IN THE SUPREME COURT OF FLORIDA

J.B. PARKER,

Appellant,

vs. Case No. 89,469

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR MARTIN COUNTY, FLORIDA

ANSWER /REPLY BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CELIA A. TERENZIO
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0656978
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL. 33409
(407) 688-7759

ATTORNEY FOR APPELLEE

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ARGUMENT IN REPLY

ISSUE I

THE TRIAL COURT ERRED IN RULING THAT BRYANT'S HEARSAY STATEMENT WOULD HAVE BEEN ADMISSIBLE AT THE GUILT PHASE OF HIS TRIAL

Parker claimed and the trial court found, that Bryant's hearsay statement would have been admissible at the guilt phase of his trial since the statement would have satisfied the three requirements under the "statement against (penal) interest" hearsay exception codified as section 90.804(2)(c), Florida Statute (1995). Again, those requirements are as follows: (1) the declarant is unavailable, (2) the statement tends to expose the declarant to criminal liability and is offered to exculpate the accused, and (3) corroborating circumstances exist to show the trustworthiness of the statement. Maugeri v. State, 460 So. 2d 975, 977 (Fla. 3d DCA 1984), cause dismissed, 469 So. 2d 749 (Fla. 1985). Parker argued that he satisfied all the requirements articulated above, and the trial court agreed, finding that Bryant's statement would have been admissible at the guilt phase of Parker's trial. This finding was in error because Parker failed to establish any of the three requirements.

First, the unavailability of the declarant in the instant case, either Cave or Bush, was sufficiently determined when Parker told Judge Davis that, if called, Cave or Bush would assert a privilege against self-incrimination. He claims on appeal that

under Florida law a declarant does not have to actually take the stand to assert the privilege since it can be assumed that one would have asserted the privilege where there existed a valid ground to do so. In support of this argument, Parker relies on three federal cases. All three cases appear to hold that unavailability of a declarant based on a privilege against self incrimination is permissible without ever having to hear from the declarant. United States v. Georgia Waste Sys. Inc., 731 F. 2d 1580, 1582 (11th Cir. 1984); United States v. Young Brothers, 728 F. 2d 682, 691 (5th Cir. 1984); United States v. Thomas, 571 F. 2d 285, 288 (5th Cir. 1978). Parker, therefore, argues that the unavailability requirement was satisfied when he assured Judge Davis that Cave or Bush would have refused to testify based on a privilege.

Parker's argument is incorrect, and his legal authority is unpersuasive. First, Parker relies on federal cases that discuss federal evidentiary rules, and not Florida law. Second, in two of the cases, the government stipulated to the unavailability of the declarant, thereby relieving the defense of its burden to demonstrate same. Georgia Waste Sys., 731 F. 2d at 1582; Young Brothers, 728 F. 2d at 691. Third, the remaining case is of little guidance. Therein, the Court stated, "[H]ere the existence of the privilege and Weeks' right to assert it and Weeks' unavailability as a witness are patent." Thomas, 571 F. 2d at 288. However, the circumstances that made the declarant's unavailability "patent" are not discussed. Consequently, the case offers no insight or

explanation regarding when if ever it would be appropriate to assume a declarant's unavailability rather than require proof of same.

Florida law is clear. The proponent of the hearsay must establish the unavailability of the declarant. Jones v. State, 678 So. 2d 309 (Fla. 1996), cert. denied, 117 S.Ct. 1088 (1997). When the declarant is physically available, unavailability can only be established via what is actually spoken or not spoken once the declarant takes the stand. In Jones, the defense stated that it did not call Schofield because everyone could assume what Schofield would say on the witness stand. Id. at 314. This Court declined to accept the defendant's assumption regarding the content of the anticipated testimony:

> Contrary to Jones' attorney's position, we do not know what Schofield would have said had he been called as a witness. The burden was on Jones to establish that Schofield was unavailable and Jones failed to meet that burden. Consequently, we find that Schofield's alleged confessions are not admissible under the declaration against penal interest exception to the hearsay rule.

Id.

Parker's argument that he is allowed to assume that Bush or Cave would have asserted a privilege against self-incrimination simply because either had a valid reason to do so is an improper assumption and contrary to Florida law.[1] See Rivera v. State, 510

[1] If carried to its logical conclusion, Parker's argument would entirely eviscerate the requirement of proof of unavailability in all cases. By its very nature, a statement against penal interest inherently possesses the valid possibility that one would invoke the privilege to avoid the ramification of

So. 2d 340, 341 (Fla. 3rd DCA 1987)(rejecting trial court's assumption that since co-defendant threatened to kill declarant if he testified the declarant was therefore determined to be "unavailable"). Consequently, before it can be said that Bush or Cave was unavailable Parker was required to put either witness on the stand.[2] Given his failure to do so, he has not met the first requirement of the hearsay exception. See Jones, 678 So. 2d at 314; Rivera, 510 So. 2d at 341.

The second requirement under 90.804(2)(c) required Parker to demonstrate that the hearsay statement overheard by Bryant was against the declarant's penal interest. Maugeri, 460 So. 2d at 977. Parker could not do so given the nature of the statement as the trial court found the hearsay statement was merely an accusation by Bush to which Cave did not respond. (PCR 1208). That factual finding made by Judge Davis is clearly supported by the record. Parker introduced into evidence the deposition of Michael

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repeating that statement. Consequently, under Parker's argument, one could always assume that a declarant would always assert the privilege against self-incrimination. Indeed, this is not the law.

[2] There is no argument, nor can there be one, that Parker was unable to secure the presence of either Cave or Bush at the evidentiary hearing given their continued incarceration since the murder of Ms. Slater. Bush was executed seven months after the evidentiary hearing in this case.

Bryant that he gave in connection with Cave's resentencing. The following excerpt from that deposition supports the trial court's findings:

> Q: Who was it that said Bush used the knife?
>
> A: It was Cave. Cave said it because Cave's the one that said it. He says, you shouldn't have stabbed her. Bush said, you shouldn't have shot her in the back of the head. He said, if she wouldn't have started screaming we wouldn't have did it. You know. I have nightmares over this stuff, man.
>
> * * * *
>
> A. Because he's the one that said, well, you shouldn't have stabbed her and Bush said well, you shouldn't have shot her. And that's all I heard.

(PCR 211-212).

Consistent with his deposition, Bryant testified at Cave's resentencing as follows:

> A. Well, what I overheard, Bush was a couple cells down and what it was, you know, they started talking about it. And Bush told Cave, says, we wouldn't never been in here if you didn't try to burn her with a cigarette butt. He said well, you stabbed her in the stomach. And Bush told Cave, well, you popped a cap in the back of her head.

(PCR 258-259).

Moreover, Parker's own witness at the evidentiary hearing, Judge Makemson conceded on three separate occasions that the statement in question was an accusation by Bush, rather than a direct admission by Cave. (PCT 89, 114, 141-143). The trial court's finding that the statement at issue was an accusation by Bush, rather than an admission by Cave, is clearly supported by the record. Therefore that finding must be accepted. See Kelly v. State, 569 So. 2d 754, 762 (Fla. 1990)(ruling that judge's findings

where supported by record must be sustained regardless of existence of conflicting evidence); cf. Watts v. State, 593 So. 2d 198, 202 (Fla. 1993)(finding that trial court as trier of fact must resolve conflicts in factual issues).

Parker's contrary characterization is wholly unsupported by the record. For example, Parker relies on the deposition/trial testimony of Art Jackson. However, Jackson's testimony was admitted at the evidentiary hearing solely to show that the state was in constructive possession of a statement by Bryant. The evidence was not admitted to prove the substance of the statement. (PCT 147-148, 160-171). Thus it is highly improper for Parker to rely on Jackson's testimony to support his characterization of the hearsay statement.

The final requirement for admissibility of a hearsay statement under section 90.804(2)(c), Florida Statute (1995) was a showing that corroborating circumstances existed to ensure the trustworthiness of the statement. Maugeri, 460 So. 2d at 977. Relying on Green v. Georgia, 442 U.S. 95 (1979) and Chambers v. Mississippi, 410 U.S. 284 (1973) Parker claims to have satisfied this requirement. Neither Chambers nor Green support Parker's argument however, since both cases are factually distinguishable. For example, the corroborating evidence relied upon in Green amounted to the following:

> The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, and substantial reasons existed to assume its reliability. Moore made his statement spontaneously to a close friend.

> The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it. In these unique circumstances, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973).

442 U.S. at 97 (citations and footnote omitted).

None of these factors referred to above exist in the instant case. The accusation by Bush was not spontaneous as it was made three months after the murder during a conversation between two co-defendants sitting in their respective jail cells. Nor was the statement made to a close friend in confidence in a private setting. Bush and Cave were jail mates separated by several cells, and were blaming each other for the predicament in which they found themselves. Moreover, the statement was not against Bush's penal interest. Finally, the state did not use this statement in the guilt phase of Cave's trial to obtain a conviction. It was used in the penalty phase and it did not provide a basis for a finding that Cave was the triggerman. To the contrary, the trial found that Cave was not the shooter. Consequently, the facts surrounding the circumstances of the statement overheard by Bryant are completely distinguishable from facts and circumstances relied upon in Green.

Likewise, the facts of the instant case are also clearly

distinguishable from the facts of Chambers.[3] The United States Supreme Court detailed the corroborating factors as follows:

> The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability. First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case--McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. Third, whatever may be the parameters of the penal-interest rationale, each confession here was in a very real sense self-incriminatory and unquestionably against interest.
>
> McDonald stood to benefit nothing by disclosing his role in the shooting to any of his three friends and he must have been aware of the possibility that disclosure would lead to criminal prosecution. Indeed, after telling Turner of his involvement, he subsequently urged Turner not to 'mess him up.' Finally, if there was any question about the truthfulness of the extrajudicial statements, McDonald was present in the courtroom and was under oath. He could have been cross-examined by the State, and his demeanor and responses weighed by the jury.

410 U.S. at 300-301 (footnote omitted).

[3] In fact, this Court recently agree with the State in another capital case that Chambers should be limited to its facts because of the peculiarity of Mississippi evidence law. Gudinas v. State, 693 SO. 2d 953 (Fla. 1997).

As noted by the Court, there was substantial extrinsic evidence to corroborate the fact that McDonald was the murderer, including three confessions to close friends, as well as an eyewitness to the shooting. No such corroboration exist in the instant case.

Nor do the circumstances surrounding the statement overheard by Bryant do not possess the indicia of reliability that is inherent in either Chambers or Green. Therefore, Bush's statement would not have been admissible at the guilt phase of Parker's trial, and the trial court's finding was in error..

Irrespective of Parker's reliance on a hearsay exception, he also claims that the statement would have been admissible simply because the state used Bryant's statement at Cave's resentencing hearing. This alone does not entitle Parker to use Bush's accusation against Cave at the guilt phase of his trial. In Jones, this Court rejected a similar argument:

> Jones also opines that, broadly construed, Baker v. State, 336 So.2d 364 (Fla.1976), stands for the proposition that if the State can use a statement against its declarant as a sword then a third party is necessarily entitled to use the statement as a shield. We do not read Baker as enunciating such a sweeping rule. In Baker, this Court simply extended the common law declaration against interest hearsay exception to cover declarations against penal interest. 336 So.2d at 369. Our decision in Baker was subsequently codified by the legislature in the Florida Evidence Code as section 90.804(2)(c) which includes the unavailability requirement. Ch. 76-237, § 1, at 575, Laws of Fla.

678 So. 2d at 314 n.3. The trial court incorrectly determined that Bryant's hearsay statement would have been admissible at the guilt phase of Parker's trial.

ISSUE II

THE TRIAL COURT ERRED IN FINDING THAT BRYANT'S TESTIMONY WAS MATERIAL TO PARKER'S PENALTY PHASE.

Parker asserts that any withheld information concerning the identity of the triggerman should be considered "material" for purposes of a violation under Brady v. Maryland, 373 U.S. 83 (1963). In support of this proposition, Parker relies primarily on Jacobs v. Singletary, 952 F. 2d 1282, 1296 (11th Cir. 1992), and Garcia v. State, 622 So. 2d 1325, 1331 (Fla. 1993). Neither is of any help to Parker, since the withheld evidence regarding the actual identity of the triggerman in both Jacobs and Garcia was consistent with the defendant's original theory regarding that issue.

For instance, in Jacobs, the state withheld a polygraph report which contained evidence that this Court described as follows:

> First, the report reveals that Rhodes was unsure whether Jacobs had fired the gun. At trial, Rhodes testified that Jacobs definitely shot the trooper and that she was the first to shoot. . . .
>
> Second, Rhodes told the jury that he witnessed Tafero taking a gun from Jacobs, whereas in the report he described Tafero as merely retrieving the gun from the backseat of the car. . . .
>
> Third, Rhodes testified at trial that he had asked Tafero "what happened at first" during the shooting. Tafero, Rhodes claimed, answered that "Sonia took care of it." In the examiner's report, however, Rhodes was described as stating in absolute terms that "no discussion concerning the shooting ever took place."
>
> Finally, Rhodes testified at trial that he heard a first shot from a nine millimeter gun, followed immediately by a louder shot

> from the trooper's gun. Tafero, Rhodes testified, then grabbed the gun from Jacobs. His trial testimony thus requires Jacobs to have fired the first shot. On the other hand, the polygraph report, describing only one "loud report" before Tafero retrieved the gun, indicates that the trooper fired the first shot and that Tafero fired all of the remaining shots. The examiner's report is therefore clearly favorable to Jacobs: Rhodes' prior statements to the polygraph examiner support Jacobs' argument that she was a passive passenger in the vehicle, and not the instigator of the killings.

952 F. 2d at 1288-89 (emphasis added).

Likewise, in Garcia, the state withheld a statement by Lisa Smith which directly supported Garcia's theory that Urbano Ribas was the actual killer. In finding the evidence to be material, this Court stated the following:

> Because Lisa Smith said exactly the same thing that Garcia said in his statement to police three days after the crime--that Joe Perez is the same person as Urbano Ribas--the statement would have greatly aided the defense in arguing that 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.

622 So. 2d at 1331 (emphasis added).

Unlike in Garcia and Jacobs, the withheld evidence in the instant case is not consistent with, and therefore does not corroborate, Parker's theory. Quite the contrary, the withheld evidence, i.e., Bush's accusation that Cave was the shooter, is in direct conflict with Parker's admission to Detective Powers that Bush both stabbed and shot Frances Slater. Unlike withheld evidence that directly supports a defendant's theory, Bush's

accusation did nothing to prove Parker's theory of defense that Bush was the actual killer. Given that the evidence contradicted Parker's theory of defense, his reliance on Jacobs and Garcia are of no moment.

Relying on Kyles v. Whitley, 514 U.S. __, 115 S.Ct. 1555 131 L. Ed. 2d 49 (1994), Parker also contends that Bush's accusation undermines the state's key evidence, i.e., Williams' testimony.[4] In Kyles the United States Supreme Court found the following evidence material under Brady:

> [T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution. The jury would have been entitled to find
> (a) that the investigation was limited by the police's uncritical readiness to accept the story and suggestions of an informant whose accounts were inconsistent to the point, for example, of including four different versions of the discovery of the victim's purse, and whose own behavior was enough to raise suspicions of guilt;
>
> (b) that the lead police detective who testified was either less than wholly candid or less than fully informed;
> © that the informant's behavior raised suspicions that he had planted both the murder

[4] Georgiann Williams testified that Parker confessed to her that he shot Ms. Slater. Parker v. State, 476 So. 2d 134, 136 (Fla. 1986).

> weapon and the victim's purse in the places they were found;
> (d) that one of the four eyewitnesses crucial to the State's case had given a description that did not match the defendant and better described the informant;
> (e) that another eyewitness had been coached, since he had first stated that he had not seen the killer outside the getaway car, or the killing itself, whereas at trial he claimed to have seen the shooting, described the murder weapon exactly, and omitted portions of his initial description that would have been troublesome for the case;
> (f) that there was no consistency to eyewitness descriptions of the killer's height, build, age, facial hair, or hair length.

131 L. Ed. 2d at 518.

In the instant case, the withheld evidence did not possess the same impact as the evidence detailed above in Kyles. The accusation of one co-defendant against another co-defendant would not undermine confidence in the outcome of a trial. See Lee v. Ilinois, 476 U.S. 5330 (1986)(holding that statement of a codefendant inculpating another codefendant is by its nature unreliable). Consequently, Kyles is of little help to Parker.

Next, Parker justifies the trial court's order by relying on Banks v. Reynolds, 54 F. 3rd 1508, 1520 (10th Cir. 1995), the facts of which are as follows: Banks was convicted for the first degree murder of a store clerk. Id. 54 F. 3rd at 1518. Banks testified at trial. That testimony was consistent with a prior recorded statement he had given to the police. The substance of both statements was that an old prison acquaintance, Billy McClure, whom Banks had not seen in well over a year, had mysteriously appeared,

robbed the store, killed the store clerk and disappeared. Id. at 1520. After trial, the defense uncovered both eyewitness statements and a confession which inculpated someone other than Banks or McClure. Id. at 1518. Following this discovery, Banks' attorney testified at an evidentiary hearing that, had he been aware of the new information, he would not have allowed Banks to testify. Although Banks' recorded statement that inculpated McClure was still admissible, the attorney testified that he would have countered the inconsistent recorded statement by arguing that Banks made the initial statement inculpating McClure to curry favor with the state because he had a pending robbery charge. Id. at 11520 n.28.

Banks is factually distinguishable from the instant case. Although the cases are similar in that the withheld evidence if introduced by the defense would totally contradict a prior statement by the defendant, that is where the similarity ends. First, the withheld evidence herein is nothing more than an accusation of one codefendant against another. As such, it pales in comparison to the strength of an actual confession by someone else, along with eyewitness testimony that implicated other known suspects. Second, in Banks, the attorney's explanation regarding the contradiction between the previously withheld evidence and the defendant's prior recorded statement was plausible and unrebutted. In contrast, Parker's former trial attorney's explanation at the evidentiary hearing regarding how he would reconcile the inconsistent defenses was not plausible. Makemson testified that

had he known of the accusation, he would have used it in his continued attempt to impeach Detective Powers. Makemson stated that he would have explained the inconsistencies in the two defense theories by continuing to argue, as he had already attempted to do at the trial, that Powers was mistaken regarding whom Parker identified as the actual shooter. The record already establishes however, that Makemson was wholly ineffectual in impeaching Powers regarding the contents of Parker's statement. It is simply not reasonable to believe that Bush's new accusation would have made Makemson's task any easier or would have made Powers change his testimony. Consequently, Parker's reliance on Banks is of no moment. More importantly, by using Bryant's testimony, Makemson would have opened the door to Bush's prior statement to the police that Parker was the shooter. Parker claims such testimony would not be admissible, but he is unable to adequately distinguish the holding of Tennessee v. Street, 471 U.S. 409 (1985), and makes no attempt to distinguish Walton v. State, 481 So. 2d 1197, 1199-1200 (Fla. 1986).[5] See also New Jersey v. Sego, 629 A. 2d 1362 (N.J. 1993)(ruling admissible the statement of codefendant placing primary responsibility of murder on defendant to impeach codefendant's subsequent statement exculpating defendant); Bolton v. Nelson, 426 F. 2d 807 (9th Circuit 1970)(finding that state's

[5] Curiously, Makemson was concerned at trial about opening the door to Bush's statement implicating Parker. Obviously he understood the potential for it and decided not to risk the admission of a statement inconsistent with his defense. (ROA 813-34).

use of prior inconsistent statement of witness for purposes of impeachment did not violate defendant's right to confront witnesses); United States v. Wuaagneux, 683 F. 2d 1343, 1357-58 (11th Circuit 1982)(same).

In summation the trial court incorrectly determined that Bush's accusation inculpating Cave was material under Brady. First, by relying on Bush's accusation as proof that Cave shot Ms. Slater, Parker would be explicitly telling the jury that he lied to the police when he accused Bush of the shooting. Second, Parker's use of Bush's accusation as substantive evidence, would then open the door for the admission of Bush's prior inconsistent statement for impeachment purposes. Bush's prior inconsistent statement was an accusation that Parker was the shooter. Therefore the jury, at best could find that Parker is a liar by his own admission, and therefore not to be believed about anything, or worse and equally possible, that he actually shot Ms. Slater.[6] Given the damaging nature of this evidence, a finding that it was favorable and therefore material was unreasonable.

Finally relying on the fact that 11th Circuit found his May 5th statement, which detailed Parker's participation in the robbery and kidnaping, to be inadmissible, and given Bush's accusation against Cave, Parker's death sentence would have been precluded as a matter of law under Tison v. Arizona, 481 U.S. 137 (1987); Enmund

[6] Bush's accusation that Parker was the shooter would be corroborated by the testimony of Georgiann Williams.

v. Florida, 458 U.S. 782 (1982). Parker's argument is unpersuasive, however, given the competent and substantial evidence to sustain a sentence of death based on Parker's major participation in the underlying felonies. In applying the principles of Tison and Enmund this Court has stated that, "focusing narrowly on the question of intent to kill is an unsatisfactory method of determining culpability." Dubois v. State, 520 So. 2d 260, 265 (Fla. 1987). Rather "'that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement.'" Id. (quoting Tison v. Arizona, 481 U.S. 137,(1987)).

Parker's major participation in the underlying felonies was sufficient to satisfy the requirements under Tison and Enmund. Parker was in the store between 11:15 P.M. and 12:45 A. M. on the night of the murder.[7] (ROA 511, 517). Bush, and two others,[8] were in the store with Ms. Slater around 3:00 A.M. (ROA 537, 538, 552). After the robbery Ms. Slater was kidnaped from the store and

[7] The obvious inference to be drawn from his presence in the store at that time was that Parker was casing the place out for the eventual crime. Parker v. Singletary, 974 F. 2d 1562, 1576 (11th Cir. 1992).

[8] Those two other men with Bush were Parker and Cave. This is the only logical inference to be drawn given that the state was precluded from seeking the death penalty against Terry Wayne Johnson, the fourth codefendant in this crime, because he did not enter the store during the actual robbery and kidnaping. Johnson v. State, 484 So. 2d 1347, 1349 (Fla. 4th DCA 1986). State witness, Judge Midelis and defense witness, Judge Makemson both testified at the evidentiary hearing that Johnson remained in the car during the actual robbery and kidnaping. (PCT 61, 204).

transported to the scene of her death. She was seated in a car among her four captors and driven thirteen miles to her execution. Parker, 476 So. 2d at 135. Thereafter Parker along with his accomplices dumped the body of Ms. Slater[9], disposed of the knife used to stab Ms. Slater, and divided the proceeds from the robbery. Furthermore J.B. Parker had ample time to try and prevent the murder or at the very least ample opportunity to retreat from the crime. His participation in the underlying felonies warranted a sentence of death irrespective of a finding that Parker was the actual triggerman.[10] See Dubois (upholding sentence of death for nontriggerman where defendant had opportunity to stop the murder and did not).

[9] Officer Vaughn testified that he heard Parker say to Detective Powers, "This is were we dumped the body." (ROA 8336, 839-848).

[10] Although the state was proceeding under the main theory that Parker was the shooter, the state also argued in the alternative that Parker's participation in the underlying felonies alone would warrant a sentence of death. (ROA 502-504, 1125-1126, 1129-1130, 1448). The defense argued to the jury that Parker's role was minimal and it was Bush who actually shot the victim. (R 1086, 1092-1093, 1099, 1473, 1486-1487). The jury was instructed on the defense of the independent acts of others. (ROA 1183).

Given that Parker's participation in the underlying felonies mirrored that of his codefendants, Bush and Cave, death would have been properly imposed irrespective of Bush's accussation against Cave. Parker, 974 F. 2d at 1576-1577.

ANWSER BRIEF

ISSUE III

THE TRIAL COURT PROPERLY DETERMINED THAT BRYANT'S STATEMENT WAS NOT MATERIAL TO THE GUILT PHASE OF PARKER'S TRIAL.

The trial court ruled that Bush's accusation, although admissible at Parker's guilt phase, was not material under Brady v. Maryland, 373 U.S. 83 (1963) since there was sufficient evidence to sustain a conviction for first degree murder under a felony murder theory. (PCR 1212). Parker argues that this finding is erroneous since it is nothing more than a sufficiency of the evidence test which is precluded under Kyles v. Whitley, 514 U.S. 419 (1995). Parker's argument misapprehends the analysis employed by the trial court.

In the instant case, Bush's accusation was relevant only to Parker's defense that he did not shoot Ms. Slater. The statement's usefulness therefore is limited solely to a determination regarding premeditated murder. The content of what Bryant overheard dealt exclusively with the identity of the triggerman. The statement neither adds nor detracts from whatever evidence existed regarding Parker's participation in the underlying felonies. The state argued that Parker was guilty of first degree murder either because he actually shot Frances Slater or because his participation in the underlying felonies was sufficient to convict him of felony murder. (ROA 502-04, 1125-26, 1129-30, 1448). Consequently the existence vel non of sufficient evidence to rebut a conviction for first degree murder based on a theory that Parker was the shooter, is

irrelevant. The trial court's determination focused on the unassailed evidence that existed regarding the alternative theory of felony murder. That analysis and subsequent determination was proper. Parker v. Singletary, 974 F. 2d 1562, 11576 (11th Cir. 1992); See Voorhees v. State, 699 So. 2d 602 (Fla. 1997)(finding withheld statement against interest no material given that sufficient evidence existed to support conviction under felony murder theory).

Next Parker attacks the trial court's failure to preclude the state from arguing that Bush's accusation was not material at the guilt phase. Relying on Green v. Georgia, 442 U.S. 95 (1979) Parker argues that the trial court should have collaterally estopped the state from challenging the materiality of the accusation since the state useed it at Cave's resentencing. Parker's argument is erroneous as Green is wholly distinguishable.

Whether Bush's accusation lacks materiality at Parker's guilt phase is not based on the crediblity of the statement, but because it is irrelevant to a determination of Parker's guilt under felony murder. Therefore, Parker's reliance on Green is misplaced.[11]

[11] Green is also distinguishable because there has never a finding by any court that someone other than Parker, was the actual triggerman. Irrespective of Bryant's testimony at Cave's resentencing, the trial court refused to find that Cave was the shooter. Consequently, the state should not be estopped from

challenging either the credibility or materiality of Bush's accusation at a separate proceeding.

Parker also claims that Bush's accusation would have rebutted Georgiann Williams testimony as well as bolstered Parker's defense that his role in the crimes was minimal. First, as already noted, Bush's accusation was irrelevant to any inquiry regarding Parker's participation in the underlying felonies.

Second, as noted above there was sufficient evidence to establish that Parker was an active participant in the crimes. See Issue II, supra. In an attempt to minimize the impact of this evidence, Parker claims that he alone remained in the car when he had his three co-defendants returned to the Lil' General Store. By implication that would mean that it was Terry Wayne Johnson and not Parker who entered the store with Cave and Bush the second time when the actual robbery and kidnaping of Ms. Slatter took place. Even if this were true, a fact not conceded by the state, Parker would still be guilty of felony murder. In assessing Parker's co-defendant, Terry Wayne Johnson's guilt under a theory of felony murder, the Fourth District Court of Appeals concluded:

> There was substantial, competent evidence that could lead a jury to conclude beyond a reasonable doubt the defendant had the intent to commit robbery, was involved in the criminal enterprise to perpetrate that robbery and kidnaping, that the killing was a part of the robbery and kidnaping, and that no evidence presented even a suggestion that the appellant withdrew from the criminal enterprise. Appellant was in the store the first time but left with the others because the girl was on the phone. So the group went riding around, went to the beach and exited the car for awhile, returned to the car and drove around, returning to the Li'l General

> Store, "And that's when we--they robbed the girl." The others brought her out and put her in the car between him and another, thus obstructing any means for her escape.He shared in the robbery proceeds as well.

Johnson v. State, 484 So. 2d 1347, 1349 (Fla. 4th DCA 1986). Consequently, to the extent that Parker argues that his participation in the underlying felonies mirrors that of codefendant Johnson, there was sufficient to sustain a conviction for first degree murder. The trial court properly found Bush's accusation to be immaterial at the guilt phase. See Voorhes, 699 So. 2d at 604; Johnson, 484 So. 2d at 1349.

ISSUE IV

PARKER'S DUE PROCESS RIGHTS WERE NOT VIOLATED AT THE 1993 RESENTENCING OF HIS CO-DEFENDANT, ALPHONSO CAVE WHEN THE STATE PRESENTED EVIDENCE AND ARGUMENT THAT CAVE WAS EITHER THE ACTUAL SHOOTER OR THAT HIS PARTICIPATION IN THE UNDERLYING FELONIES WARRANTED A SENTENCE OF DEATH

Parker alleges that the State violated his due process rights by presenting at two different trials "necessarily contradictory testimony." The alleged improper actions by the state occured at Parker's trial in January of 1983 and at his co-defendant, Alphonso Cave's resentencing in 1993.[12] The nature of the alleged contradictory evidence is as follows: At Parker's trial, the state presented the testimony of Georgiann Williams who stated that Parker admitted that he shot Ms. Slater. In contrast to that evidence, at Cave's resentencing, the state presented the testimony of Michael Bryant. Bryant testified that he overheard a conversation between Parker's two co-defendants, John Bush and Alphonso Cave. During that conversation, Bush accused Cave of shooting Ms. Slater. Cave never responded to the accusation. The

[12] Cave was originally convicted and sentenced to death in 1982. This Court affirmed both his conviction and sentence. Cave v. State, 476 So. 2d 180 (Fla. 1985). The United States District Court for the Middle District of Florida vacated Cave's death sentence due to ineffective assistance of trial counsel, which the Eleventh Circuit Court of Appeals affirmed. Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992). Cave was resentenced to death in 1993, but this Court vacated the sentence and remanded for another resentencing. Cave v. State, 660 So. 2d 705 (Fla. 1995). Cave has since been resentenced to death, and his appeal is pending before this Court in case number 90,165. The state did not present the testimony of Michael Bryant in that pending case.

state's use of this "contradictory" evidence violated Parker's due process rights.

This very issue was previously before this Court. The procedural history is as follows: Parker raised this issue in his first motion for postconviction relief. Therein he argued that the state had taken inconsistent positions at the respective trials of all the codefendants. In denying relief this Court stated:

> Parker's third contention is that the state failed to inform the court and the jury of its inconsistent factual positions in the trials of the codefendants. He argues that the state violated Parker's due process and eighth amendment rights by taking different positions concerning who fired the fatal shot. Parker asserts that the state was required to advise the court and the jury of this fact because this information would have indicated that the state itself had doubts as to whether Parker was the triggerman. We find that the state had no duty to present this information. It must be noted, however, that Parker was not precluded from presenting this matter to the jury by an appropriate witness, either during his case or on cross-examination. In this regard, the codefendants' trials predated this trial and Parker knew the position of the state in those trials.

Parker v. State, 542 So. 2d 356, 357-58 (Fla. 1989). Parker then unsuccessfully pursued this claim in federal court. In denying the claim, the 11th Circuit noted that a critical difference existed between the instant case and both Green and Drake. The Court found that there was no presentation of "necessarily contradictory evidence." Parker, 974 F.2d at 1578. In disposing of the claim, the Court stated:

> Parker makes the argument that the failure to disclose the inconsistency violated

> "his due process right to have the jury at his trial take into account--both in determining his guilt or innocence and in deciding whether to recommend a sentence of death--that the [S]tate had previously contended that someone other than Parker fired the shot that killed Ms. Slatter." But no due process violation occurred, because there was no necessary contradiction between the state's positions in the trials of the three co-defendants. Given the uncertainty of the evidence, it was proper for the prosecutors in the other co-defendants' cases to argue alternate theories as to the facts of the murder. The issue of whether the particular defendant on trial physically committed the murder was an appropriate question for each of the co-defendants' juries.

Id.

Parker relies on Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2D 738 (1979) and Drake v. Georgia, 762 F.2d 1449, 1478-1479 (11th Cir.1985)(*en banc*)(Clark, J. Specially concurring), cert. denied, 478 U.S. 1020, 106 S.Ct. 3333, 92 L. Ed. 2d 738 (1986) in support of his due process argument. Parker's reliance on Green and Drake is unpersuasive. First, Parker is relying on a concurrence in Drake which is not binding on this Court. Greene v. Massey, 384 So. 2d 24, 27 (Fla. 1980)(ruling that a concurring opinion does not constitute law of the case and is therefore not binding precedent); Lendsay v. Cotton, 123 So. 2d 745, 746 (Fla. 3rd DCA 1960); Mitchum v. State, 251 So. 2d 298 (Fla. 1st DCA 1971)(same). Second, the concurrence makes clear that the concern of the court centered on the fact that there was a total lack of evidence presented against Drake absent the "contradictory evidence". Drake, 762 F. 2d at 1478-79.

In the instant case, even if Bush's accusation were to be admitted, that would not necessarily result in a finding that Parker did not shot Ms. Slater. Georgiann Williams unequivocally stated that Parker admitted the shooting. More importantly however, is the fact, that absent a finding that Parker was the shooter, there was overwhelming evidence to convict him under a theory of felony murder. Consequently Drake is of no help and should be limited to its facts.

Likewise Green is wholly distinguishable, a point already established. See issue I, supra. In Green the Court was concerned that state evidentiary rules deprived the jury of evidence that had already been found to be credible, and trustworthy since the state had successfully relied upon it to convict and sentence to death Green's co-defendant. Again Bush's accusation does not meet that standard. Given the factual dissimilarities between both Drake and Green, and the instant case, Parker's attempt to relitigate this issue must fail.

First, no "necessarily contradictory" evidence exists between the two cases. The essence of Parker's alleged exculpatory information is not an admission by Cave but simply Cave's failure to respond to Bush's accusation that he (Cave) shot the victim. The inherent unreliability of the evidence is exemplified in the fact that the trial judge at Cave's resentencing rejected the evidence and found Cave not to be the shooter. More importantly, the fact still remains that Cave and Parker along with John Bush were all responsible for the murder of Frances Slater regardless of

who actually pulled the trigger. Conseqeuntly there is nothing "necessarily contradictory" in the respective convictions of first degree murder for either Cave or Parker.

The state contends that this Court's prior rejection of this issue remains correct. There simply has not been a violation of Parker's due process rights.[13] The state would point this Court to the holding in Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995) which is factually similar to the instant case. Two men were indicted for the murder of a store clerk. One of the defendants, Williams, pled guilty to the murder and proceeded to the penalty phase. The state argued that Williams was either the actual shooter or he was equally responsible under a principals theory. Williams was sentenced to death. There was never any factual determination that Williams actually fired the fatal shot.

At the subsequent trial of the co-defendant Nichols, the state argued that Nichols was either the acutal shooter or was still deserving of a death sentence under the law of principals. On appeal Nichols argued as does Parker, that the state should have been estopped from taking inconsistent positions at the respective trials of codefendants. The 5th Circuit rejected Nichols' claim. The court found no authority for the defendant's estoppel/due process argument.

[13] As noted, Cave's resentencing is presently before this Court. The state did not present Bryant's testimony at Cave's most recent resentencing hearing.

The same result is warranted in the instant case. There is no evidence that the state withheld any exculpatory evidence from Parker or attempted to present any false or misleading evidence. The Cave "statement" is not an actual admission. As noted above, Cave's resentencing did not yield a finding that he was the actual shooter. The fact that all three co-defendants wish to implicate the others, and the state attempts to make use of that information at the respective penalty phase of each defendant, does not translate into any due process violation by the state. Parker has not demonstrated that the state engaged in any wrong doing let alone any actions which would warrant the reversal of his death sentence. The trial court properly rejected this argument.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

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CELIA A.TERENZIO
Assistant Attorney General
Fla. Bar No. 0857238
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Francis Landry, Proskaauer Rose, 1585 Broadway, New York, New York 10036, this ____ day of Decmeber, 1997.

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CELIA A. TERENZIO
Assistant Attorney General