminal allegedly pulled off is more apt to be jailhouse braggadocio than a statement against his criminal interest." *Id.* at 233. The circumstances of the alleged statements at issue in *Seabolt* are nothing like those surrounding Cave's admission. Bush was not a stranger to Cave's crimes but a participant in them. Cave had no reason to brag to Bush or to falsely state that he shot the victim since Bush, having been present during the crime, would have known whether the statement was hyperbole or a falsehood.

The third element of the statement against penal interest exception is satisfied because corroborative circumstances indicate the trustworthiness of Cave's statements.

Corroborative circumstances exist where there is evidence extrinsic to the declarant's statement that affords a basis for believing the truth of the matter asserted. ***Maugeri*****, 460 So.2d at 977. There are at least four corro**

borating circumstances that provide "particularized guarantees" of the trustworthiness of the Bush and Cave statements.[13] *Id.* at 979.

First, there is "other evidence" aside from Cave's own statements pointing to Cave as being the shooter. At least one court has concluded that this factor alone was sufficient to find a declarant's statement again

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[13] At Parker's hearing, the State suggested that corroborating circumstances must be derived from the evidence admitted at Parker's trial. PCT 108-09. As several cases confirm, however, the court can look to any corroborating evidence, including evidence that was not admitted at the defendant's trial. *See Green v. Georgia*, 442 U.S. 95, 97 (1979); *United States v. Atkins*, 558 F.2d 133, 135-36 (3d Cir. 1977), *cert. denied*, 434 U.S. 929, 972, 1071 (1978); *Johnson v. Singletary*, 647 So. 2d 106 (Fla. 1994). For example, in *Green*, the Supreme Court looked to corroborating circumstances beyond the evidence adduced at defendant's trial. In particular, the Court considered that the State had previously relied on the third party confession the defendant sought to admit. 442 U.S. at 97. In *Johnson*, Justice Kogan in his concurrence suggested that newly discovered evidence that was neither admitted nor available at defendant's trial tended to corroborate the deceased declarant's confession. 647 So. 2d at 112. Further, the majority, in granting defendant an evidentiary hearing to demonstrate corroborating circumstances, suggested that defendant did not have to rely on the trial record to show corroborating circumstances. *Id.* at 111 n.4.

st interest reliable. ***See Perry,*** 675 So.2d at 980. In *Perry*, **the trial court erroneously excluded statements made by the defendant's companion, Powell, that Powell was the triggerman in the crime for which the defendant was accused**. After determining that Powell was unavailable and that the statements were against Powell's penal interest, the district court concluded that "since there was other evidence pointing to Powell as being the shooter, the trustworthiness requirement was satisfied." *Id.* (emphasis added)

The State now argues, in stark contrast to its strenuous arguments to Cave's re-sentencing jury in 1993, that there is "absolutely no extrinsic evidence which showed, or even intimated, that Cave was the shooter." State's Brief at 39. This argument is flatly contradicted by the circumstances marshaled by the State in support of its claim at the 1993 Cave re-sentencing hearing that Cave was the shooter. At

Cave's 1993 re-sentencing hearing the State supported its argument that it had established beyond a reasonable doubt that Cave shot Ms. Slater, with the following assertions: that the evidence at Cave's trial showed that Cave was the "leader of the group of men who committed the Robbery and Kidnaping," it was Cave "alone possessed and used the sole firearm during the Robbery and Kidnaping," it was Cave "who used the firearm to force the victim to open the safe," and it was Cave "who used th

e firearm to force the victim from the store and into the awaiting car." Moreover, the State argued, "[n]o evidence was introduced to show that anyone but the defendant possessed and used the gun" PCR 1421; 1383-98; *see Chambers*, 410 U.S. at 300 (the declarant's confession was corroborated by other evidence that declarant had been seen with a gun immediately after the shooting, of declarant's prior ownership of a gun, and of declarant's subsequent purchase of a new weapon). In light of these statements to the Cave re-sentencing jury and court, it is remarkable that the State would now contend that "[t]here was absolutely no extrinsic evidence which showed, or even intimated, that Cave was the shooter." State's Brief at 38-39.

Second, the circumstances under which Cave made the statements at issue support a finding of their trustworthiness.

Cave made his confession at a time when he assumed that Bryant and other inmates were sleeping, and therefore not listening to his conversation with Bush. Contrary to the State's argument, the fact Cave and Bush were a few cells apart when the conversation took place does not diminish the trustworthiness of the conversation State's Brief at 38. As Bryant described the setting of C

ave's and Bush's conversation, it was night, and the lights in the cell had been turned off for approximately thirty to forty-five minutes when Cave and Bush began conversing. PCR 1283. As Bryant testified at Cave's re-sentencing hearing, at the time of Cave's conversation with Bush, Cave believed that Bryant was asleep. PCR 1266, 1283-84. At the evidentiary hearing Judge Midelis, one of the prosecutors at Parker's 1983 trial, who never read Bryant's testimony and thus was entirely ignorant of the circumstances giving rise to the overheard conversation, emphasized how unlikely it was that Cave would confess to Bryant, a total stranger. PCT 197, 231. Judge Midelis's argument serves to illuminate the point that, contrary to the case where a confession is knowingly made in the presence of strangers, Cave's overheard confession, which was made to a friend under the cover of night under the illusion of a private conversation, presents circumstances of reliability. *See, e.g., Green v. Georgia*, 442 U.S. 95, 97 (1979) (that declarant "made his statement spontaneously to a close friend" was a circumstance corroborating the confession).

Third, as the lower court correctly acknowledged,

> Cave's confession is corroborated by the testimony of Art Jackson PCR 1210. When Jackson went to Cave's cell to investigate the assault on Bryant, Jackson overheard Cave "advise [] Michael Bryant if he would tell what had happened that he would do more to him." PCR 1539. Cave's overheard threat tends to demonstrate the reliability of the Cave declaration because it is independent evidence that the Bush/Cave conversation, as reported by Bryant, had in fact occurred. *See Chambers*, 410 U.S. at 301 (after the declarant confessed his involvement in the crime to an acquaintance the declarant subsequently warned the acquaintance not to "mess him up"). As Judge Davis stated "[t]his statement was a threat to Bryant to keep quiet" about the conversation he had overheard in which Cave admitted to murder. PCR 1210. The State's argument that Cave's threat to Bryant is hearsay and thus cannot corroborate the conversation between Cave and Bush, State's Brief at 39, misunderstanding the use to be made of Jackson's testimony. The corroborative element of Jackson's testimony does not lie in showing that Cave actually intended to carry out his threat to harm

Bryant. Rather, the import of the statement lies in the fact that it was made. It supports Parker's argument that Cave believed or suspected that Bryant had overheard his conversation with Bush during which he made inculpatory statements.

Fourth, perhaps the most telling indicia of reliability of Cave's confession is that the State used Cave's confession at Cave's 1993 re-sentencing hearing to argue that Cave was the triggerman and, therefore, deserving of the death penalty. PCR 1421.-

Not surprisingly, the State now argues, because it is convenient to do so, that "the state's arguments in Cave's re-sentencing were highly equivocal as to the shooter." State's Brief at 42-43. The State deliberately chooses to ignore its direct admission at Cave's 1993 re-sentencing that Bryant's testimony was "credible and believable" and its firm contention that, based on this evidence alone, the court and jury should conclude that Cave "in fact committed the murder for which he is to be sentenced." PCR 1421.

As the Supreme Court held in *Green*, the State's own use of a nonverheard admission that a co-defendant is the shooter is a substantial reason for assuming its reliability. 442 U.S. at 97. Indeed, in *Green*, the Supreme Court expressly held that, in assessing the trustworthiness of such a declaration, perhaps the "most important" factor was that the State "considered the testimony sufficiently reliable to use it against [the declarant] and to base a sentence of death upon it." *Id.* Those precise circumstances are presented here—the Bryant testimony has been relied upon by the State to obtain a death sentence for Cave. The State should not now be heard to disown its admission that Cave's statements overheard by Bryant are reliable.[14]

The State's contention that the situation in Parker's case is not comparable to that in *Green* should be rejected.[15] In *Green* the Court pointed to four "substantial reasons" for

[14] It makes no difference, and the State has failed to articulate why it should make a difference, that Green was seeking to introduce the hearsay declarant's statement against interest at the penalty phase. The reasoning employed in *Green* applies with equal force to the guilt phase.

[15] Knowing that the circumstances surrounding the Cave admission are not truly distinguishable from those in Green, the State chooses to ignore the fact of Cave's direct admission and again bases its arguments on the false premise that the only relevant statement at issue is Bush's accusation.

assuming the reliability of the declarant's statement: 1) the statement in question was made spontaneously to a close friend; 2) there was ample evidence supporting the declarant's admission; 3) the declarant did not have an ulterior motive for making the statement; and 4) the prosecution relied on the statement in the declarant's trial. Each one of these factors is present here. First, Cave and Bush were friends, PCR 422, and Cave's admission to being the shooter was made spontaneously during his conversation with Bush. Second, the State presented ample evidence at Cave's re-sentencing that pointed to Cave's guilt as the triggerman. Third, the record does not evidence any ulterior motive for Cave to implicate himself as the shooter. Finally, the State has previously relied on Bryant's testimony. Under these circumstances Bryant's testimony is sufficiently reliable to have been deemed admissible at Parker's trial under *Green*.

2. Admission of Bryant's Testimony Would Have Been Mandated Under *Chambers*

Even if the trial court had found that Bryant's statement did not satisfy one of the elements of the statement against penal interest exception, the trial court would still have been required to admit Bryant's testimony at the guilt/innocence phase of Parker's trial because, under the principles established in *Chambers*, to exclude it would have violated Parker's Due Process rights. As the Supreme Court stated in *Chambers*, the hearsay rule is "grounded in the notion that untrustworthy evidence should not be presented to the triers of fact." 410 U.S. at 298. Exceptions have developed to allow the admission of hearsay statements "made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination" *Id.* at 299.

In *Chambers*, the Mississippi trial court erred in excluding hearsay testimony consisting of three separate confessions made by the declarant, which "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations

against interest ...[and] ...also was critical to Chamber's defense." *Id.* at 302. The Supreme Court found that Chambers should have been permitted to introduce the statements in his defense, because "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.*; *see also Green*, 442 U.S. at 97 ("Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case [the] exclusion [of critical and reliable testimony] constituted a violation of the Due Process Clause of the Fourteenth Amendment.").

The State has demonstrated its confidence in the reliability of Cave's confession by using Bryant's statement against Cave at his re-sentencing hearing and by touting Bryant's account of the confession as "credible and believable." PCR 1421. On the basis of Bryant's testimony, the State implored the jury to find that Cave "was a major participant in the felonies committed and the actual triggerman in the death of Frances Julia Slater." *Id.* The State cannot now reverse its position and conveniently argue that Bryant's statements should not be admiss

ible at Parker's trial because the testimony regarding the confession is hearsay and so not trustworthy.

None of the State's arguments attacking Parker's reliance on *Chambers* are valid. First, the State argues that "[u]nlike in *Chambers*, neither Bush nor Cave confessed to shooting the victim." State's Brief at 45. As the State acknowledged at the 1993 Cave re-sentencing hearing, however, Bryant heard Cave make "an actual confession" PCR 1453; *see also* PCR 1454-55. Second, the State argues that, unlike in *Chambers*, the statement at issue in Parker's case was not made "to a 'close acquaintance shortly after the murder.'" State's Brief at 45 (citation omitted). The State's argument is not valid because it fails to acknowledge the fact that Bush and Cave were "friends," PCR 422, and that Cave made his admission shortly after the murder while he and Bush were awaiting trial. Third, the State argues that, "unlike in Chambers, there was no other evidence which corroborated the accusation." State's Brief at 46. The State's argument is not valid because it conveniently glosses over the fact that in its Memorandum of Law submitted at Cave's re-sentencing, it argued that "the evidence shows" that Cave "in fact committed the murder for which he is to be sentenced." PCR 351. Finally, the State argues that in *Gudinas v. State*, 693

So. 2d 953 (Fla. 1977), this Court endorsed limiting *Chambers* to its facts. [16] Even if the State is correct it is of no consequence; the analysis above demonstrates that the key facts in *Chambers* are the same as in Parker's case.

Because Judge Davis' determination that Bryant's testimony was admissible at the guilt phase of Parker's trial is supported by the record and by the applicable case law, that determination should be affirmed.

B. Bryant's Statements Are Material to the Guilt/Innocence Phase of Parker's Trial

The State implied in the court below that Bryant's statement is not material because Parker's jury would not have found Bryant credible, and therefore, Bryant's testimony would not have made a difference. PCT 26-27. The State has no basis upon which to argue that Parker's jury would not have found Bryant's testimony credible, and indeed, Judge Davis considered the State's use of Bryant's testimony in the Cave re-sentencing and found that the State should be estopped from challenging Bryant's credibility. PCR 1212. At Parker's hearing, the

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[16] The decision in *Gudinas* turned on facts not present here. There the Court found that "no *Chambers* issue exists and therefore Gudinas' claim is without merit" because "[n]o exculpatory evidence was excluded which would have benefitted Gudinas' defense, denying him a fair trial in accordance with fundamental standards of due process." 693 So. 2d at 965. Here, as the record, the law and the lower court's findings demonstrate, Bryant's testimony is exculpatory, was withheld, would have aided Parker's defense, and had a reasonable probability of affecting the outcome of Parker's trail. In contrast to *Gudinas*, a *Chambers* issue is clearly present in Parker's case.

State's three witnesses, Judge Midelis, Robert Stone and David Powers claimed never to have met Bryant in person. PCT 193, 215, 248, 265-66, 283; *but see* Part IV, *infra* (where we note Stone's contradictory testimony in connection with the Cave re-sentencing and that someone from the prosecutor's office must have interviewed Bryant prior to Cave's original sentencing in 1982). Moreover, Judge Midelis and Stone both indicated that they had never even read Bryant's deposition or trial testimony in the Cave re-sentencing proceedings. PCT 214, 250-51. Without ever having read Bryant's testimony (and claiming never to have met him), the judgment of these witnesses as to how Parker's jury would have reacted to Bryant's testimony is nothing more than baseless speculation.

The State challenges Bryant's credibility even though Richard Barlow, the prosecutor responsible for the re-sentencing of co-defendant Cave, argued to the court at Cave's 1993 re-sentencing hearing that Bryant was "credible and reliable."[17] Under *Green*, the most

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17 **Richard Barlow, the only witness listed for the State who admits to having met Bryant, was present in the court at Parker's hearing but the State elected not to call him. Barlow was the Assistant State Attorney who introduced the Bryant testimony in support of the Sta**

important factor in determining the trustworthiness of a witness's statement, is the fact that the State has used it against another defendant and based an argument in support of a death sentence upon it.

In determining whether suppressed exculpatory evidence is material, the Supreme Court stated in *United States v. Bagley*, 473 U.S. 667, 683 (1985), that "the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." Further, "[t]he reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." *Id.* In Parker's case there is ample evidence demonstrating that the State's failure to turn over Bryant's statement had an adverse effect on the ability of Parker's trial counsel, Judge Makemson, to prepare and present Parker's defense.

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te's effort s to obt ain a deat h sent ence against Cav ea t his re-sent encing proceeding. Barlow's v iew of Bryant 's credibil it y is a mat t er of record—Barlow st at ed, on behal f of t he St at e, t hat Bryant 's t est imony is "cred ible and bel iev able." PCR 1421. The St at e should be es t opped from now claiming t hat Bryant 's t est imony is so mehow incredible or unt rust worthy.

The State's disclosure of Bryant's statements would have dramatically changed the tenor of Parker's trial. The most profound adverse impact of the State's suppression on Judge Makemson's ability to prepare and present Parker's defense was the lack of available evidence to rebut adequately the testimony of Georgeanne Williams. The State has acknowledged that Georgeanne Williams's testimony was its strongest evidence against Parker. Judge Midelis testified to this effect at the hearing:

> The J.B. Parker case is the only case that we had someone testify to the jury that he said he killed Frances Juli[a] Slater by shooting her. This is the only case that we had evidence that the person charged admitted to the shooting, okay. This was the only case like that of the four cases. . . . In the Bush case we argued to the jury it was his gun, it was his car. In the Cave case we argued that he went in the store with the gun, he utilized the gun in escorting Frances Juli[a] Slater out, but we never had anyone in those other two cases testify that he said he did it. This case, J.B. Parker case is the only case where we had that type of evidence, which is our strongest case.

PCT 205; *see also id.* at 237. As Judge Makemson noted, Williams's testimony was the only testimony linking Parker to the murder and to active participation in the crime. PCT 54. Rebutting Williams's testimony was therefore critical to Parker's defense. *Id.*

In *Jacobs v. Singletary*, 952 F.2d 1282 (11th Cir. 1992), suppressed evidence that would have undermined the testimony of the State's only witness who could link the defendant to the murder and active participation in the crimes was found material to the determination of the defendant's guilt or innocence. There, the defendant, Jacobs, was convicted of theft, kidnaping and first-degree murder. *Id.* at 1285. The basis of Jacobs's *Brad*y claim was the State's suppression of statements by its key witness, Rhodes, made during a polygraph examination prior to trial. *Id.* at 1286. The statements were inconsistent with the Rhodes's testimony at Jacobs's trial. *Id.* Reversing the district court, the Eleventh Circuit found that

Jacobs could have used Rhodes's prior inconsistent statements to impeach him regarding his statements about Jacobs's role in the shooting, *Id*. at 1288. The court found it reasonably probable that (absent other inadmissible evidence) the disclosure of the Jacob's statements would have altered the outcome of Jacobs's trial because, if accepted by the jury, the statements related to issues which centrally concerned Jacobs's guilt or innocence. *Id.* at 1289.

Second, had the State not suppressed Bryant's statement, Parker's trial would undoubtedly have taken a different course because, in addition to rebutting Georgeanne Williams, Bryant's and Jackson's testimony would have supported the defense's theory of the case. Judge Makemson testified that at the guilt phase he would have introduced Bryant's statement because it was consistent with the defense's theory of minimizing Parker's participation in the crime:

> The theory was to minimize as much as possible any evidence that would indicate Mr. Parker had an active participation in any of the events that night. . . . to minimize whatever evidence the State had as to his guilt.

PCT 39.

> If I have somebody who can testify or put in issue, somebody other than my client is the one that actually shot and killed the victim, then obviously I would want to have that evidence in to show lack of active participation in the crime.

PCT 53.

Third, the trial court instructed Parker's jury that, to find Parker guilty of felony murder the State must have proved beyond a reasonable doubt that Parker was the triggerman or "knowingly" participated in the underlying felonies. R 1182. As discussed above,

the standard to determine the materiality of Bryant's suppressed statement is not sufficiency of the evidence, and thus it is not the only factor to be taken into account, as the State contends. However, it is significant that the State's case against Parker, even on the felony murder charge, was far from overwhelming. In fact, as shown below, in the absence of Parker's First Statement, which was admitted in violation of Parker's Fifth and Sixth Amendment rights, *Parker v. Singletary*, 974 F.2d 1562, 1575 (11th Cir. 1992), and his trial testimony, which would not have been admitted had the First Statement been suppressed, *id.*, with the exception of the Williams testimony, there was no direct evidence of Parker's active participation in any of the felonies charged. When we state that there was no direct evidence of active participation, we do not mean that there was only a little direct evidence, we mean none.

As the trial transcript amply bears out, leaving the Williams testimony to one side for the moment to understand just how important that evidence was to the State's case against Parker without the inadmissible First Statement, all the other evidence properly admitted against Parker only shows that: 1) at one point well before the robbery, Parker was identified as having been in the store; 2) at about the time of the robbery, another witness saw three black males in the store, one of whom was Bush, but was not able to identify any of the three as Parker; 3) this same witness saw a fourth black male outside in Bush's car, but was unable to identify who was in the car; 4) Parker admitted that he was in Bush's car during the course of the evening and was able to identify where the body had been left and where Bush threw the knife out of the car; and 5) Parker admitted that he received a share of the proceeds of the robbery.

It is important to understand what this evidence does not constitute. It does not in any way indicate or suggest, much less prove, that Parker had any knowledge

beforehand of a plan to rob the store and kidnap and kill Ms. Slater. It does not demonstrate that Parker actively participated in the robbery, abduction or murder. The State's claim that Parker was casing the store when seen there earlier that evening is simply an inference the State asked the jury to draw. There is no direct evidence to support this supposed fact. *See* PCT 226. Similarly, the State's contention that Parker was in the store during the robbery is just that, a contention. No witness identified Parker as having been in the store during the robbery. *See id.* at 226-27. It is equally reasonable for the jury to conclude that Parker was the one who stayed in the car.

Thus, as the following summary of the testimony at Parker's trial relating to Parker's actions during the commission of these crimes establishes, in the absence of the Williams testimony, there is no direct evidence of Parker's active participation in the crimes charged.

1 Marilyn McDevitt — R 508-22: McDevitt testified she was visiting the victim at the Li'l General Store between 11:15 p.m. and 12:45 a.m. the evening the crimes occurred. She identified Parker as someone who came into the store while she was there. At trial, Judge Makemson established through cross examination that her line-up identification was questionable. R 513-17. At her deposition, McDevitt testified that the man in the store was "a little bit taller" than Judge Makemson. Judge Makemson is approximately 5' 4", and Parker is approximately 6' 3". The State's argument that this questionable identification is evidence of Parker's active participation in the crime because it shows he was "casing" the store is supported by nothing other than the State's suspicion. PCT 79-80. There simply is no evidence that even if Parker was in the store while McDevitt was there, that he was not there to buy a bag of chips, or for some other innocent activity. PCT 226.

2 Danielle Symons — R 532-52: Symons was a student at the Florida Institute of Technology with a job in the evenings as a paper carrier. She testified that on the night of the crimes, she stopped her car at the intersection where the Li'l General Store was located at about 3:00 a.m., and saw three black men inside the store and one in the car outside. She identified Bush in a line-up as one of the men in the store. R 535-38, 548-49. She could not identify Parker as any of the four men nor could she identify the person in the car. R 535-37. The State could present no evidence, absent Parker's inadmissible May 5 statement, *see Parker,* 974 F.2d. at 1536, that Parker was in the store and was not the person in the car outside.

3 Richard Lee Farnell — R 614-16: Farnell, a Ft. Pierce police officer, testified that prior to the day of the crimes he saw the four co-defendants together in Ft. Pierce "on the streets." Farnell had no knowledge of the evening in question, so his testimony is irrelevant to the issue of Parker's active, knowing participation in the crimes.

4 Richard Douglas — R 616-33: Douglas testified that he was robbed at Jensen Beach earlier that evening by four Black men, one of whom had long, stringy hair and looked like a woman. He was unable to identify Parker as one of the men who robbed him. His testimony, therefore, provides no evidence to support the State's claim that Parker was an active participant in the crimes for which he was charged.

5 Timothy Gene Bargo — R 674-92: Bargo, a deputy sheriff for St. Lucie County, testified that, on two occasions after the robbery, abduction and murder had already occurred, he stopped Bush's car because it had a defective tail light. Except for Bush, Bargo could not identify any of the occupants of the car.

6 Detective Powers — R 794-836: Detective Powers testified regarding Parker's second statement made to the police. He testified that he took Parker and Richard Kelly Vaughn, a police officer with the Martin County sheriff's department, for a drive during which they covered the route of the crime. Powers testified that Parker showed him where the body was left and where Parker believed the knife had been thrown. Powers also stated that Parker believed Bush had shot and stabbed the victim. R 798. Powers testified that Parker told him that Parker was in the front seat of the car with Bush as they were driving. Parker then told him that all co-defendants were present when they split the money up at Cave's house; his portion, according to Powers, was between twenty and thirty dollars. R 802-03.

In his cross-examination of Powers, Judge Makemson attempted to cast doubt on whether Powers was testifying to exactly what Parker had said to him on the ride. Powers took a statement from Bush immediately after his ride with Parker. Judge Makemson therefore attempted to demonstrate that Powers could have confused the two statements because the conversation with Parker had not been taped, and Powers did not record what Parker allegedly stated until ten days after the ride. R 806-12, 835.

7 Richard Kelly Vaughn — R 836-48: Vaughn confirmed that he accompanied Powers and Parker on the drive covering the route taken by the defendants on the night of the crime. He testified that his role was strictly for security purposes, and that he had been instructed not to participate in the investigation of the crimes for which Parker was charged. Vaughn testified that from his position in the back seat he overheard Parker indicate that he had received between twenty-five and thirty dollars. R 847.

8 Georgeanne Williams — R 878-913: The State called Williams as one of its last witnesses. Her testimony, which was improperly buttressed with testimony from two other witnesses who repeated her prior consistent statements, *see Parker v. State*, 476 So. 2d 134, 137 (Fla. 1985), was the State's only evidence that Parker was the shooter, and indeed, is the only direct admissible evidence of an active role in the murder by Parker. Williams testified that when she was visiting her boyfriend Bush, whom she visited as often as she could, R 894, she stopped at Parker's cell and asked who shot the victim. Williams claims that Parker responded by telling her that he did, and that Bush stabbed her. R 883.

Judge Makemson attacked Williams's credibility by pointing out that she was Bush's girlfriend, had not known Parker well, and had lied before to her parents about Bush so they would not object to her seeing Bush. R 891-94, 897-99.[18]

As is clearly demonstrated by a review of the trial transcript, and as the Eleventh Circuit stated, absent Parker's inadmissible statement, there was very little evidence of Parker's active, knowing participation in the robbery. *Parker*, 974 F. 2d at 1575-76. The only evidence linking Parker to the murder is the Williams testimony. Without Parker's inadmissible

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18 **There was no other evidence submitted at Parker's trial bearing on the nature and extent of Parker's participation in the robbery, kidnaping and murder. The balance of the witnesses testified to the physical evidence pertaining to these crimes. None of these witnesses, however, could place Parker at the scene or testify concerning what, role, if any, he had in the crimes charged.**

May 5 statement and with the admission of credible evidence rebutting Williams testimony, the only unrebutted evidence connecting Parker to the crime is the second statement, as testified to by Powers. Since the second statement contained no details of the murder, and no discussion of the events leading up to the murder, it could not be used to prove that Parker "knowingly" participated in the underlying felonies.

Because the State could establish that Parker was guilty of felony murder by arguing that Williams's testimony proves that Parker was the shooter, evidence that someone else had confessed to being the shooter was plainly material to Parker's defense. Had that evidence been disclosed, Judge Makemson would have used it in his effort to establish that Parker was not the killer. PCT 53. At the evidentiary hearing, the State's witnesses themselves recognized that in a murder trial nothing is more important to the prosecution than evidence that the defendant then on trial committed the murder. PCT 204-05, 261-62. Indeed, both prosecutors testified that they would have wanted to use the Bryant testimony at the Cave trial. PCT 214-16, 261-62. In fact, it was precisely because the State possessed such direct evidence against Parker, that the State believed that Parker's was its strongest case. PCT 204-05, 237. These facts, submitted in support of a claim that the Bryant statements were not material, prove exactly the opposite — they establish the critical importance to the defense of any evidence that someone other than Parker was the shooter. That Judge Makemson was deprived of this opportunity by the State's wilful withholding of exculpatory evidence establishes that this Court can have no confidence in the guilty verdict against Parker.

The lower court erred by concluding that since the Eleventh Circuit determined that the unconstitutional admission of Parker's May 5 statement into evidence was harmless error, the admission of Bryant's testimony at the guilt/innocence phase of the trial would not be material to the jury's verdict. First, the Eleventh Circuit's decision is contradicted by its earlier conclusion that the second statement made by Parker to police "contained no details of the events leading up to and during the murder." *Parker*, 974 F.2d at 1575-76.[19] Second, to demonstrate a *Brady* violation, the standard to be met is not harmless error, but rather, one must demonstrate there is a reasonable probability that the cumulative effect of the suppressed evidence, the unconstitutional admission of Parker's May 5 statement into evidence, and the inappropriate bolstering of Williams's testimony through the introduction of prior consistent statements, *see Parker*, 476 So. 2d. at 137, would affect the outcome of the trial. That is, whether the constitutional errors committed by the State undermine confidence in the verdict. *Kyles v. Whitley*, 514 U.S. 419, 435-36 (1995) makes clear that this is different from a harmless error standard. Therefore, the fact that the Eleventh Circuit held that the admission of Parker's May 5 statement was harmless error is not determinative of whether the cumulative affect of the suppression of Bryant's testimony and the unconstitutional admission of Parker's May 5 statement entitles Parker to a new trial. As the Eleventh Circuit held in *Jacobs v. Singletary*, 952 F.2d 1282, 1289 (11th Cir. 1992), where the cumulative effect of the suppressed evidence and the

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19 **In his petition for rehearing and rehearing en banc in the Eleventh Circuit, PCR 527-68, Parker has brought this inconsistency in the Panel's opinion to the attention of the court as part of his request that the court reconsider the panel's conclusion that the wrongful admission of the first statement constituted harmless error.**

inadmissible evidence — here, Bryant's statements and Parker's inadmissible May 5 statement — is that confidence in the verdict rendered by the jury is undermined, the suppressed evidence is deemed material, and the defendant entitled to a new trial.

III.

THE RECORD AND THE LAW PLAINLY SUPPORT THE LOWER COURT'S FINDING THAT BRYANT'S STATEMENTS ARE MATERIAL TO THE PENALTY PHASE OF PARKER'S TRIAL

As a result of the suppression of the Bryant statements, the Parker jury's advisory verdict of death, by a vote of eight to four, is not a verdict worthy of confidence for the following reasons: 1) Parker's trial counsel was prevented from introducing independent evidence that someone other than Parker was the triggerman — a factor that is critical to the judge's and jury's deliberations at the penalty phase; 2) Parker's trial counsel was prevented from introducing disinterested evidence that would have undercut the Williams testimony, the State's only direct evidence that Parker was responsible for the murder; and, 3) Parker's trial counsel was prevented from presenting critical evidence that would have supported Parker's defense of lack of active participation in the crimes.[20] Contrary to the State's argument on this appeal, the lower court's materiality determination was fully supported by these effects of the suppression on the penalty phase proceeding and was not based solely on an assessment of Bryant's credibility.

A. The State's Suppression of Bryant's Statement Undermines Confidence in the Outcome of the Penalty Phase of Parker's Trial

[20] As Judge Davis held, PCR 1209, and the State has conceded, State's Brief at 14, Bryant's testimony plainly would have been admissible at the penalty phase of Parker's trial.

As this Court and the Eleventh Circuit Court of Appeals have held, at the sentencing phase, evidence regarding the identity of the triggerman is critical to the deliberations of both the judge and the jury, and evidence contradicting the State's claim that the defendant is the shooter is therefore material. *See Jacobs v. Singletary*, 952 F.2d 1282, 1296 (11th Cir. 1992); *Garcia v. State*, 622 So. 2d 1325, 1331 (Fla. 1993); *Hawkins v. State*, 436 So. 2d 44 (Fla. 1983); *Malloy v. State*, 382 So. 2d 1190 (Fla. 1979). Nowhere in its Brief on Appeal does the State even begin to address this central role at the penalty phase of evidence bearing on the relative culpability of the co-defendants.

In *Jacobs*, for example, the evidence suppressed by the State would have been used by defense counsel to impeach the State's key witness, who, like Georgeanne Williams in Parker's case, provided the *only* evidence that the defendant was the shooter. The State withheld evidence that the witness's prior statements directly contradicted his trial testimony on several important issues, including the identity of the shooter. The Eleventh Circuit reversed Jacobs' conviction and remanded the case for a new trial, since the court found it reasonably probable that the outcome of Jacobs's trial would have been different if the witness's prior statements had been disclosed and the inadmissible evidence had not been admitted. 952 F.2d at 1289.

In *Garcia*, as was the case at Parker's trial, the state attorney argued to the jury that Garcia was the shooter, while suppressing evidence that supported Garcia's contentions that another co-defendant was the shooter. Upon his arrest, Garcia had named "Joe Perez" as being the shooter of the two victims, and Garcia identified the man using the name "Joe Perez" as one of his co-defendants, Urbano Ribas. 622 So. 2d at 1328-29. Nevertheless, the State argued

that "Joe Perez" did not actually exist, and contended that when Garcia referred to the deeds of "Joe Perez," Garcia was actually talking about his own actions.

The State, however, had suppressed a statement given to the police which would have corroborated the existence of "Joe Perez." In the statement, a witness said that, upon arrest, Ribas identified himself as "Joe Perez." *Id.* at 1330. This statement directly contradicted the prosecutor's statements in his opening and closing arguments that "Joe Perez and Garcia are one and the same person and Garcia was thus a shooter by his own words." *Id.* The Florida Supreme Court ruled that the withheld statement was clearly material as to the penalty phase of appellant's trial, since:

> the statement would have greatly aided the defense in arguing that [co-defendant] Ribas, not Garcia, was a shooter, and Garcia was thus undeserving of the death penalty. The State's failure to disclose the statement undermines the integrity of the jury's eight-to-four recommendation of death and constitutes a clear *Brady* violation.

Id. at 1331.

Garcia mandates the conclusion that Bryant's statements are material to the penalty phase of Parker's trial. Parker's jury also voted eight to four to recommend the death sentence. Just as in *Garcia*, credible testimony that Cave, not Parker, was the shooter would have greatly supported Parker's argument that he was not deserving of the death penalty, creating a reasonable probability that two of the eight jurors who recommended death would have instead recommended life imprisonment. Here, the Bryant statements are even stronger than the evidence suppressed in *Garcia*. Bryant could have testified to a direct admission by Cave that he, not

Parker, was the shooter. The statement at issue in *Garcia* could only have been used to support the defendant's claim on a collateral issue — that Ribas was also known as Perez — thereby supporting his own statement that Ribas was the shooter.

The importance of the identity of the triggerman to the jury's determination of sentence has been repeatedly recognized. *See Hawkins*, 436 So. 2d at 47; *Malloy*, 382 So. 2d at 1193. Even where the identity of the shooter is seemingly irrelevant to the aggravating factors found by the trial court as justification for imposing the death sentence, if there is conflicting evidence as to the identity of the shooter, the jury's advisory sentence of life is reasonable, since *"[c]onflicting evidence on the identity of the actual killer can form the basis for a recommendation of life imprisonment." Cooper v. State*, 581 So. 2d 49, 51 (Fla. 1991) (emphasis added). Thus, contrary to the State's argument, State's Brief at 18, there is a sound basis supporting the trial court's finding of a reasonable probability that, had Bryant's testimony been available to Parker, the result would have been a life recommendation and sentence.

In *Hawkins*, the jury, by a vote of six to six, returned a verdict advising a life sentence. The defendant, in an effort to rebut the State's evidence that he was the shooter, introduced evidence that he was not the shooter and, in fact, participated in the crime under duress. The trial judge, however, rejected the jury's recommendation and imposed a sentence of death. The Florida Supreme Court reversed the trial judge, finding that, *given the conflicting evidence introduced regarding the identity of the triggerman, there was a reasonable basis for the jury's advisory sentence of life.* 436 So. 2d at 47 (emphasis added); *see also Malloy*, 382 So. 2d at 1193 ("the jury's action was reasonable because of the conflict in the testimony as to who was actually the triggerman").

In addition to providing crucial evidence of the identity of the triggerman, Bryant's statements are material because, had they been available for use at Parker's trial, they would have undercut Williams's testimony — the State's only evidence against Parker directly implicating him in the murder. As the United States Supreme Court and this Court have consistently held, evidence that undercuts and destroys confidence in the prosecutions's key witness is material to the death penalty determination. *See Kyles v. Whitley*, 514 U.S. 419, 442-45 (1995) (statements suppressed by the state would have "destroyed confidence" in the story told by the State's "best" witness); *Jacobs*, 952 F. 2d at 1289 (reversal required where evidence the defense could have used to impeach the state's key witness was suppressed); *Gorham v. State*, 597 So. 2d 782, 785 (Fla. 1992) (undisclosed evidence was material where the defense was unable to impeach a key witness due to the suppression of evidence).

In *Jacobs*, the Eleventh Circuit held that the State's suppression of evidence the defense could have used to impeach a key witness was material and required a reversal of Jacobs's conviction. There, the defendant was convicted of first degree murder of a police officer, theft of a firearm and a car, and kidnaping. The defendant had been driving with two others at the time of the alleged offenses, and asserted that she had been merely a passenger in the car and thus a passive participant in the crimes. The State did not disclose evidence that its key witness had taken a polygraph test prior to trial, making inconsistent statements about defendant's involvement in the crime. Since his testimony was the state's only significant evidence of defendant's active involvement, the court found:

> The state violated *Brady v. Maryland* by presenting its most important eyewitness without disclosing a prior statement that both contradicted the

> eyewitness' trial testimony and supported Jacobs' defense theory.

952 F.2d at 1296.

Williams's testimony was the only admissible evidence of Parker's *active* participation in the crimes. Indeed Williams's testimony was the only evidence submitted at Parker's trial that could even connect Parker in any way to the murder weapon — a gun owned by Bush, which was never located and which no witness at Parker's trial other than Williams could place in Parker's hand — or to the act of shooting the victim. In short, the evidence against Parker was not overwhelming and the State's contention that Parker was more than a passive participant rested primarily on the shoulders of Georgeanne Williams.[21] If the jury had heard Bryant's statement that Cave shot the victim and Bush stabbed her, it is reasonably probable that this testimony would have destroyed whatever confidence the jury had in Williams's testimony that Parker "confessed" to her. While Parker's counsel sought to undermine Williams's credibility, stressing her obvious bias as Bush's girlfriend, he was significantly handicapped because he had no disinterested testimony to support his contention that Williams was lying to protect Bush. As Judge Davis pointed out in his opinion, the Florida Supreme Court later "found as a reasonable explanation with regard to Williams's testimony, that the circumstances indicated that she had a motive to falsify her testimony — to keep her boyfriend, Bush, out of the electric chair. *Parker v. State*, 476 So.2d 134, 137 (Fla. 1995)." PCR 1210. Bryant's testimony would

[21] In assessing the impact of the suppression of Bryant's statements, it is critical to keep in mind that, but for the erroneous denial of Parker's pre-trial motion to suppress his inadmissible May 5 statement, the penalty phase jury and court would not have considered the aspects of Parker's May 5 statement and testimony that the prosecutors contended showed Parker's active participation in the felonies. Parker's trial counsel would not have introduced the May 5 statement at the penalty phase. PCT 40.

have provided independent evidence needed to persuade the jury that Williams had fabricated her story. *See Banks v. Reynolds*, 54 F.3d 1508, 1520 (10th Cir. 1995) (evidence that would have rebutted the State's key witness was material under *Brady*).

Presented with the conflicting Bryant and Williams testimony at the 1993 Cave re-sentencing hearing, Judge Walsh concluded that he could not find that the State had established beyond a reasonable doubt that Cave was the shooter. PCR 1490-91. It is at least reasonably probable that, had Parker's trial judge and jury been presented with the same conflicting evidence, they would not have concluded that the State had met its burden of proving beyond a reasonable doubt that Parker was the shooter. Judge Walsh's reaction to the conflicting testimony demonstrates that putting forth evidence that someone else had confessed to being the shooter, even though it would contradict Parker's alleged statement to Powers that Bush was the shooter, raises sufficient doubt about Parker's involvement in the murder to create a probability of a different outcome. As the Supreme Court stated in *United States v. Agurs*, 427 U.S. 97, 112 (1976), "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."

Bryant's testimony would not have left the jury with the impression that Parker was untruthful, as the State argues. State's Brief at 24. Rather, Bryant's testimony would have been consistent with an argument by Parker's trial counsel that Powers' memory had eroded and, as demonstrated, would have undercut Williams's tale of Parker's "confession." The State, not Parker, has the burden of proving beyond a reasonable doubt which of the defendants was the shooter. So long as the evidence creates a reasonable doubt as to Parker — which the Bryant

testimony clearly does — the jury is more likely to conclude that someone other than Parker is responsible for the victim's death, and that Parker therefore should not receive a death sentence.

A finding that Bryant's statements are material even if they seemingly conflict with Parker's statement that Bush was the shooter is supported by case law. In *Banks,* 54 F.3d at 1520 fn28 for example, evidence withheld by the State that suggested that one, Hicks, was the shooter was material even though it would have been inconsistent with a recorded statement the defendant gave to the police in which he stated that one, McClure, was the shooter. In *Felker v. Thomas*, 52 F.3d 907, 910-11 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 956 (1996) a case relied on by the State, the prosecution's theory that the murder victim was last seen alive on a Tuesday was contradicted by allegedly undisclosed evidence that the victim was seen alive on Wednesday, but, in the presence of the defendant. The *Felker* court found that "although the evidence in question would have been inconsistent with the prosecution's theory at trial about when the victim the was last seen alive, it would not have been inconsistent with any of the evidence proving Felker's guilt." *Id*. at 910-11. Similarly, even if evidence that Cave was the triggerman would have been inconsistent with Parker's statement that Bush was the triggerman, it would nevertheless be material since it would be consistent with the evidence supporting Parker's innocence.[22]

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[22] The State's reliance on *Felker* is misplaced. The withheld evidence in question in *Felker* was contradictory in that, if true, the evidence tended to establish Felker's guilt, not innocence. 52 F.3d at 910-11. The other cases relied on by the State are equally unsupportive of its position. In *United States v. Starrett*, 55 F.3d 1525, 1556 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1369 (1996) there was a determination by the court that the defendant would have had to lie in presenting his defense to the court in order to take advantage of the withheld exculpatory evidence. The decision in *United States v. Gossett*, 877 F.2d 901, 907 (11th Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990) similarly does not support the State's argument because, as the State acknowledges, that case had nothing to do with the issue of *Brady* materiality (finding

evidence not trustworthy under the statement against penal interest exception). Finally, the decision in *Garcia* in fact, supports Parker's case. 622 So.2d at 1330-31 (evidence was material where it contradicted State's theory at the penalty as to the identity of the triggerman).

The State's suppression of Bryant's statements undermines confidence in the outcome of the penalty phase because Parker's trial counsel was prevented from presenting critical evidence that would support the defense's theory of the case. *See* PCT 56-59. Contrary to the State's portrayal, Parker's defense strategy did not hinge on proving that Bush was the shooter. Parker's defense strategy was to demonstrate that: he was innocent of the shooting; the State's key witness, Georgeanne Williams, was not worthy of belief; and, his role in the crimes was minimal. The introduction of Bryant's statement supports this defense strategy. When undisclosed evidence supports the defense theory of the case, such evidence is deemed material. *See Kyles*; *Jacobs*; *Garcia*, 622 So. 2d at 1331. Bryant's testimony would not have contradicted or been detrimental to Parker's defense, as the State contends. State's Brief at 24, 27. Bryant's testimony is consistent with Parker's innocence of the shooting, Williams's having testified falsely and Parker's minimal role in the crimes. As Judge Makemson testified at the evidentiary hearing, Bryant's testimony that someone else admitted to shooting the victim could have had a great impact in rebutting the Williams testimony and providing affirmative evidence that someone other than Parker was most culpable. PCT 58-59. As the record evidences, Bryant's testimony would have been used by Parker's trial counsel to support Parker's defense that he was merely a passive participant in the crimes. PCT 56-57. Bryant's testimony thus would have supported Parker's argument that Cave and Bush were the active perpetrators of the crimes, while he and Terry Wayne Johnson were not.

B. Introduction of the Bryant Statements at the Penalty Phase Would Not Have Led to the Introduction of Bush's and Cave's Out-of-Court Statements Implicating Parker

Unable to challenge effectively the materiality of Bryant's testimony to the penalty phase of Parker's trial, the State has resorted to arguing that, even if Bryant's testimony had been disclosed, Parker's trial counsel would not have called Bryant to testify because to do so would have opened the door to the admission of Bush's and Cave's [23] statements implicating Parker to "impeach the credibility of Bush's accusation." [24] State's Brief at 25-26. The State's argument is based on a misstatement of the exculpatory evidence at issue. The State portrays the exculpatory evidence to which Bryant would testify as merely an accusation by Bush that Cave was the shooter and corresponding silence by Cave. As the State itself acknowledged at Cave's 1993 re-sentencing hearing, this is not the case. Bryant's deposition testimony and Jackson's deposition and hearing testimony at Cave's re-sentencing clearly evidence a direct admission by Cave. No door to Cave's and Bush's prior statements would have been opened because it is Bryant's testimony of Cave's direct admission which would have been elicited from Bryant at Parker's trial and on which Parker would have relied. The "credibility of Bush's accusation" is simply irrelevant to a direct admission by Cave.

Even if Bryant's testimony would have provided a basis on which to seek to introduce Cave's and Bush's statements, to introduce the statements would have violated Parker's Sixth Amendment right to confront the witnesses against him. At the very least, admission of the Bush and Cave statements, would have been denied because the prejudicial effect

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[23] Despite the State's claim that introduction of both statements would have been inadmissible to impeach Bush's credibility, nowhere does the State explain how Cave's statement could possibly pertain to an assessment of Bush's credibility.

[24] In arguing at Cave's 1993 re-sentencing hearing that Bryant's testimony demonstrated that Cave was the shooter, the State did not think that it was opening the door to introduction of Bush's prior statement to the police implicating Parker or Parker's statements implicating Bush and certainly did not believe that it was putting Bush's credibility at issue.

of the statements plainly outweighs whatever slim probative value they may have in impeaching Bush's credibility.

The State attempts to overcome the Sixth Amendment bar to the introduction of the Cave and Bush statements by relying on *Tennessee v. Stree*t, 471 U.S. 409 (1985), for the proposition that the statements would be admissible for a nonhearsay purpose, namely to "show that all of the co-defendants were pointing fingers at each other."[25] State's Brief at 25. *Street* is inapplicable to this case for several reasons.[26] First, in *Street*, the State's strongest evidence against the defendant, Street, was his own confession. Street argued that his confession was a coerced imitation of the confession of his co-defendant. To rebut the defendant's claim, the State was allowed to introduce the co-defendant's confession for the alleged nonhearsay purpose of pointing out to the jury the differences between the two confessions. The Supreme Court held that the admission of the co-defendant's confession did not violate the Confrontation Clause. The Court did not, however, rule that all out-of-court co-defendant statements are per se admissible for a nonhearsay purpose irrespective of the

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[25] The irrationality of the State's contention is established by the single fact that, through Bryant, Parker could show that Cave, in an unguarded moment when he thought only Bush could hear, did not point the finger at a co-defendant. He instead pointed it directly, and unequivocally, at himself.

[26] *Street* was not decided until 1985 and was therefore not the law at the time of Parker's 1983 trial. Prior to *Street*, none of the Supreme Court's Confrontation Clause cases addressed the issue of whether a co-defendant's confession introduced for a nonhearsay purpose violated the Confrontation Clause. *See Street*, 471 U.S. at 413. Thus, even if the State had raised the argument that the Bush and Cave statements were admissible for nonhearsay purposes, in the absence of any authority supporting its position, it is doubtful that the State's argument would have carried the day.

Confrontation Clause. Rather, the Court admitted the confession because "there were no alternatives that would have both assured the integrity of the trials's truth-seeking function and eliminated the risk of the jury's improper use of evidence." As Justice Brennan stated in his concurrence: "[t]he out-of-court confession is admissible for nonhearsay purposes in this case only because that confession was essential to the State's rebuttal of respondent Street's defense and because no alternative short of admitting the statement would have adequately served the State's interest." *Id*. at 417 (emphasis added).

As the Supreme Court made plain in *Street*, the State must demonstrate that its use of the Bush and Cave statements would have been essential to refute Parker's defense. The State's use of the Cave and Bush statements against Parker would have been peripheral, not essential, to the State's case. The State had a clear alternative means of responding to the impact of the Bryant testimony — to argue, as it did repeatedly at Parker's trial, that Parker himself had admitted shooting Ms. Slater in his alleged statement to Georgeanne Williams.

In addition, *Street* is inapplicable because Bush's and Cave's statements are substantially more prejudicial, and less probative, than the co-defendant statement at issue in *Street*. The co-defendant's confession in *Street* was merely cumulative of the defendant's confession which was already in evidence. Further, any claim by Street that admitting his co-defendant's confession would prejudice him was specious given that Street had earlier sought to introduce the same co-defendant's confession on the ground it was "very material" to proving his argument that his confession was coerced. *Street*, 471 U.S. at 417 fn*. In contrast, Parker has consistently maintained that Bush's and Cave's statements are highly prejudicial and has fought, successfully, to keep them from being introduced against him. See R 1608-09, 1682.

Parker's case falls squarely within *Bruton v. United States*, 391 U.S. 123 (1968). There the Supreme Court stated:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored . . . [s]uch a context is presented here, where the powerfully incriminating extrajudicial statements of a co-defendant . . . are deliberately spread before the jury. . . .

Id. at 135-136.

Bruton thus prohibits the admission of statements which would have the *"'powerfully incriminating' effect of one accomplice pointing the finger directly at another, without subjecting himself to cross-examination." United States v. Di Gregorio*, 605 F.2d 1184, 1190 (1st Cir. 1979) (quoting *Bruton*, 391 U.S. at 136) (emphasis added) (distinguishing *Bruton* on the ground that admission of co-defendant's statement that only indirectly implicated defendant was not "powerfully incriminating"), *cert. denied*, 444 U.S. 937 (1979). This is exactly the kind of evidence that the State now claims it would have sought to place before Parker's jury had Parker's trial counsel introduced Bryant's statements.

Nor could the Confrontation Clause objection to the introduction of Bush's and Cave's statements be cured by a limiting instruction to the jury. As the Supreme Court acknowledged in *Bruton*, a limiting instruction that attempts to restrict the jury to consideration of the admissible aspects of a co-defendant's out-of-court statement is insufficient when the inadmissible aspect of the statement is "devastating to the defendant," and the declarant has a "recognized motivation to shift the blame onto others." 391 U.S. 123, 129, 136; *see Gaines v.*

Thieret, 846 F.2d 402 (7th Cir. 1988) (reversible error to allow police officer to testify regarding out-of-court statements of defendant's brother implicating defendant as triggerman).

The *Bruton* Court further stated that "[t]he government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." *Bruton*, 391 U.S. at 129 (quoting *Delli Paoli v. United States*, 352 U.S. 232, 248 (1957) (Frankfurter, J., dissenting). This is exactly the type of windfall the State seeks to gain under the guise of introducing Cave's and Bush's statements for a nonhearsay purpose. In deciding the appropriate penalty for Parker, the jury was required to consider whether the shooting was done by another individual and whether Parker's involvement was relatively minor. *See* Fla. Stat. §921.141(6)(d) (1996). Whether Parker was the triggerman was, therefore, a central issue in the jury's decision to sentence Parker to death. At Parker's trial, the only statements introduced supporting the State's theory that Parker was the triggerman were those of Bush's girlfriend, an obviously biased witness. Cave's and Bush's statements thus could conceivably add weight to the State's contention that Parker was the triggerman. In these circumstances the admission of Cave's and Bush's statements would violate the Sixth Amendment.

Even if the Sixth Amendment did not bar the introduction of Bush's and Cave's statements those statements would nevertheless have been excluded because their probative value is substantially outweighed by the undue prejudice they would cause to Parker. *See* Fla. Stat. § 90.403 (1996). In *United States v. Reyes*, 18 F.3d 65, 67-68 (2d Cir. 1994), the government introduced statements that were allegedly made to a customs agent by the defendant's accomplices which implicated defendant, Stein, in drug smuggling. The government

argued that the statements were admissible for a nonhearsay purpose. There the court stated that although the government was technically correct because the jury was instructed not to consider the out-of-court declarations as evidence of the truth of what was said, "when the likelihood is sufficiently high that the jury will not follow the limiting instructions, but will treat the evidence as proof of the truth of the declaration, the evidence is functionally indistinguishable from hearsay." *Id*. at 69. As a result, whether the evidence may be received turns on a balancing of the probative value against the prejudicial effects. *Id*. at 69-70. As the court stated:

> contrary to the government's contention, the mere identification of a relevant non-hearsay use of such evidence is insufficient to justify its admission if the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice.

Id. at 70.

This is a textbook example of a situation in which evidence would be properly excluded as more prejudicial than probative. It is well settled that the statement of a co-defendant inculpating another is presumptively unreliable. *Lee v. Illinois*, 476 U.S. 530, 541 (1986). Accordingly, evidence that Bush and Cave pointed the finger at Parker is of minimal probative value with respect to the purported reason for their introduction — to challenge Bush's credibility. On the other side of the scales, Bush's and Cave's statements are highly prejudicial. Bush's and Cave's statements address the most disputed issue in Parker's case, the identity of the triggerman, and directly implicate Parker. Given the State's use of Williams's testimony to prove that Parker is the triggerman, it is likely that Bush's and Cave's statements will be viewed by the jury as further substantive evidence that Parker was the triggerman or as evidence bolstering Williams's testimony.

It is axiomatic that that so-called impeachment evidence is not permitted where it is used as a stratagem to get before the jury otherwise impermissible hearsay. *See United States v. Gossett*, 877 F.2d 901, 907 (11th Cir. 1989), *cert. denied,* 493 U.S. 1082 (1990); *Morton v. State*, 689 So. 2d 259, 263 (Fla. 1997). At the evidentiary hearing, Judge Midelis, the prosecutor at Parker's trial, directly stated what the State's true motive for seeking to introduce Bush's and Cave's statements would be — to get the jury to conclude that, "[the co-defendants are] all accusing one another of doing it and they're all guilty of first degree murder . . ." PCT 213. Because there can be no doubt that Cave's and Bush's statements are most valuable to the State if the jury accepts them for their truth, there is strong reason to believe that, had the State sought to introduce the Bush or Cave statements to respond to Bryant's testimony, the State would impermissibly be seeking to put before the jury evidence that would otherwise be inadmissible hearsay.

C. Judge Davis Did Not Err in Granting Relief with Respect to the Penalty Phase

Contrary to the State's contention on this appeal, in evaluating materiality, Judge Davis properly considered the significance of the State's use of Bryant's testimony at Cave's 1993 re-sentencing hearing. At the evidentiary hearing and in its posthearing brief the State challenged the materiality of Bryant's statements on the ground that Bryant would not have been effective if called by Parker as a witness because Bryant's testimony would have been subject to impeachment. PCT 212, 216; PCR 768. Specifically, the State argued that Midelis would have attempted to establish that Bryant had a motive to point the finger at Cave because Cave had sexually assaulted Bryant and broken his nose. PCR 768-69. The State argued that Midelis would further have attempted to establish that because Cave had denied Bryant food for

three days, Bryant's ability to perceive accurately the Cave and Bush conversation was impaired.[27]

PCR 770. In rejecting the State's arguments Judge Davis stated:

> The State also contends that Bryant's testimony is impeachable with regard to accuracy and bias. . . . This argument is inconsistent with the State's use of Bryant as a witness in the Cave re-sentencing. The Court has carefully reviewed the depositions and trial testimony of Bryant and Jackson in the Cave resentencing and finds that Bryant could be considered by a jury to be a credible witness as to the incident which he reported. There is no evidence that Bryant can expect any gain or favor for his testimony eleven years after the event. Further, his testimony is consistent with his report to Jackson in 1982. . . .

PCR 1209-10.

[27] As these facts make clear, the State's contentions that the "trustworthiness of Bryant's testimony was never an issue in the materiality analysis regarding Parker's penalty phase" and that it only "argued the untrustworthiness of *the substance* of Bryant's testimony" in an effort to refute the existence of corroborating circumstances necessary for the admission of Bryant's statement at the guilt phase, State's Brief at 19, 28, are directly contradicted by the record.

Judge Davis concluded that:

> In the present case, the State suppressed evidence favorable to Parker, by failing to disclose Bryant's statement. This statement was material and the Court finds that it could with a reasonable probability, result in a different recommendation by the jury in the penalty phase. The State has vouched for the credibility and trustworthiness of Bryant's testimony by using it in the Alphonso Cave proceedings. The State cannot say, in good conscience, that this testimony is not credible, not trustworthy, is biased and insignificant to Parker's defense.

PCR 1212.

The State's prior use of Bryant's statements was not the "sole basis" for Judge Davis's decision to grant relief with respect to the penalty phase. It is apparent from Judge Davis's decision that he considered and accepted Parker's argument that, when faced with the conflicting testimony of Bryant and Williams, it was reasonably probable that the jury would have found Bryant's testimony sufficient to raise a reasonable doubt concerning the State's claim, in reliance on the William's testimony, that Parker was the shooter. PCR 1210 n 2. Moreover, Judge Davis did not simply rely on Bryant's credibility for his materiality determination with respect to the penalty phase. Rather, Judge Davis evaluated the materiality of Bryant's statements to the penalty phase of Parker's trial in the context of the entire record, and applied the correct standard of materiality in doing so. PCR 1208-09, 1211. The record amply supports Judge Davis's determination that the State withheld material exculpatory evidence entitling Parker to a new sentencing hearing.

D. The Plain Materiality of Bryant's Statements to the Sentencing Phase Is Demonstrated by the Impact of that Evidence on the Ability to Sustain a Death Sentence Under *Enmud* and *Tison*

The State argued in the court below that the identity of the triggerman is irrelevant in light of the aggravating factors relied upon by the State. PCR 684; PCT 203-04. Even though this argument apparently has been abandoned on appeal, its assertion in the lower court demonstrates the State's consistent understatement of the importance to the sentencing determination of evidence demonstrating that Parker was not the shooter. As shown above, this Court and the Eleventh Circuit have repeatedly recognized that, in the sentencing process, whether the jury or trial judge believes that the defendant then on trial is the shooter is perhaps the most critical factor in the deliberations. Indeed, in each of these cases, the assessment of the materiality of the suppressed evidence concerning the identity of the shooter was not at all diminished by the existence of aggravating factors cited by the trial court in support of a death sentence. *See Jacobs*; *Garcia*.

The State's argument that the identity of the triggerman is immaterial flies in the face of the State's repeated emphasis in its closing arguments to the jury at the penalty phase of Parker's trial, that Parker was the triggerman:[28]

> I submit to you that J.B. Parker executed Frances Julia Slater.

[28] Indeed, in the court below, the State contended that Williams's identification of Parker as the triggerman made the State's case against Parker stronger than its cases against the other co-defendants. PCT 205.

* * *

What did Frances Julia Slater ever do to J.B. Parker? Absolutely nothing. Nothing. Frances Julia Slater, an eighteen year old girl, tries to make her own way in life. She was gainfully employed. She never harmed J.B. Parker. Now, the stabbing by John Earl Bush did not cause Frances Julia Slater's death. J.B. Parker shooting her in the head did.

* * *

Ask yourself, by what authority did J.B. Parker have to take this girl's life. By what authority did he have to prevent her from leading a normal life of having children, of having the parents enjoy the events of Christmas, watching their grandchildren playing with the Christmas trees, opening the presents. By what right did he have to deprive them of seeing their grandchildren blow out the birthday candles on their cake. By what right did he have to do that? None. Absolutely none.

* * *

The evidence is established that he is a cold

blooded killer. And that's why the State of Florida is

asking you to return an advisory sentence of death. .

. .

R 1449-50.

In rendering the findings of fact supporting his decision to sentence Parker to death, the trial court explicitly found Parker was the shooter.[29] Clearly, both the State, which proposed the findings adopted by the court, and the trial judge, who adopted the State's proposed findings in support of his imposition of a death sentence on Parker, believed that the fact that, in their view, Parker had been proven to be the shooter supported imposition of a death sentence. Otherwise, why did Judge Midelis repeatedly emphasize to the jury that Parker had "executed" Ms. Slater, and why did Judge Nourse recite this "fact" in support of his conclusion that Parker should now be executed?

The judge and jury are expressly required to consider the mitigating circumstances and weigh them against the aggravating factors. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982). That the defendant is not the shooter is a fundamental mitigating circumstance, expressly recognized under Florida's death penalty statement — it asks the jury and judge to conclude that someone else is more culpable and thus that, whatever might be appropriate in the

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29 For a more complete discussion of the trial court's findings, see PCR 60-63. Specifically referring to the "fact" that Parker was the triggerman, the court adopted the following findings: "The victim was driven to a remote area where the defendant shot her"; "Before she was shot in the head by the defendant, she was forcibly removed from the vehicle which had stopped in a remote area. She was stabbed in the stomach by another co-defendant, while the defendant watched." PCR 1582.

case of the defendant who actually killed the victim, the defendant then on trial is not deserving of a death sentence.

Under Florida Statutes, Section 921.141(6)(d), it is a mitigating circumstance that "defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor." If Parker were to succeed in convincing the judge and jury that he was not the shooter, they would have no choice but to conclude that someone else committed the capital felony. Without an acceptance of the Williams testimony as true, the remaining evidence leaves the judge and jury no choice but to conclude that Parker's participation was relatively minor. The State's confidence, as expressed at the evidentiary hearing by former prosecutor Stone, that all four of the defendants are "equally responsible," PCT 259, 262-63, *see also id.* at 201-02 (Midelis), simply is not the law.

The obvious materiality of Bryant's statements to the issues to be presented at the sentencing phase of Parker's trial is further demonstrated by the strong likelihood that, if Bryant's statements had been disclosed, and Williams's testimony not credited, as a matter of law, under *Tison v. Arizona*, 481 U.S. 137 (1987), and *Enmund v. Florida*, 458 U.S. 782 (1982), there would be insufficient remaining evidence of Parker's active and knowing participation in the robbery, kidnaping or murder to support the imposition of a death sentence on Parker. In *Tison* and *Enmund*, the Supreme Court defined the circumstances under which it would be constitutionally impermissible to impose a death sentence on an individual found guilty of felony murder. Under the standards established in those cases, a court may not, consistent with the dictates of the Eighth Amendment, impose a death sentence unless the evidence either demonstrates that the defendant intended or knew "that a killing take place or that lethal force [would]

be employed," *Enmund*, 458 U.S. at 797, or shows the defendant's "major participation in the felony committed, combined with reckless indifference to human life." *Tison*, 481 U.S. at 158.

In the absence of Parker's inadmissible May 5 statement[30] and trial testimony, discrediting the Williams testimony is critical to establishing that the imposition of a death sentence on Parker would violate the dictates of *Enmund* and *Tison*. If the Parker jury and trial judge were to hear the conflicting testimony from Bryant and Williams and conclude, as Judge Walsh did as to Cave when presented with this conflicting evidence in the 1993 Cave re-sentencing proceeding, PCR 1490-91, that the State had not proved beyond a reasonable doubt that Parker was the shooter, the remaining evidence of Parker's participation, which consists primarily of Parker's alleged statement to Detective Powers, does not meet the culpability standards of *Enmund* and *Tison*. Detective Powers testified that Parker merely acknowledges sharing in the money from the robbery and being present when "they" took the victim from the

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30 **Contrary to the Eleventh Circuit's suggestion that the May 5 statement might have been introduced by Parker's trial counsel during the sentencing phase, Judge Malemso made very clear that he would not have done so. PCT 50-52. As Judge Malemso explained, that statement would have supplied evidence concerning Parker's participation and knowledge, and thus would have been detrimental at either phase of the trial. Nor is it reasonable to conclude that Judge Malemso would have introduced the May 5 statement to support a claim at the penalty phase that Parker was remorseful. The May 5 statement had been introduced, although wrongfully, and thus was evidence available to Judge Malemso informulating his arguments at the sentencing phase. Not once did he rely on that statement to evidence Parker's remorse during the sentencing phase. *See* R1466-87.**

car. R 798, 802-03. These facts do not prove that Parker knew that a killing would take place, nor do they show that Parker was a major participant in the underlying felonies. *See Enmund*, 458 U.S. at 797; *Tison*, 481 U.S. at 158; *Jackson v. State*, 575 So. 2d 181, 192-93 (Fla. 1991) (even though evidence showed that the defendant was a major participant in the crime and that a reasonable inference could be drawn that the defendant was the shooter, there was insufficient evidence to show that the defendant demonstrated either reckless indifference to human life or intent to kill or employ lethal force and thus the imposition of a death sentence was impermissible under *Tison* and *Enmund*); *Brumbley v. State*, 453 So. 2d 381, 387 (Fla. 1984).

One of Parker's co-defendants, Terry Wayne Johnson, did not receive a death sentence. In fact, the trial court in Johnson's case precluded the State from seeking a death sentence because to do so would violate *Enmund*. PCT 202. As the State explained at the 1993 Cave re-sentencing proceeding, Johnson received a life sentence because:

> he didn't go into the store, never handled the gun, didn't get involved in the armed robbery or the actual physical kidnaping of the victim although [he] did split up the money from the actual robbery and the kidnaping . . . and was present at the time of the murder although did not participate in either the stabbing or the shooting of the victim in this particular case.

PCR 1457; *see also* PCT 204 (Johnson was "[a]t the very best, a lookout. . . . we could establish only that [Johnson] was in the car outside and he shared the proceeds." (Midelis)). Without Parker's inadmissible May 5 statement, the only significant admissible evidence distinguishing the Johnson case from the Parker case is the Williams testimony. Under such circumstances, the materiality of Bryant's statements, that Cave confessed[31] to having been the shooter, is unquestionable.

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[31] Lest we again be criticized by the State for referring to the overheard Cave statements as a confession, *see* PCT 228, "confession" is the precise term used by the State in its argument before the court in the 1993 Cave re-sentencing proceeding: Bryant heard "an actual confession" PCR 1453; *see also* 1454-55.

IV.

THE STATE'S RELIANCE ON NECESSARILY CONTRADICTORY EVIDENCE CONCERNING THE IDENTITY OF THE SHOOTER CONSTITUTES PROSECUTORIAL MISCONDUCT IN VIOLATION OF PARKER'S DUE PROCESS RIGHTS

The State's reliance on the necessarily contradictory testimony of Bryant and Williams at the separate trials of Cave and Parker, without providing the Parker jury the opportunity to weigh the Bryant testimony and the impact of the State's reliance on that testimony at the 1993 Cave re-sentencing proceeding, also constitutes prosecutorial misconduct in violation of Parker's rights to due process. The Eleventh Circuit's opinion on Parker's appeal from the denial of his federal habeas corpus petition alone establishes this claim. As the Eleventh Circuit held, due process is violated if, at the separate trials of Parker and his co-defendants, the State relies upon inconsistent evidence concerning the identity of the triggerman. *Parker v. Singletary*, 974 F. 2d 1562, 1578 (11th Cir. 1992); *see also Green v. Georgia*, 442 U.S. 95, 97 (1979); *Drake v. Kemp*, 762 F.2d 1449, 1478 (11th Cir. 1985) (Clark, J., concurring), *cert. denied*, 478 U.S. 1020 (1986); *United States v. Powers*, 467 F.2d 1089, 1097-98 (7th Cir. 1972) (Stevens, J., dissenting), *cert. denied*, 410 U.S. 983 (1973).

Through its suppression of the Bryant statements and subsequent reliance on this evidence at the 1993 Cave re-sentencing hearing, the State has now committed the very violation of due process recognized in the Eleventh Circuit's opinion — the use of and reliance on necessarily contradictory evidence concerning the identity of the triggerman at the separate trials of Cave and Parker. Under the Eleventh Circuit's reasoning, the State's actions have now eliminated any distinction between the facts in Parker's case and those that led to findings of due process violations in *Green* and *Drake*.

In its Answer in the court below, PCR 689-90, the State sought to defeat this claim by contending that, at the time of Parker's trial the prosecutors were unaware of Bryant's statement concerning Cave's admission that he was the shooter. The State has yet to cite a single precedent establishing that the conceded knowledge by Jackson, *see* PCR 679, is insufficient to constitute prosecutorial misconduct. Knowledge in 1982 by Jackson, an admitted member of the prosecutorial team, of Bryant's statement is concededly sufficient to charge the State with knowledge, prior to Parker's trial, that Cave had admitted to being the shooter. The State thus knowingly relied upon evidence at Parker's trial that it knew to be contradicted by other, undisclosed evidence in its possession. As is the case under *Brady*, that the individual prosecutors may not have known, is immaterial for purposes of determining whether the State has violated Parker's Due Process rights.

As Judge Clark held in his special concurrence in *Drake*:

> This flip flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate that fundamental fairness essential to the very concept of justice. . . . *[I]t*

makes no sense to say that only [one defendant's] due process rights were violated by the inconsistent theories. Either both defendant's rights were prejudiced by the prosecutor's actions or neither's were.

762 F.2d at 1479 (citations omitted)(emphasis added). The issue thus is not whether, at

the time of Parker's trial, the prosecutors were aware of Cave's admission to Bryant,[32] but rather, whether at the separate trials of Parker (in 1983) and Cave (in 1993) the State relied upon necessarily contradictory evidence. It cannot be disputed that this is precisely what the State has

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[32] The evidence demonstrates, in any event, that the prosecutor's office must have known about Bryant's statements. One of the prosecutors, Stone, testified during the 1993 Cave re-sentencing hearing (at a time when the State wished to support its claim that Bryant's statements were not a fabrication), that "there was some discussion" about Bryant's statements. PCT 267. Stone also acknowledged at the hearing in this case that the other principal prosecutor, Midelis, must have interviewed Bryant in connection with Cave's original 1982 trial. PCT 247-48; PCT 272-73. It is inconceivable that Midelis, at the time a seasoned prosecutor, would have failed to elicit from Bryant the circumstances of the assault. Bryant's testimony also evidences Stone's knowledge of Cave's admission. During his deposition, and at Cave's re-sentencing hearing, Bryant stated that, prior to Cave's trial in December, 1982, he met with Stone and another investigator, showed them pictures of himself after Cave assaulted him, and told them of Cave's admission. PCR 1297-99; PCR 1360-78.

done and that the Eleventh Circuit's ruling on Parker's federal appeal confirms that the State has thereby violated Parker's rights to due process. *See Parker,* 974 F.2d at 1578.

The State's reliance on *Nichols v. Scott,* 69 F.3d 1255 (5th Cir. 1995), *cert. denied,* 116 S. Ct. 2559 (1996), is misplaced. *Nichols* addressed the circumstances under which either the collateral estoppel or judicial estoppel doctrines could bar the State from taking inconsistent positions at separate trials of co-defendants. *See Id.* at 1268-74. *Nichols* did not present circumstances, such as those presented here, where the prosecution has relied on mutually contradictory evidence regarding a critical element of the crimes charged at the separate trials of co-defendants. *Nichols* thus presents nothing more remarkable than a re-statement of the principles established on Parker's appeal to this Court from the denial of his first Rule 3.850 motion, *Parker v. State*, 542 So. 2d 356, 357-58 (Fla. 1989), and on his appeal to the Eleventh Circuit from the denial of his federal habeas corpus petition, *Parker* 974 F.2d at 1577-79 — the maintenance by the State of inconsistent *positions* does not violate Due Process. As the Eleventh Circuit made abundantly clear, however, under *Green* and *Drake*, the State's reliance on contradictory *evidence* does. *Id*. at 1578.

The State's prosecution of Parker with testimony that it has since discredited with evidence it had previously suppressed constitutes prosecutorial misconduct in violation of Parker's constitutional rights under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution and the corresponding amendments under the Florida Constitution. For this reason alone, this Court should reverse the lower court's denial of Parker's motion to vacate the judgment of conviction or, at the very least. affirm the lower court's order vacating the death sentence imposed on Parker.

CONCLUSION

For the foregoing reasons, as well as those set forth in Parker's Motion, Pre-Hearing and Post-Hearing Memoranda of Law, Appellee / Cross-Appellant J.B. Parker

requests that this Court affirm the trial court's decision to vacate death sentence and reverse Parker's judgment of conviction.

Dated: September 22, 1997

Respectfully submitted,

PROSKAUER ROSE LLP

By: _____
Francis D. Landrey
Mia Franklin
Francine Miller

Counsel for Appellee/Cross-appellant
J.B. Parker

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of The Initial Brief of Appellee / Cross-appellant J.B. Parker has been furnished by overnight mail to Celia Terenzio, Esq., Assistant Attorney General, 11 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 22nd day of September, 1997.

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