

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant/Cross-Appellee,

vs.

Case No. 89,469

J.B. PARKER,

Appellee/Cross-Appellant.

_____ /

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

INITIAL BRIEF OF APPELLANT/CROSS-APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CELIA A. TERENCE
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0656879
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL. 33409
(407) 688-7759

ATTORNEY FOR APPELLANT

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STATE OF FLORIDA,

Appellant/Cross-Appellee,

vs.

Case No. 89,469

J.B. PARKER,

Appellee/Cross-Appellant.

_____ /

PRELIMINARY STATEMENT

Appellant/Cross-Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the state." Appellee/Cross-Appellant, J.B. PARKER, was the defendant in the trial court below and will be referred to herein as "Appellant" or "Parker." Reference to the various records will be as follows:

PCR = pleadings in current postconviction record
PCT = transcripts from evidentiary hearing
R = original trial record

STATEMENT OF THE CASE AND FACTS

J.B. Parker, Alphonso Cave, John Earl Bush, and Terry Wayne Johnson were indicted for the robbery, kidnaping, and murder of Frances Julia Slater, which they committed on April 27, 1982. All were convicted and sentenced to death, except Johnson, who was sentenced to life imprisonment. This Court affirmed Parker's conviction and sentence. Parker v. State, 476 So. 2d 134 (Fla. 1985).

Parker filed his first motion for postconviction relief in December 1987. Following an evidentiary hearing, the motion was denied. In conjunction with the appeal of the postconviction motion, Parker filed a state habeas corpus petition. This Court denied all relief. Parker v. State, 542 So. 2d 356 (Fla. 1989).

Then-Governor Martinez signed a death warrant in this cause on August 29, 1989. Pursuant to that warrant, Parker filed a successive motion for postconviction relief, which the trial court summarily denied. In conjunction with the appeal from the summary denial, Parker filed his second habeas corpus petition. On October 25, 1989, this Court refused to grant a stay of execution and denied all relief. Parker v. Dugger, 550 So. 2d 459 (Fla. 1989).

Parker immediately sought redress in the United States District Court for the Southern District of Florida. Parker received a stay of execution pending litigation of his federal petition. Ultimately, the district court denied the petition

without an evidentiary hearing, and Parker appealed to the Eleventh Circuit. On October 6, 1992, the Eleventh Circuit upheld the district court's denial of relief. Parker v. Singletary, 974 F. 2d 1562 (11th Cir. 1992). Parker then filed a petition of rehearing and suggestion for rehearing en banc. Pending the rehearing, Parker filed a motion to hold the federal appellate proceedings in abeyance while he raised a claim based on newly discovered evidence in state court. Without objection from the state, the Eleventh Circuit granted the motion on August 19, 1993.

On June 25, 1994, Parker filed his third motion for postconviction relief, which is the subject of this appeal. In his motion, Parker alleged that he had discovered material, exculpatory information during Cave's 1993 resentencing proceedings that would have, within a reasonable probability, changed the outcome of his trial. He based his claim not only on the newly discovered evidence provisions of Rule 3.850 (PCR 48-68), but also on a violation of Brady v. Maryland, 373 U.S. 83 (1963). His third claim was based on a due process violation because the state had argued inconsistent positions in each of the defendants' trials as to the identity of the actual shooter. (PCR 69-88).

The trial court held an evidentiary hearing on Parker's claims on March 17 & 18, 1996. At the evidentiary hearing, Parker introduced into evidence a deposition of Michael Bryant, taken on May 2, 1993, as well as Bryant's testimony from Cave's

resentencing proceedings, given on May 3, 1993. (PCT 147-148). The substance of Bryant's deposition and testimony was as follows: Michael Bryant was in jail for violating a restraining order, and was placed in a cell with Alphonso Cave. (PCT 180, 192-193, 301). John Earl Bush, another co-defendant of Cave and Parker was confined separately two cells away from Bryant and Cave. (PCR 208, 307). One night, Bryant overheard a conversation between Cave and Bush, which he summarized as follows:

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, he says, well, you popped a cap in the back of her head.

(PCR 258-59, 302).

Later that evening, Cave made unwanted sexual advances towards Bryant, which Bryant rebuffed. The next morning, Bryant assured Cave that he would not tell anyone about the conversation he overheard, but Cave did not believe him, so Cave and several other inmates beat up Bryant and broke his nose. (PCR 213-14, 308). Bryant notified the prison authorities about the assault, and Lieutenant Art Jackson investigated. (PCR 215-22). According to Bryant, he told Jackson about the assault, as well as the substance of the conversation he had overheard between Cave and Bush. (PCR 223). Bryant also stated that he told Bob Stone about the overheard conversation. (PCR 224, 299, 305).

Parker introduced Art Jackson's deposition and trial testimony from Cave's resentencing solely to demonstrate that the

state had knowledge and possession of Bryant's information. (PCT 171). Jackson had testified that, during his investigation of Bryant's alleged assault, Bryant told him that Cave had made sexual advances towards him and that Cave hit him. (PCR 460-61).

According to Jackson, Bryant also told him that Cave bragged about the murder. (PCR 461). Jackson testified that he did not include in his report any reference to what Bryant had overheard because he did not believe it was relevant to his investigation. (PCR 462, 481). Jackson did not remember telling anyone about the conversation. (PCR 463).

Robert Makemson, now a circuit court judge, was Parker's only witness at the evidentiary hearing. Makemson testified that the trial court appointed him to represent Parker in May 1982. (PCT 32-35). During his pretrial investigation, the state never listed Bryant as a witness or revealed the substance of his 1993 testimony. Had he been given the information, he would have deposed Bryant regarding the conversation he had overheard. (PCT 39). Although Makemson was initially confused about the nature of the conversation Bryant overheard, he ultimately acknowledged that Cave did not confess to shooting the victim. Rather, Bryant overheard Bush accuse Cave of shooting the victim, and Cave made no response. (PCT 89, 114, 132-136, 141-144).

According to Makemson, his strategy at Parker's trial was to minimize Parker's role in the murder and discredit Georgeanne Williams' testimony regarding Parker's confession to her that he shot the victim. (PCT 39-49). Had he been aware of Bryant's

testimony, he would have introduced it in both phases, despite Parker's confession to Williams that he was the shooter and despite his statement to the police that Bush was the shooter. (PCT 53, 58-59, 126). To minimize the contradictory nature of Bryant's statement to the police, Makemson testified that he would have attempted to impeach Detective Powers' recollection of Parker's statement to him that Bush was the shooter. (PCT 90-93).

Regarding the admissibility of Bryant's hearsay testimony at the guilt phase, Makemson testified that he would have sought admission of the testimony as a statement against penal interest. He was unable, however, to state what corroborating circumstances were available to support its admission. (PCT 104-109).

In rebuttal, the state called James Midelis, now a county court judge, as its first witness. (PCT 188). Midelis testified that he assisted the State Attorney, Bob Stone, in the prosecution of John Bush, Alphonso Cave, J.B. Parker, and Terry Johnson in 1983. (PCT 188-191). They had listed Michael Bryant as a witness in Cave's trial to rebut the "no significant history" mitigator, but he was unaware of any conversation Bryant had allegedly overheard between Cave and Bush. Had he been aware of such a conversation, they surely would have used it at Cave's original trial. (PCT 191-96). He was shocked that Art Jackson failed to include the statement in his report. (PCT 221). Midelis never met Michael Bryant. (PCT 215).

Robert Stone also testified for the state. Stone was the lead prosecutor in Parker's trial. (PCT 246, 266). Stone never met Bryant, but was aware of the assault committed by Cave upon Bryant. Had Cave attempted to argue for the "no significant history" mitigator, they would have used Bryant to rebut it. (PCT 270-73). He was unaware, however, of the conversation overheard by Bryant. (PCT 248-51, 268).

The state's final witness was Detective David Powers. Powers was the lead detective in the murder investigation and had interviewed Parker on May 7, 1982. Parker told Powers that Bush shot and stabbed the victim. Powers testified that he was unaware of the existence of Bryant's statement. Powers also stated that he never had any contact with Bryant. (PCT 274-83).

Following the evidentiary hearing, the parties submitted posthearing memoranda. (PCR 741-78, 779-829). Thereafter, the trial court entered a written order, making the following relevant findings: (1) the state failed to disclose Bryant's information to Parker, the information was favorable to Parker, and neither Parker nor counsel could have obtained the information through due diligence (PCR 1207, 1210-11); (2) Bryant's testimony would have been admissible in both the guilt and penalty phases of Parker's trial (PCR 1209); (3) the admission of Bryant's testimony probably would not have resulted in a different outcome in the guilt phase, given the Eleventh Circuit's finding that Parker was guilty of first-degree felony murder (PCR 1212-13); and (4) the admission of Bryant's testimony

probably would have resulted in a different outcome in the penalty phase (PCR 1211-13). This appeal follows.

SUMMARY OF ARGUMENT

Issue I - The trial court erroneously found as a matter of law that Michael Bryant's hearsay testimony of a conversation he overheard in jail between Cave and Bush, which the state withheld in violation of Brady v. Maryland, was material to Parker's penalty phase defense.

Issue II - The trial court erroneously found as a matter of law that Bryant's hearsay testimony would have been admissible at the guilt phase of Parker's trial under the "statement against (penal) interest" exception to the hearsay rule.

ARGUMENT

ISSUE I

THE TRIAL JUDGE ERRED IN FINDING THAT BRYANT'S HEARSAY TESTIMONY WAS MATERIAL EVIDENCE THAT ENTITLED PARKER TO A NEW PENALTY PHASE HEARING.

During the pendency of a motion for rehearing in the Eleventh Circuit Court of Appeals, Parker filed a motion to stay the proceedings in order to bring a successive postconviction motion in state court. The basis for the request was a claim of newly discovered evidence. (PCR 95-101). Without objection from the state, the Eleventh Circuit stayed the proceedings on August 19, 1993, to allow Parker the opportunity to pursue his claim in state court. (PCR 174).

On June 22, 1994, Parker filed his successive motion in circuit court presenting three separate claims based on the same newly discovered evidence. His first claim was based on a violation of Brady v. Maryland, 373 U.S. 83 (1963). (PCR 37-47). His second claim was based on the newly discovered evidence provision of Rule 3.850. (PCR 48-68). And his third claim was based on prosecutorial misconduct as a violation of due process because the state had argued inconsistent positions as to the identity of the actual shooter. (PCR 69-88).

As the basis for these claims, Parker alleged that he had recently discovered information from the 1993 resentencing proceedings of his co-defendant, Alphonso Cave.¹ This information

¹ Cave was originally convicted and sentenced to death in 1982. This Court affirmed both his conviction and sentence. Cave

consisted of the deposition and trial testimony of an inmate named Michael Bryant, and the deposition and trial testimony of a correctional supervisor named Art Jackson. (PCR 10). At Cave's resentencing, Bryant had testified that he shared a cell with Cave prior to Cave's original trial. (PCR 257). John Earl Bush, another co-defendant of Cave and Parker, was being held two cells down from them. One night, Bryant overheard the following conversation between Cave and Bush:

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, he says, well, you popped a cap in the back of her head.

(PCR 26-27, 258-59, 302).

Later that night, Cave went over to Bryant, who was pretending to be asleep, and made a sexually explicit remark about wanting some "booty," but Bryant told Cave to leave him alone. The next morning, Cave told Bryant that if he told anybody about what he

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.

overheard he would "see to it that somebody [took] care of [him]."

(PCR 259). When Bryant told Cave he would not tell anyone, Cave responded that he did not believe him, so Cave and several others beat up Bryant, sending him to the hospital with a broken nose. (PCR 259-60, 297).

Bryant reported the assault to Lieutenant Art Jackson, the shift supervisor at the jail. According to Bryant, he told Jackson about the conversation he overheard between Cave and Bush. (PCR 298-99, 305). Bryant further testified that he told Bob Stone, the lead prosecutor in Cave's case, about the overheard conversation. (PCR 299-300, 305).

Lieutenant Jackson had also testified at Cave's 1993 resentencing hearing. Jackson confirmed that Bryant had related the substance of the conversation he overheard between Cave and Bush: "Mr. Bryant advised me that Mr. Cave was stating that they had apparently stabbed the victim and he got sick of hearing her hollering and he shot her." (PCR 472-74). As he was escorting Cave to his office for questioning about the assault, he heard Cave threaten Bryant: "He advised Michael Bryant if he would tell what had happened that he would do more to him." (PCR 480). While he "might have told detectives [involved in Cave's murder case] about what [he (Jackson)] heard," he did not include in his report on the battery the conversation Bryant overheard because he did not believe the conversation was relevant to his investigation of the assault. (PCR 481, 484).

Based on this testimony from Cave's resentencing, Parker

alleged that the state failed to disclose the substance of Bryant's testimony at the time of his trial, and failed to list Bryant as a witness. Parker also claimed that he was not aware of this information until Cave's 1993 resentencing and could not have discovered it with due diligence. Finally, Parker claimed that, had he known about it at the time of his trial, he would have used Bryant's testimony to rebut the state's theory that he was the shooter. Given the circumstantial nature of the state's case, he believed that it probably would have produced a different result at both the guilt and penalty phases of his trial. (PCR 37-68).

In its response to Parker's motion, the state conceded that the substance of Bryant's testimony was in the state's constructive possession at the time of Parker's trial, given Lieutenant Jackson's testimony at Cave's resentencing hearing that he was aware in 1982 of the overheard conversation. (PCR 679). See Garcia v. State, 622 So. 2d 1325, 1330 (Fla. 1993) (finding that possession or knowledge of information held by police will be imputed to the state regardless of prosecutor's actual knowledge of information). The state also tacitly conceded that it failed to disclose such information to Parker at the time of his trial. (PCR 679-80). Finally, it tacitly conceded that Parker could not have obtained such information with the exercise of due diligence. (PCR 679-80). Thus, the only issues for the trial court to resolve were whether the evidence was "material" under Brady² or would probably

² A subissue under "materiality" was whether Bryant's testimony would have been admissible in either the guilt or penalty

produce an acquittal on retrial under Jones v. State, 591 So. 2d 911 (Fla. 1991),³ and whether the state's inconsistent positions as to the shooter in the separate trials violated Parker's due process rights.

phases of Parker's trial. Under Green v. Georgia, 442 U.S. 95 (1979), the state conceded that Bryant's testimony would have been admissible in the penalty phase of Parker's trial. It did not concede that such evidence would have been admissible in the guilt phase of Parker's trial. See Issue II, infra.

³ The state submits that these standards are the same. Thus, the main claim could be analyzed under either standard. For the sake of clarity, the state will analyze the claim under the Brady materiality standard, as this was the focus of the trial court's order.

At the evidentiary hearing, Parker submitted the deposition and trial testimony from Cave's 1993 resentencing of both Michael Bryant and Lieutenant Jackson, in lieu of their live testimony.⁴ (PCT 147-48, 160-71). He also presented the testimony of his original trial attorney, Robert Makemson. Makemson testified that his strategy at Parker's trial was to minimize Parker's role in the murder and discredit Georgeanne Williams' testimony regarding Parker's confession to her that he shot the victim. (PCT 39-49). Had he been aware of Bryant's testimony, he would have introduced it in both phases, despite Parker's confession to Williams that he was the shooter, and his statement to the police that Bush was the shooter. (PCT 53, 58-59, 126). As a basis for its admission in the guilt phase, Makemson testified that he would have attempted to introduce it under the "statement against (penal) interest" exception to the hearsay rule. (PCT 103). He was unable, however, to state what corroborating circumstances were available to support its admission. (PCT 104-109). To minimize the contradictory nature of Bryant's statement to the police, Makemson testified that he would have attempted to impeach Detective Powers' recollection of Parker's statement to him that Bush was the shooter. (PCT 90-93).

Following Judge Makemson's testimony, the state presented the

⁴ Lieutenant Jackson's testimony was admitted solely to prove that the state had constructive possession of the information at the time of Parker's trial; it was not admitted to prove that Bryant, in fact, overheard the conversation, or that the substance of the conversation was true.

testimony of James Midelis and Robert Stone, the prosecutors in Parker's case; and David Powers, the lead detective in Parker's case. Midelis, Stone, and Powers all testified that they were unaware of the conversation overheard by Bryant until Cave's 1993 resentencing hearing. (PCT 194, 215, 221, 251, 266, 282; PCR 680).

Following the evidentiary hearing and the submission of posthearing memoranda, the trial court made the following relevant findings: (1) the state failed to disclose Bryant's information to Parker, the information was favorable to Parker, and neither Parker nor counsel could have obtained the information through due diligence (PCR 1207, 1210-11); (2) Bryant's testimony would have been admissible in both the guilt and penalty phases of Parker's trial (PCR 1209); (3) the admission of Bryant's testimony probably would not have resulted in a different outcome in the guilt phase, given the Eleventh Circuit's finding that Parker was guilty of first-degree felony murder (PCR 1212-13); and (4) the admission of Bryant's testimony probably would have resulted in a different outcome in the penalty phase (PCR 1211-13). Regarding the penalty phase, the trial court stated:

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. 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 his testimony is not credible, not trustworthy, is biased and insignificant to Parker's defense.

* * * *

Parker is entitled to a resentencing. To deny him this where the State has suppressed such evidence would violate his due process rights and undermine the confidence in the penalty imposed.

(PCR 1212-13).

The trial court's finding of materiality as to the penalty phase was erroneous as a matter of law. Under the prevailing definition of materiality, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). In making this determination, the reviewing court must consider the evidence in the context of the entire record. United States v. Agurs, 427 U.S. 97, 112 (1976). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Id. at 109-10.

Because the trial court's ruling was based on a mixed question of fact and law, review by this Court is *de novo*. See Delap v. Dugger, 890 F. 2d 285, 298-99 (11th Cir. 1989) (assessing a Brady claim *de novo*); United States v. Beasley, 72 F. 3d 1518 (11th Cir. 1996) (finding Brady claims subject to *de novo* review); cf. Thomas v. State, 616 So. 2d 1150 (Fla. 4th DCA 1993) (reviewing a trial court's ruling on a question of law *de novo*). Here, there is no reasonable basis in the record to support the trial court's finding that Bryant's testimony would have resulted in a life recommendation and sentence. Therefore, this Court should reverse the trial court's order granting relief and reinstate Parker's sentence of death.

In granting relief as to the penalty phase, the trial court placed great, if not exclusive, emphasis on the fact that the state used Bryant's testimony at Cave's resentencing:

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. 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 his testimony is not credible, not trustworthy, is biased and insignificant to Parker's defense. (PCR 1212). This, however, was not a legitimate basis for granting relief. As noted previously, materiality must be assessed based on the facts and circumstances in the case at hand--not on the facts and circumstances of a totally different case. See Agurs, 427 U.S. at 112. The trial court's reliance on the state's use of Bryant's testimony at Cave's resentencing ignored this principle.

In Cave's case, the state admitted Bryant's testimony during a penalty phase proceeding where the rules of evidence were relaxed. See § 921.141(1), Fla. Stat. (1995) ("Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements."). The state had no obligation to justify the admission of Bryant's testimony under a hearsay exception or to otherwise prove the trustworthiness of the hearsay statements. It was for the jury to determine Bryant's credibility and the trustworthiness of the conversation between Bush and Cave.

Parker, on the other hand, alleged that Bryant's testimony was

material to the guilt phase of his trial. To support such an argument, he had to show that the testimony would have been admissible in that phase, and under what theory since the rules of evidence would have been applicable. As the basis for admission, he relied on the "statement against (penal) interest" exception to the hearsay rule. This exception, however, requires the proponent to show corroborating circumstances which prove the trustworthiness of the hearsay statements. § 90.804(2)(c), Fla. Stat. (1995).

It is in this context that the state argued the untrustworthiness of the substance of Bryant's testimony. The trustworthiness of Bryant himself was never an issue. To say, as Parker and the trial court did, that the state's use of Bryant's testimony, by itself, established the trustworthiness of the conversation between Cave and Bush begs the question. The evidentiary standards in Cave's resentencing were far different than those in Parker's guilt phase. By relying on the state's use of Bryant's testimony in Cave's resentencing as the sole basis for granting relief, the trial court failed to assess Parker's claim under the appropriate standards of review.

As for the admissibility of Bryant's testimony at Parker's penalty phase, the state conceded that his testimony would have been admissible under the relaxed evidentiary rules. In this context, trustworthiness never became an issue. Thus, the trial court should never have factored it into its materiality analysis regarding the penalty phase. The fact that it did so illustrates its lack of understanding and faulty reasoning.

In addition, in assessing materiality at the penalty phase, the trial court failed to consider significant evidentiary inconsistencies that would have rendered Bryant's testimony ineffectual in Parker's penalty phase. As evidenced by the original trial record and Robert Makemson's testimony at the evidentiary hearing, Makemson's strategy was to minimize Parker's role in the entire criminal enterprise and to identify Bush as the shooter. (R 1466-87; PCT 39-49). Although the jury found Parker guilty of the murder, Makemson maintained during the penalty phase that Georgeanne Williams was not credible, that Parker was a minor participant, and that Bush shot Frances Slater to avoid his arrest for the robbery:

I hope [your verdict] was not based upon the testimony of Georgeanne Williams. That Mr. Parker was the killer. I hope that you realize and I hope that you agree that Georgeanne Williams' testimony was not worthy of your belief, it's not credible beyond a reasonable doubt and I hope that that was not the reason and I hope that if you come back with a decision to recommend the death penalty for Mr. Parker, it is not because of what Georgeanne Williams said.

* * * *

I would submit to you that the crime of murder was not committed for a financial gain. I would submit to you that the crime of murder was committed by John Earl Bush to keep Frances Slater from identifying him

* * * *

I submit to you there is evidence, that has been presented in the form of Mr. Parker's statement and in the form of Mr. Parker's testimony. That his participation . . . was relatively light as compared to John Earl Bush and Alfonso Cave.

Bush and Cave went in, took the gun in, brought the girl out, put the girl in the car and Bush shot her. Mr. Parker's participation

was relatively minor as compared to Bush and Cave.
(R 1466-68, 1473, 1474).

By admitting Bryant's testimony in the penalty phase,⁵ Parker would have contradicted his entire defense, impeached his own credibility, and caused the introduction of otherwise inadmissible, but highly inculpatory, evidence. Parker had identified Bush as the shooter on three separate occasions--in two statements to the police and in his guilt phase testimony. (R 774-793, 797-804, 959-1008). Although the Eleventh Circuit ultimately found that Parker's first statement to the police should not have been admitted at the guilt phase, and that Parker would not have testified had it not been admitted, the court ruled that defense counsel would have admitted the statement at the penalty phase given its overall exculpatory nature. Parker v. Singletary, 974 F.2d 1562, 1566-74 (11th Cir. 1992). Makemson denied at the evidentiary hearing, however, that he would have introduced Parker's first statement during the penalty phase, despite the Eleventh Circuit's finding. (PCT 51). Even were this true, and even if the jury had never heard Parker's testimony or his first statement, it still would have heard his second statement wherein he identified Bush as the shooter.⁶ By introducing Bryant's

⁵ The state maintains, contrary to the trial court's finding, that Parker would not have been able to admit Bryant's testimony in the guilt phase, as it constitutes hearsay without any exception. See Issue II, infra.

⁶ The Eleventh Circuit ruled that Parker's second statement to police was properly admitted at the guilt phase. Id. at 1575 n.72.

testimony, Makemson would have contradicted his defense that Bush was the shooter. While he could have argued instead that Cave was the shooter, he would have been faced with his own client's inconsistent statement that Bush was the shooter.

Although Makemson acknowledged a conflict between Parker's statement to the police and Bryant's testimony, he testified that he would have attempted to convey during cross-examination of Detective Powers that the officer was mistaken when he testified that Parker told him that Bush was the shooter. (PCT 90-91). A review of Makemson's cross-examination of Powers at trial, however, reveals a contrary result. Detective Powers vehemently maintained that he was not, and could not have been, mistaken about Parker's statement to him that Bush was the shooter. (R 806-813). In fact, cross-examination of Powers terminated with the following exchange:

MAKEMSON: Lieutenant Powers, because of the fact that you did not have a tape recorder, and because of the fact that you did not take any notes, either contemporaneously or later on that afternoon, and because of the fact that you did not prepare this report until ten days later, is it possible that you could be mistaken in what you say J.B. Parker told you?

POWERS: No, sir.

MAKEMSON: That's not possible at all?

POWERS: No, sir.

MAKEMSON: You aren't willing to even concede that any portion of it could be a mistake?

POWERS: No, sir.

MAKEMSON: That's all.

(R 835). Given Power's unequivocal testimony at Parker's trial, Makemson's belief that he would have been better able to discredit Powers' testimony had he presented Bryant's testimony was, at best,

ill-considered.

Moreover, besides having told the police that Bush was the shooter, Parker had also confessed to Georgeanne Williams that he shot Frances Slater. So, by the time the jury would have heard Bryant's testimony implicating Cave as the shooter, it would have already heard in the guilt phase Parker's confession to Williams that he was the shooter, and his second statement to the police that Bush was the shooter. Bryant's testimony would have done nothing but make Parker appear to be a liar--twice. The contradictory nature of the evidence demonstrates that it is not material under Brady. See Felker v. Thomas, 52 F. 3d 907, 910-11 (11th Cir. 1995) (finding evidence not material for Brady claim where withheld evidence was in direct contradiction to defendant's own statement and jury would have viewed defendant as liar); United States v. Starrett, 55 F. 3d 1525, 1556 (11th Cir. 1995) (same); cf. United States v. Gossett, 877 F. 2d 901, 907 (11th Cir. 1989) (finding hearsay evidence not trustworthy under "statement against (penal) interest" exception where declarant was prison inmate and new information contradicted defendant's own version of events); Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993) (finding withheld statement material since it was in total contradiction to state's theory at penalty phase).

Finally, by admitting Bryant's testimony, Makemson would have opened the door to the admission of Cave's and Bush's statements to the police implicating Parker as the shooter. While Bruton v. United States, 391 U.S. 123 (1968), prohibits the state from

introducing co-defendants' confessions that implicate a defendant, such evidence would have been admissible, not for its truth, but to impeach the credibility of Bush's accusation. In other words, Cave's and Bush's confessions identifying Parker as the shooter would have been admissible to show that all of the co-defendants were pointing the fingers at each other. See Tennessee v. Street, 471 U.S. 409 (1985) (finding no confrontation clause violation where accomplices' confession implicating defendant was admitted for nonhearsay purpose to rebut defendant's claim that his confession was coercively derived from accomplice's statement); Walton v. State, 481 So. 2d 1197, 1199-1200 (Fla. 1986) (finding no confrontation clause violation where defendant opened door to state's questioning of detective that arrest warrant was based on accomplice's statement implicating defendant). Under these circumstances, it is highly unlikely that Makemson would have admitted Bryant's testimony, despite his testimony to the contrary.

An important distinction which the trial court also failed to consider was that Cave did not "confess" to anything. Rather, Bush accused Cave of causing their incarceration by his actions of burning the victim with a cigarette and shooting her in the head.⁷

That Cave failed to expressly deny such accusations in Bryant's presence may render his silence admissible against him as an adoptive admission, but it does not dispositively identify him as

⁷ Curiously, the medical examiner in Parker's trial found absolutely no evidence of any external injuries to the victim other than the stab wound, the gunshot wound, and a defensive wound to a finger. (R 667).

the actual shooter. After all, the trial judge at Cave's resentencing found insufficient evidence, despite Bryant's testimony, to prove that Cave was the shooter. (PCR 150). Obviously, the probative value of Bush's accusations were suspect. See United States v. Seabolt, 958 F.2d 231, 233 (8th Cir. 1992) (cited in Jones v. State, 678 So. 2d 309, 314 (Fla. 1996)) (finding that "a statement by one criminal to another criminal . . . is more apt to be jailhouse braggadocio than a statement against his criminal interest"), cert. denied, 507 U.S. 971 (1993).

When viewed in the context of the entire record, Bryant's statement is nothing more than an example of co-defendants placing blame on each other. The jury was already aware that Parker's motivation to speak to the police was based on the fact that Bush had implicated Parker in his own statement to police. Parker, 974 F. 2d at 1579. Parker's confession to Georgeanne Williams included a statement to her that it would be Bush's word against Parker's. Id. at 1566. Rather than being exculpatory, Bryant's statement would have been detrimental to Parker's cause. The statement is nothing more than continued examples of how all of the co-defendants were making self-serving statements to save themselves.

To the extent the trial court based a finding of materiality on an alleged due process violation, that ruling was also legally erroneous. A state's presentation of contradictory theories and evidence at separate trials of co-defendants does not violate fundamental fairness. Nichols v. Scott, 69 F. 3d 1255, 1269-76 (5th Cir. 1995). In rejecting such a claim, the Fifth Circuit

held:

Because Nichols was not in jeopardy in Williams' trial, the results of that trial do not bind the state in its prosecution of Nichols. Moreover, the rule of "collateral estoppel" described in Ashe as having been applied in federal criminal cases for "more than 50 years"--and which it ultimately held mandated by the double jeopardy clause--required that the two actions be between "the same parties." Ashe [v. Swenson, 397 U.S. 436 (1970)]. Thus, because Nichols was not a party in Williams' trial, the result in that trial could not collaterally estop the state in its prosecution of Nichols even under the federal common law rule of collateral estoppel in criminal cases. We have declined to apply collateral estoppel against the United States in a criminal prosecution on the basis of an earlier determination in the United States' criminal prosecution of a different defendant. United States v. Mollier, 853 F. 2d 1169, 1176 (5th Cir. 1988) (where defendants are different "collateral estoppel has no application in criminal cases"); United States v. Montes, 976 F. 2d 235, 239 (5th Cir. 1992) (same), cert. denied, --- U.S. ---, 113 S. Ct. 1831, 123 L. Ed. 2d 459 (1993). Consequently, allowing persons to claim collateral estoppel benefits of an adjudication to which they were strangers can hardly be considered as mandated by historic concepts of fundamental fairness or due process.

Nichols, 69 F. 3d at 1270.

In conclusion, the trial court's ruling was erroneous as a matter of law. The trustworthiness of Bryant's testimony was never an issue in the materiality analysis regarding Parker's penalty phase. That the trial court based its finding of materiality on the trustworthiness of Bryant's testimony was plain error. As for the effect of the admission of Bryant's testimony on Parker's penalty phase, no reasonable person could say that Parker would

have received a life recommendation and sentence based on Bryant's testimony. Such testimony was antithetical to Parker's theory at trial that Bush was the shooter, and would have been contradicted by Parker's own statements that he or Bush was the shooter. It would have shown Parker to be a liar, and it would have opened the door to Cave's and Bush's confessions that Parker was the shooter.

Since there is no reasonable probability that the outcome would have been different had this information been presented at Parker's penalty phase, this Court should reverse the trial court's ruling and reinstate Parker's sentence of death. See Felker, 53 F. 3d at 910-11; Starrett, 55 F. 3d at 1556; Jones, 678 So. 2d at 314.

ISSUE II

THE TRIAL COURT ERRED IN RULING THAT BRYANT'S
HEARSAY TESTIMONY WOULD HAVE BEEN ADMISSIBLE
AT THE GUILT PHASE OF PARKER'S TRIAL.

In its written order, the trial court erroneously found that Michael Bryant's hearsay testimony of the alleged conversation between Cave and Bush would have been admissible in the guilt phase of Parker's trial.⁸ (PCR 1209). It made this finding without citation or reference to any legal authority, and none, in fact, supported such a finding on the basis of this record. Therefore, this Court should reverse this legal ruling.

In his postconviction motion and posthearing memorandum, Parker alleged that Bryant's hearsay testimony relating Cave's and Bush's conversation constituted Brady material. He further alleged that, had the state disclosed it at the time of his trial, defense counsel would have used it, and its use probably would have resulted in a different verdict. (PCR 37-47, 697-707, 793-823). As a preliminary matter, the basis for its admission became an issue. Parker offered the following two bases for its admission: (1) under the "statement against (penal) interest" exception to the hearsay rule; and (2) as a matter of fairness and due process under

⁸ While the trial court ultimately found that the state's nondisclosure of this alleged conversation was not "material" to the guilt phase pursuant to Brady v. Maryland, 373 U.S. 83 (1963), the state submits that this finding of admissibility was erroneous and may prejudice the state in any cross-appeal or later prosecution or postconviction proceeding.

Chambers v. Mississippi, 410 U.S. 284 (1973), and Green v. Georgia, 442 U.S. 95 (1979). As the state argued before the trial court, neither of these bases supported the admission of Bryant's hearsay testimony. Thus, the trial court erred in finding that the testimony would have been admissible.

The "statement against (penal) interest" hearsay exception provides in pertinent part:

(2) Hearsay Exceptions. The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness:

* * * *

(c) *Statement Against Interest.* . . . A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

§ 90.804(2)(c), Fla. Stat. (1995).

Central to the application of this exception is the definition of "statement." Section 90.801(1)(a), Florida Statutes (1995), defines "statement" as (1) "[a]n oral or written assertion," or (2) "[n]onverbal conduct of a person if it is intended by the person as an assertion." Here, Bryant allegedly overheard a conversation between two people: Cave and Bush. Thus, there were two declarants and three "statements." In the first statement or "oral assertion," Bush accused Cave of causing their incarceration by burning the victim with a cigarette. In the second statement or "oral assertion," Cave accused Bush of causing their incarceration by stabbing the victim in the stomach. In the third statement or "oral assertion," Bush accused Cave of shooting the victim in the

head. Cave made no response to this accusation, and the conversation apparently ended.

Of these three "statements," only the third one was relevant to Parker's materiality claim, since who burned the victim and who stabbed the victim were not at issue. What Parker consistently focused on, however, was not the accusation by Bush, but the silence by Cave. It was this silence, in the face of a serious accusation, Parker claimed, that inculpated Cave and exculpated him. This silence, however, did not constitute a "statement" within the definition of section 90.801(1)(a), since it was neither an oral or written assertion, or nonverbal conduct intended as an assertion. Thus, the only relevant "statement" was the third one, wherein Bush accused Cave of being the shooter.

As noted earlier, to support the admission of this entire conversation between Cave and Bush, Parker claimed that it fell within the "statement against (penal) interest" exception. This exception, however, requires proof that (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).

As for the first two elements, Parker made only the following analysis in his posthearing memorandum of law: "There can be no legitimate dispute as to the first two factors: the declarants, Bush and Cave, would have been unavailable to testify at Parker's

trial, and the statements plainly tended to expose Bush and Cave to criminal liability." (PCR 794) (citations omitted). Such blanket conclusions, however, did not satisfy proof of these two elements.

In the context of the "statement against (penal) interest" exception, "unavailability" is defined in pertinent part as follows:

(1) Definition of Unavailability.

"Unavailability as a witness" means that the declarant:

(a) Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; . . .

For the first to apply, the trial court must exempt the witness from testifying based on a claim of privilege. For the second to apply, the witness must physically refuse to testify despite an order to do so by the trial court. Either way, the witness must appear in court, for the court to determine his or her availability.⁹

⁹ The cases cited to in Parker's posthearing memorandum to support his conclusion that Cave and Bush would have claimed a privilege against self-incrimination actually support the state's position instead. In both cases, the witnesses actually took the stand and claimed the privilege, which the trial court sustained, thereby exempting the witnesses from testifying, and rendering them

"unavailable." Brinson v. State, 382 So. 2d 322, 324 (Fla. 2d DCA 1979); State, Dept. of HRS v. Bennett, 416 So. 2d 1223, 1224 (Fla. 3d DCA 1982).

In Jones v. State, 678 So. 2d 309, 313 (Fla. 1996), the defendant produced numerous people who claimed that Glen Schofield had confessed to them that he murdered the victim. At the evidentiary hearing, Jones' counsel represented that Schofield would deny any involvement if called as a witness, and thereafter decided not to call him at the hearing. On appeal, this Court found that Jones had failed to prove Schofield's unavailability: "Contrary to Jones' attorney's position, we do not know what Schofield would have said had he been called as a witness." Id. at 314. As in Jones, by failing to call Cave and Bush at the evidentiary hearing, Parker failed to show the unavailability of the declarants. Parker's attorney's assertion that they would have claimed a privilege if they had been called as witnesses at Parker's original trial (or at the evidentiary hearing) was not sufficient to prove this element. Thus, the trial court erred in finding that this conversation would have been admissible at Parker's original trial.

Similarly, Parker failed to show that Cave's and Bush's "statements" tended to expose them to criminal liability. Taking each statement separately, none were admissions by the declarant that the declarant committed any unlawful act. Rather, they were each accusations against the other. Bush accused Cave of burning the victim with a cigarette and shooting her, and Cave accused Bush of stabbing her. While Bush's accusations may have exposed Cave to criminal liability, they did not expose Bush to criminal liability. And while Cave's accusation may have exposed Bush to criminal

liability, it did not expose Cave to criminal liability. As such, these "statements" did not satisfy the second element of the "statement against (penal) interest" exception since they did not expose the declarant to criminal liability.¹⁰ Regardless, "a statement by one criminal to another criminal . . . is more apt to be jailhouse braggadocio than a statement against his criminal interest." United States v. Seabolt, 958 F.2d 231, 233 (8th Cir. 1992) (cited in Jones, 678 So. 2d at 314), cert. denied, 507 U.S. 971 (1993). Since Parker failed to prove this element, the trial court erred in finding that Bryant's testimony would have been admissible at Parker's original trial.

¹⁰ Once again, Cave's silence in the face of Bush's accusation that he (Cave) shot the victim is not a "statement" within the exception's definition. Thus, Cave's silence does not constitute a statement that exposes him to criminal liability. While Parker might argue to a jury, as an inference from the evidence, that Cave's failure to respond to the accusation constituted an admission by silence, Cave's silence cannot be admitted in Parker's trial as an "adoptive admission" because such can only be admitted against the declarant in the declarant's own trial. See § 90.803(18)(b), Fla. Stat. (1995) ("[T]he following are not inadmissible as evidence, even though the declarant is available as a witness: . . . Admissions. A statement that is offered against a party and is . . . [a] statement of which the party has manifested an adoption or belief in its truth[.]").

Finally, Parker failed to provide extrinsic, corroborating circumstances that clearly showed the trustworthiness of Cave's and Bush's "statements." See Maugeri, 460 So. 2d at 977 (noting that statements against interest "must be accompanied by corroborating circumstances clearly indicating their trustworthiness, or, in the words of the Supreme Court, 'particularized guarantees of trustworthiness'"). It is important to distinguish between the trustworthiness of Cave's and Bush's conversation, and the trustworthiness of Bryant's testimony. The former is the focus of this legal analysis; the latter is a matter for the jury. Maugeri, 460 So. 2d at 979-80 (holding that the credibility of the in-court declarant's testimony was not a matter for consideration by the trial or appellate courts in determining the admissibility of the out-of-court statements).

To support this trustworthiness element, Parker alleged the following four circumstances as indicia of trustworthiness: (1) Cave's and Bush's conversation occurred at night after the lights were turned out when Cave believed that Bryant, who shared Cave's cell, was asleep and that their conversation would be private; (2) according to the state's argument at Cave's resentencing, Cave was the "leader of the group" during the robbery and kidnaping, using the only firearm to force the victim to open the store's safe and to leave the store with him and his codefendants; (3) Art Jackson overheard Cave tell Bryant that if Bryant told Jackson "what had happened" Cave would "do more to him"; and (4) the state's use of the conversation at Cave's resentencing. (R 795-98).

Throughout his posthearing memorandum, Parker characterized the conversation between Cave and Bush as "Cave's confession." (PCR 795) ("Cave made his confession"); (PCR 796) ("the evidence corroborating Cave's confession"); (PCR 797) ("Cave's confession is corroborated by"; "perhaps the most telling indicia of reliability of Cave's confession is that the State used Cave's confession"). As discussed previously, however, the only relevant "statement" that might fall within the exception was Bush's accusation that Cave shot the victim. Cave made no confession, and his silence does not constitute a "statement" within the exception. Thus, the focus should be on the trustworthiness of Bush's accusation, not Cave's silence.

As for Parker's first alleged corroborating circumstance, Cave's intent to have a private conversation with Bush, and Cave's belief that his conversation with Bush was private did not account for Bush's intent and belief when Bush made the accusation against Cave. Moreover, evidence in the record revealed that Cave and Bryant were locked down for the night in their cell, while Bush was locked down several cells away. (PCR 257-59). Thus, any expectation of privacy as they conversed from cell to cell was unjustified and hardly constituted a legitimate indicia of trustworthiness.

As for Parker's second alleged corroborating circumstance, the fact that Cave used the only gun during the robbery and used the gun to force the victim into their car did not sufficiently corroborate Bush's accusation that Cave was the shooter, in light

of (1) Parker's confession to Georgeanne Williams that he was the shooter,¹¹ (2) Bush's confession to the police that Parker was the shooter,¹² and (3) Cave's confession to the police and to his girlfriend, Brenda Strachen, that Parker was the shooter.¹³ There was absolutely no extrinsic evidence which showed, or even intimated, that Cave was the shooter. Thus, the fact that Cave used Bush's gun throughout the robbery and kidnaping did not supply sufficient corroborating circumstances to show that Bush's accusation was trustworthy.¹⁴

Parker's third corroborating circumstance was that Art Jackson overheard Cave tell Bryant that if Bryant told Jackson "what had

¹¹ In his second statement to the police, Parker implicated Bush as the shooter, but never implicated Cave.

¹² Bush never implicated Cave as the shooter.

¹³ Cave initially told his girlfriend that Bush was the shooter, but told her later that same day that Parker was the shooter. He never confessed to being the shooter, despite the fact that he confessed to using the gun throughout the robbery and kidnaping.

¹⁴ In fact, the trial judge at Cave's resentencing did not even find that Cave was the shooter after hearing Bryant's testimony. (PCR 427-28).

happened" Cave would "do more to him." Parker posited that Cave was threatening Bryant not to tell Jackson about the conversation he overheard between Cave and Bush. This ambiguous threat by Cave, however, did not, as Parker suggested, corroborate Bush's accusation that Cave was the shooter. First, the threat was rank hearsay, whether related by Bryant or Jackson. Moreover, it was not, by itself, sufficiently trustworthy, so it could not be used to establish the trustworthiness of another hearsay statement.

Second, Cave's reference to "what had happened" was far too ambiguous to corroborate Bush's accusation that Cave was the shooter. That it may have corroborated Parker's assertion that Cave and Bush had a conversation, and that Bryant overheard that conversation, was irrelevant, since that was not the focus of this analysis. Moreover, the threat was subject to several interpretations. It could refer to Cave's sexual advance on Bryant, or to Cave's battery upon Bryant. The record reveals that Cave made a sexual advance towards Bryant that Bryant rebuffed, and that Cave beat up Michael Bryant the next morning. Bryant thereafter reported the sexual advance and the battery to Art Jackson. Jackson allegedly overheard Cave's threat when he came to their cell to investigate the battery, not the conversation Bryant overheard. After all, Jackson testified that he did not even include the overheard conversation in his report because he did not believe that it was relevant to his investigation of the battery. In this context, one could infer from the ambiguity of the statement that Cave was threatening Bryant not to report the sexual

advance or pursue the battery, or Cave would "do more to him," i.e., inflict further injury upon him. Given the hearsay nature of this threat, and the ambiguous nature of Cave's reference to "what had happened," the state submits that this threat did not sufficiently corroborate Bush's accusation that Cave was the shooter.

As his fourth corroborating circumstance, Parker relied heavily on the fact that the state vouched for Bryant's credibility and veracity when it presented the overheard conversation in Cave's resentencing hearing to argue that Cave might have been the shooter. To support this argument, Parker relied exclusively on Green v. Georgia, 442 U.S. 95 (1979). In Green, the defendant and a codefendant, Carzell Moore, were convicted of abducting a woman from a store, raping her, and shooting her to death. In Moore's trial, the state had presented the testimony of Thomas Pasby, who testified that Moore had confessed to him that he killed the victim after ordering Green to run an errand. Moore was sentenced to death. At Green's sentencing hearing, Green sought to introduce Pasby's testimony, but the trial court excluded it as hearsay. Id. at 96. On appeal, the Supreme Court ruled that Pasby's testimony should have been admitted, despite its hearsay nature, because it was "highly relevant to a critical issue in the punishment phase of the trial," and because "substantial reasons existed to assume its reliability." Id. at 97. Those corroborating circumstances included that Moore made the statement spontaneously to a close friend, that there was ample evidence to corroborate the confession

and to obtain a conviction and death sentence against Moore, that the statement was against Moore's interest and there was no evidence of any ulterior motive for making it, and that the state considered the testimony sufficiently reliable to use it against Moore. Id.

For the following reasons, Green is factually and legally distinguishable from the present case: First, Green sought to introduce Pasby's testimony into the penalty phase; Parker claimed that Bryant's testimony would have been admissible in the guilt phase of his trial. Second, the state conceded that Bryant's testimony would have been admissible in Parker's penalty phase since Florida has relaxed evidentiary rules in that phase; Georgia obviously has not relaxed its evidentiary rules for the penalty phase.¹⁵ Third, there were not, as in Green, "substantial reasons" to assume that Bush's accusation that Cave was the shooter was "reliable." Green, 442 U.S. at 97. Bush did not make this accusation spontaneously to a close friend. Rather, Bush and Cave, who were locked down in separate cells apart from each other, were each accusing the other of causing their incarceration by blaming various aspects of the murder on the other. These circumstances hardly rendered the accusations reliable.

Moreover, there was not any, much less ample, evidence, as in Green, to corroborate Bush's accusation. Although the state used

¹⁵ Even without relaxed evidentiary rules, Florida, unlike Georgia, recognizes an exception to the hearsay rule for statements against penal interest. See § 90.804(2)(c), Fla. Stat. (1995); Green, 442 U.S. at 96 n.1.

Bryant's testimony in Cave's resentencing to secure a death sentence for Cave, it did not, as in Green, use it in Cave's guilt phase, and it was not, as in Green, sufficient by itself to secure a death sentence for Cave. Rather, the state's arguments in Cave's resentencing were highly equivocal as to the shooter. For example, in opening argument, the prosecutor stated,

The State's evidence will show that the defendant either himself killed Fran Slater by shooting her in the back of the head as she pleaded for her life after being stabbed in the stomach and falling to her knees on the ground and being shot execution style, or that the defendant was a major participant, the major participant in the robbery and the kidnaping of Fran; and that he acted with a reckless disregard and indifference to the life of another human being.

(Cave's resentencing p. 23) (emphasis added). And in his closing argument, that prosecutor stated, "That would be appropriate for what he did, the trigger man in this case. A lot has been made about the trigger man. Trigger man or not, I submit to you it does not matter based upon the facts and the crimes that were committed." (Cave's resentencing p. 969).

Nor was Bush's accusation, as was Moore's confession to Pasby, a statement against Bush's interest. Although it was a statement against Cave's interest, which Cave apparently did not refute, it cannot be said, as in Green, that Bush did not have an ulterior motive for saying it, not the least of which was to shift blame from himself. It also could have been made in jest, which Cave decided not to dignify with a response since he and Bush both knew the truth. Given the circumstances, it could hardly be deemed

reliable.

Finally, as for the state's use of Bryant's testimony at Cave's resentencing, the state presented Bryant's testimony for the jury and the trial court to assess his credibility and veracity as they saw fit. As noted, the state did not use Bryant's testimony in Cave's guilt phase proceeding and did not rely on Bryant's testimony as unequivocal proof that Cave was the shooter. Ultimately, the trial court rejected Bryant's testimony and found that Cave was not the shooter. (PCR 427-28). The fact that the State used Bryant's testimony in a different proceeding and under different evidentiary standards did not automatically render the substance of the testimony trustworthy. Under the hearsay exception, Parker was required to allege other corroborating circumstances which proved that Bush's accusation was trustworthy. The state's use of Bryant's testimony simply was not a sufficient corroborating circumstance. Thus, without any legitimate corroborating circumstances, the trial court erred in finding that Bryant's hearsay testimony would have been admissible in Parker's original trial.

As his second basis for admitting Bryant's testimony in the guilt phase of his trial, Parker alleged that it would be admissible as a matter of fairness and due process under Chambers v. Mississippi, 410 U.S. 284 (1973), and Green v. Georgia, 442 U.S. 95 (1979). Neither Chambers nor Green, however, allow *cart blanche* admission of otherwise inadmissible evidence. Both, in fact, require a showing of reliability. See Chambers, 410 U.S. at 300

("The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability."); Green, 442 U.S. at 97 ("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." (citations omitted)).

In Chambers, the Supreme Court found reliable, despite their hearsay nature, three separate confessions to three separate people by someone other than the accused, because each "was made spontaneously to a close acquaintance shortly after the murder," because each "was corroborated by some other evidence in the case," because of the sheer number of confessions, because of the self-incriminatory nature of each confession, and because the declarant was available for cross-examination at the trial. 410 U.S. at 300-01.¹⁶

Unlike in Chambers, neither Bush nor Cave confessed to shooting the victim; rather, Bush accused Cave of doing so, and Cave made no response. This accusation was not made to a "close acquaintance shortly after the murder," but was made between two codefendants while locked down in separate cells on the same cell block. As noted previously, "a statement by one criminal to another criminal . . . is more apt to be jailhouse braggadocio than a statement against his criminal interest." United States v. Seabolt, 958 F.2d 231, 233 (8th Cir. 1992) (cited in Jones, 678 So.

¹⁶ The corroborating circumstances in Green were discussed previously.

2d at 314), cert. denied, 507 U.S. 971 (1993).

More importantly, unlike in Chambers, there was no other evidence which corroborated the accusation. In Chambers, there was a sworn confession by the same declarant, an eyewitness to the shooting, testimony that the declarant was seen with a gun immediately after the murder, and proof that he owned a .22 caliber revolver and later purchased a new weapon. 410 U.S. at 300. Here, there was nothing. In fact, Bush's accusation was inconsistent with Parker's own confession to Georgeanne Williams that he (Parker) shot the victim, and to Parker's confession to the police that Bush shot the victim.

Further, unlike in Chambers, Bush's accusation was not self-incriminating. While it may have incriminated Cave, it did not incriminate Bush as the shooter. As for Cave's failure to deny or protest Bush's accusation, the circumstances under which the conversation was had would not necessarily lead a reasonable person to do so. Bush could have easily been teasing his codefendant with inaccurate accusations, which Cave felt no need to protest or deny.

Finally, the Supreme Court relied heavily in Chambers on the fact that the declarant was available at the trial for cross-examination by the state. This fact was important because Mississippi did not recognize the "statement against (penal) interest" exception to the hearsay rule. Since Florida does recognize such an exception and actually requires that the declarant be unavailable, this distinction is further reason not to apply Chambers to this case. In fact, this Court recently agreed

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, 22 Fla. L. Weekly S181, 185 (Fla. Apr. 10, 1997).

Under the facts of the present case, any exclusion of Bryant's testimony from the guilt phase of Parker's trial would not have resulted in a due process violation under Chambers or Green. Parker provided no circumstances to show the reliability of Bush's accusation and/or Cave's silence. Without such a showing, Bryant's testimony would not have been admissible during the guilt phase of Parker's trial. Thus, the trial court erred in finding that it would have been. This Court should reverse the trial court's finding.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court reverse the trial court's granting of postconviction relief and reinstate Parker's sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

CELIA A. TERENCE
Assistant Attorney General
Fla. Bar No. 0656879
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, Esquire, Proskauer, Rose, Goetz & Mendelsohn LLP, 1585 Broadway, New York, New York 10036, this 19th day of June, 1997.

CELIA A. TERENCE
Assistant Attorney General