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

STATE OF FLORIDA,

Appellant/Cross-Appellee

v.

J.B. PARKER,

Appellee/Cross-Appellant

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

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

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PRELIMINARY STATEMENT

In support of its appeal and in opposition to the cross-appeal of defendant J. B. Parker the State repeatedly misstates the record by referring to the admittedly suppressed evidence as merely an *accusation* by Bush that Cave was the triggerman. This blind refusal to acknowledge the irrefutable fact that the suppressed evidence includes a *direct confession* by Cave to the shooting forms the essential (and erroneous) foundation for each of the State's contentions on this appeal.

At his deposition in the Cave proceedings, Bryant testified to a *direct confession* by Cave that he (Cave) had shot Ms. Slater. According to Bryant, Cave stated: "I just popped a cap in her head," meaning that he, Cave, shot Frances Slater. PCR 1266. That Cave directly confessed in 1982 to the shooting of Ms. Slater is confirmed by the testimony of Art Jackson, the Martin County Supervisor of Corrections, who testified: "Mr. Bryant advised me that Mr. Cave was stating ... he [Cave] got sick of hearing her hollering and he shot her." PCR 1533.

The State's current efforts to pretend that Cave did not directly admit to the shooting, and indeed made no incriminating statements other than a tacit admission, is in stark contrast to its position at Cave's 1993 re-sentencing hearing. At that hearing, the State baldly asserted that Cave made "an actual confession." PCR 1453. Based on that evidence alone, the State contended that it had proved that Cave was "the actual triggerman in the death of Frances Julia Slater." PCR 1421. The State's refusal on this appeal to confront directly Cave's clear confession, and instead hide behind the unsupportable contention that only a tacit admission is at issue, should be recognized for what it is: an effort to divert the Court's attention from the

evident materiality and admissibility of the suppressed direct admission by Cave that he alone shot Ms. Slater.

ARGUMENT

I.

THE TRIAL COURT INCORRECTLY REFUSED TO VACATE THE JUDGMENT OF CONVICTION AGAINST PARKER

A. Bryant's Testimony Would Have Been Material to the Guilt/Innocence Phase

The trial court concluded, based on the wrong standard, that Bryant's testimony was not material to the guilt/innocence stage of Parker's trial. In the opinion of the lower court, the Eleventh Circuit's determination that Parker "was guilty of felony murder" ended the *Brady* materiality analysis with respect to the guilt/innocence stage. The lower court thus expressly based its materiality determination as to the guilt/innocence stage on its conclusion that there was sufficient evidence to support the verdict, a materiality standard expressly rejected by the Supreme Court in *Kyles v. Whitley,* 514 U.S. 419 (1995).

As is irrefutably clear in *Kyles, United States v. Bagley,* 473 U.S. 667 (1985), and *United States v. Agurs,* 427 U.S. 97 (1976), a sufficiency of the evidence is *not* the standard to be applied to *Brady* violations. While the other evidence against the defendant may be a factor in the court's determination, it is certainly not the end of the analysis. *Brady* imposes an obligation on the State to disclose material evidence that tends to exculpate the accused. In deciding whether to make such disclosure, the State is not at liberty to assess the strength of its other evidence and to determine, when presented with a strong case, that it need not disclose exculpatory evidence in

light of the other evidence of guilt. Rather, the inquiry is whether the exculpatory evidence, standing alone and viewed against the background of the crime charged, is such that its non-disclosure would render the verdict unworthy of confidence. *Kyles*, 514 U.S. at 435 (A *Brady* violation is demonstrated "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.").

The State does not deny *Kyles*, *Bagley*, and *Agurs* expressly rejected a sufficiency of the evidence standard for materiality determinations under *Brady*. Rather, the State argues that the trial court did not in fact apply a sufficiency of the evidence standard. State Answer Brief at 22. The lower court's express reliance on the Eleventh Circuit's opinion, however, makes plain that it indeed applied a sufficiency of the evidence standard. The entire basis for the Eleventh Circuit's conclusion was that "there was sufficient evidence to support Parker's conviction under a felony murder theory, even without Parker's original statement." *Parker v. Singletary*, 974 F.2d 1562, 1576 (11th Cir. 1992). The State's own characterization of the trial court's analysis demonstrates that Judge Davis applied the wrong standard of materiality. In the State's words:

> The trial court's determination focused on the unassailed evidence that existed regarding the alternative theory of felony murder.

State Answer Brief at 23; *see also Id*. at 22. The State directly contributed to the lower court's error by expressly arguing to the court, in reliance on the Eleventh Circuit opinion, that the evidence of Parker's guilt of felony murder was sufficient to defeat Parker's *Brady* claim as to the guilt/innocence phase of his trial. *See* PCR 682; PCT 22-23.

The State's reliance on *Voorhees v. State*, 699 So. 2d 602 (Fla. 1997), is misplaced. *Voorhees* involved application of a harmless error analysis with respect to the

erroneous exclusion of evidence that tended to exculpate the defendant and did not concern the materiality standard under *Brady*. In its harmless error analysis in *Voorhees*, this Court expressly relied on the sufficiency of the evidence for its conclusion that the exclusion of a co-defendant's admission was harmless. *Id.* at 613-14. As *Kyles* makes clear, however, *Brady* materiality does not require that the defendant satisfy a sufficiency of the evidence test. Rather, the defendant need only establish that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Kyles*, 514 U.S. at 433-34.

In an effort to demonstrate that Parker has failed to establish that there is a reasonable probability that the suppressed evidence would have affected the guilt/innocence determination, the State would have this Court believe that the relevance of Bryant's statement was limited to the premeditated murder charge. The State's argument overlooks the fact that at Parker's trial the jury was instructed that the State could establish that Parker was guilty of felony murder by proving beyond a reasonable doubt that Parker was the shooter. R 1182. The State's argument also ignores its admission on this appeal that it was proceeding at Parker's trial on the "main theory that Parker was the shooter." State Answer Brief at 20 n.10. Had the jury heard the Bryant testimony, there is a greater probability that it would have rejected the Williams testimony and thereby concluded that Parker was not the triggerman. The only trier of fact who has been confronted with the conflicting Bryant and Williams testimony was the trial judge at Cave's 1993 re-sentencing hearing who, concluded, based on all the evidence, that the State had failed to prove beyond reasonable doubt that Cave was the shooter. PCR 1490-91. It is therefore reasonable to conclude that the Parker jury would have similarly concluded that the State had failed to meet its burden of proving that Parker was the shooter thus requiring that it focus instead

on the remaining evidence concerning the extent of Parker's participation in the underlying felonies. The gauge for materiality is whether in the absence of the suppressed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. Parker was deprived of such a fair trial because the State's suppression of evidence that pointed to Cave as the triggerman meant that the jury had no opportunity or reason to reject the Williams testimony and focus instead on the weaknesses inherent in the State's contention that Parker was an active, willing participant in the underlying felonies. This fact undermines confidence in the jury's verdict.

Contrary to the State's argument, Bryant's statement is plainly material to any inquiry regarding Parker's participation in the underlying felonies. State Answer Brief at 23. Bryant's statement would have rebutted Georgeanne Williams's testimony. Since Georgeanne Williams's testimony was the only testimony linking Parker to the murder and to active participation in the crimes, PCT 54, rebutting Williams's testimony was of critical importance to Parker's defense.

The State argued in the court below that the suppressed evidence is not material because Parker's jury would not have found Bryant credible. PCT 26-27. This contention is fully refuted by Parker's demonstration that, under *Green v. Georgia*, 442 U.S. 95 (1979), the State, having admitted the reliability of Bryant's testimony, has no basis upon which to argue that Parker's jury would not have found Bryant's testimony credible. Indeed, Judge Davis considered the State's use of Bryant's testimony in the Cave re-sentencing and found that the State should be estopped from challenging Bryant's credibility. PCR 1212; Parker's Initial Brief at 31-32. Unable to support its original argument that Bryant's statement would not have been believed, or

overcome Parker's evidence to the contrary, the State now argues that Bryant's credibility is irrelevant to an assessment of Parker's guilt. State Answer Brief at 23. This is not the case. Clearly the more credible and believable the jury found Bryant, the greater the impact of Bryant's testimony in rebutting Williams.

In addition to rebutting Williams, Bryant's statement and Jackson's statement would have been consistent with the defense's theory of minimizing Parker's participation in the crime. This showing of materiality is not answered by the State's argument that, because there was sufficient evidence to establish felony murder, minimizing Parker's role is irrelevant. State Answer Brief at 24. The State's case against Parker on the felony murder charge was far from overwhelming. In the absence of Parker's First Statement, which was admitted in violation of Parker's Fifth and Sixth Amendment rights, *Parker*, 974 F.2d at 1575, and his trial testimony, which would not have been admitted had the First Statement been suppressed, *id.*, with the exception of the Williams testimony, there was no direct evidence of Parker's active participation in any of the felonies charged.

The trial court instructed Parker's jury that, to find Parker guilty of felony murder, the State must have proved beyond a reasonable doubt that Parker was the triggerman or "knowingly" participated in the underlying felonies. R 1182. Parker has argued and the State does not attempt to dispute that, leaving the Williams testimony and the inadmissible First Statement to one side, all the other evidence properly admitted against Parker only shows that: 1) at one point well before the robbery, Parker was identified as having been in the store; 2) at about the time of the robbery, another witness saw three black males in the store, one of whom was Bush, but was not able to identify any of the three as Parker; 3) this same witness saw a fourth

black male outside in Bush's car, but was unable to identify who was in the car; 4) Parker admitted that he was in Bush's car during the course of the evening and was able to identify where the body had been left and where Bush threw the knife out of the car; and 5) Parker admitted that he received a share of the proceeds of the robbery.

Parker has demonstrated, and the State does not attempt to dispute, that the admissible evidence does not in any way indicate or suggest, much less prove, that Parker had any knowledge beforehand of a plan to rob the store and kidnap and kill Ms. Slater, nor, does it demonstrate that Parker actively participated in the robbery, abduction or murder. Parker has also shown, and the State does not attempt to dispute, that the State's claim that Parker was casing the store when seen there earlier that evening is simply an inference the State asked the jury to draw without any direct evidence to support this supposed fact. *See* PCT 226. Similarly, Parker has argued, and the State does not attempt to dispute, that the State's contention that Parker was in the store during the robbery is just that, a contention. No witness identified Parker as having been in the store during the robbery. *See id.* at 226-27. It is therefore equally reasonable for the jury to conclude that Parker was the one who stayed in the car.

The State does not attempt to challenge the foregoing facts and conclusions. The State's sole response is that, even if Parker was the one who stayed in the car, he would have been found guilty of felony murder because Terry Wayne Johnson, who also claimed to have stayed in the car during the robbery, was found guilty of felony murder. State Answer Brief at 24-25, *citing Johnson v. State,* 484 So. 2d 1347, 1349 (Fla. 4th Dist. Ct. App.), *review denied*, 494 So. 2d 1151 (Fla. 1986). The review of Johnson's conviction, however, was restricted to an assessment of whether sufficient evidence existed to establish Johnson's guilt of felony murder.

By citing *Johnson* the State has once again evidenced its inability to appreciate that *Brady* materiality is not based on an assessment of the sufficiency of the evidence. The State's reliance on the Johnson case thus purposely misses the point, and avoids tackling the real issue — the utter lack of proof, other than the plainly biased Williams testimony that is contradicted by the suppressed Cave confession, that Parker knowingly or actively participated in the underlying felonies.

B. Bryant's Testimony Would Have Been Admissible at the Guilt/Innocence Phase

The State argues, in part, that Bryant's testimony would not have been material under *Brady* to the guilt/innocence determination at Parker's trial because it is inadmissible hearsay. Bryant's statements, however, would have been admissible under the statement against penal interest exception, codified as Florida Statute section 90.804(2)(c) (1997), because: (1) Cave, the hearsay declarant, would have been unavailable; (2) Cave's statements tended to expose him to criminal liability and to exculpate Parker; and (3) corroborating circumstances exist that show the trustworthiness of Cave's statement. *See Maugeri v. State*, 460 So. 2d 975, 977 (Fla. 3d Dist. Ct. App. 1984), *cause dismissed*, 469 So. 2d 749 (Fla. 1985).

In contrast to the State's argument on this appeal, Parker satisfied his burden of demonstrating that Cave, the hearsay declarant, would have been unavailable at Parker's trial. It is well established that a declarant's valid assertion of his privilege against self-incrimination renders that declarant unavailable. *See* Fla. Stat. § 90.804(1)(a) (1997); *State, Dept. of Health & Rehabilitative Servs. v. Bennett*, 416 So. 2d 1223, 1224 (Fla. 3d Dist. Ct. App. 1982) (assertion of the privilege against self-incrimination rendered declarant unavailable); *Brinson v. State*, 382

So. 2d 322, 324 (Fla. 2d Dist. Ct. App. 1979) (same). Parker's showing here that Cave would have been unavailable at Parker's trial is based on fact not assumption. At the time of Parker's trial, it was understood that the co-defendants would not testify at each others trials, and in fact no co-defendant did so. The trial court granted the motion to sever the trials of the co-defendants, and each defendant was tried separately. R 1608-09, 1616. The State has not disputed the fact that the entire severance motion proceeded on the clear understanding that each of Parker's co-defendants would not take the stand because, if called, each defendant would assert his privilege against self-incrimination. The record shows, that Cave has steadfastly refused to take the stand — he did not take the stand either at his 1983 trial or at his 1993 re-sentencing.

Parker was not required to call Cave as a witness at his 1996 evidentiary hearing on his *Brady* claim in order to establish that Cave would have been unavailable at Parker's 1983 trial. The record of proceedings at the original trials of Parker and his co-defendants made abundantly clear that no co-defendant was available to testify at the trial of another co-defendant. Even the State did not believe that Parker needed to prove Cave's unavailability in 1996 when challenging the failure to disclose the Bryant and Jackson statements. At that 1996 evidentiary hearing, the State never once asserted that to meet the requirements of the hearsay exception for statements against penal interest Parker was required to call Cave as a witness to establish that he would assert his Fifth Amendment right to remain silent. This after the fact argument is, in any event, plainly refuted by the record of proceedings in 1982 at which time the trials were severed because each had made a statement admissible only as to the declarant and would not be available for cross-examination because each defendant was relying on his Fifth Amendment right to refuse to testify.

Case law firmly establishes that a court may find that a declarant, who would have validly asserted a privilege against self-incrimination, unavailable, without the necessity of the declarant taking the stand. *See United States v. Georgia Waste Sys. Inc*., 731 F.2d 1580, 1582 (11th Cir. 1984); *United States v. Young Brothers, Inc.*, 728 F.2d 682, 691 (5th Cir.), *cert. denied*, 469 U.S. 881 (1984); *United States v. Thomas*, 571 F.2d 285, 288 (5th Cir. 1978). The State's criticism of these on the ground that they involve the application of the statement against penal interest exception found in the Federal Rules of Evidence, State Answer Brief at 3, is without merit. This Court has itself recently relied on case law interpreting the federal statement against penal interest exception as an aid in applying Florida's statement against penal interest exception. *See Franqui v. State*, 699 So. 2d 1332, 1338-39 (Fla. 1997).

Nor are the cases on which Parker relies factually distinguishable in any way that is either relevant or legally significant. Each case stands for the proposition, plainly applicable to the facts of this case, that whenever it would be a mere formalism to require the hearsay declarant to take the stand to assert his privilege against self-incrimination, such testimony is not required. *Thomas*, 571 F.2d at 288; *Georgia Waste Sys.*, 731 F.2d at 1582; *Young Brothers, 728 F.2d at 690.* In light of the clear evidence regarding the circumstances presented at the original trials of Parker and his co-defendants, to require Cave to expressly assert his right against self-incrimination would be a mere formalism as well.

Young Brothers provides sound support for Parker's argument that Cave was properly deemed unavailable. In that case, the government argued that in order for a witness to be deemed unavailable based on the privilege against self-incrimination the witness must have been exempted from testifying by a ruling of the court. *Young Brothers*, 728 F.2d at 690. As the

State does here, the government contended further that the appellants were required to produce the declarants so that the court could make a ruling on availability. *Id.* The Fifth Circuit rejected the government's contentions. Following its decision in *Thomas*, the court stated that a ruling on unavailability is not required when it would be a mere "formalism." *Id.* at 691. The court noted that it had been "clear to all participants," (as it had been at the time of Parker's trial) that each of the declarants would have made a claim of privilege if called. *Id.*

As the reasoning in *Thomas*, *Young Brothers*, and *Georgia Waste System* demonstrates, given that Cave has consistently refused to testify, it would have been a mere formalism to have required Cave to take the stand at Parker's evidentiary hearing to assert that, at the time of Parker's trial, he would have relied on his privilege against self-incrimination. This reasoning is not undermined by the two cases on which the State relies. *See Jones v. State*, 678 So. 2d 309 (Fla. 1996), *cert. denied*, 117 S. Ct. 1088 (1997); *Rivera v. State*, 510 So. 2d 340 (Fla. 3d Dist. App. 1987). Neither *Jones* nor *Rivera* so much as touches upon the issue of the court's determination of unavailability in the context of a declarant's assertion of the privilege against self-incrimination.

Not only has Parker satisfied his burden of demonstrating that Cave would have been unavailable, Parker has established that Cave's admission was unquestionably against his penal interest. The State's argument that Parker can not demonstrate that Cave's statement was against his penal interest is based solely on its refusal to acknowledge the clear record evidence of Cave's direct admissions that he was the triggerman.[1] Bryant heard Cave say, "I just popped a

[1] The State's reliance on an alleged "finding" by the trial court that the statement at issue was an accusation by Bush, rather than an admission by Cave, State Answer Brief at 6, is neither correct nor persuasive. Judge Davis expressly recognized Jackson's testimony that

cap in her head," meaning that, he, Cave, shot Frances Slater. PCR 1266. Jackson's recollection of what Bryant told him about the Cave/Bush conversation is consistent with Bryant's testimony that, Cave directly confessed to being the shooter: "Mr Bryant advised me that Mr. Cave was stating. . . he [Cave] got sick of hearing her hollering and he shot her." PCR 1533.

In addition to satisfying the first two requirements of the statement against penal interest exception, Parker has satisfied his burden of demonstrating the existence of corroborating circumstances that indicate the trustworthiness of Cave's admission. *See Maugeri*, 460 So. 2d at 977; *Perry v. State*, 675 So. 2d 976 (Fla. 4th Dist. Ct. App.), *review denied*, 684 So. 2d 1352 (Fla. 1996); *Green v. Georgia*, 442 U.S. 95 (1979); *Chambers v. Mississippi*, 410 U.S. 284 (1973). Corroborative circumstances exist where there is evidence extrinsic to the declarant's statement that affords a basis for believing the truth of the matter asserted. *Maugeri*, 460 So. 2d

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Bryant had referred to a direct admission by Cave. PCR 1208 ("Jackson testified at the Cave resentencing that Bryant had told him in 1982, that Cave had stated that 'he (Cave) shot her.'"). In any event, even if Judge Davis had made such a finding, this Court would be obliged to disregard it because any such finding would not be supported by the record. The State tries to avoid the principle that this Court could not accept a finding that is not supported by the record by arguing, based on *Kelley v. State*, 569 So. 2d 754, 762 (Fla. 1990) and *Watts v. State*, 593 So. 2d 198, 202 (Fla.), *cert. denied*, 112 S. Ct. 3006 (1992), that there is conflicting evidence regarding Bryant's testimony. Any such conflict is imagined. Bryant plainly recounted Cave's direct admission and no amount of denial by the State will change this irrefutable fact.

at 977. The State has failed to sufficiently challenge the four corroborating circumstances that provide "particularized guarantees" of the trustworthiness of Cave's statements on which Parker relies. *Id.* at 979.

First, the State made no attempt to respond to Parker's argument that particularized guarantees of trustworthiness of Cave's statement exist because there is "other evidence"[2] aside from Cave's own statements pointing to Cave as being the shooter. *See Perry*, 675 So. 2d at 980. In *Perry* this factor alone was sufficient to find a declarant's statement against interest reliable. Ignoring *Perry*, the State attempts to argue that *Chambers* and *Green* are factually distinguishable and do not support Parker's argument. However, in contrast to the State's repeated efforts to dismiss the suppressed evidence as a mere tacit admission, as in *Green*, the statement at issue is a direct admission of guilt made in the expectation that it was not being overheard. [3] Similarly, the State's efforts to distinguish *Chambers* are futile. The State argues that *Chambers* is "clearly distinguishable" because the declarant in that case confessed on three separate occasions and because in *Chambers* there was an eyewitness to the shooting. State Answer Brief at 9. These differences in the type of corroborating evidence are irrelevant. What is

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[2] Rather than reiterating the "other evidence" that exists pointing to Cave as the shooter, Parker refers the Court to his Initial Brief at 24-25.

[3] Contrary to the State's contention, it is of no significance that Cave made his admission three months after the crime. Webster's Dictionary defines spontaneous as "of one's free will, voluntarily, acting or taking place without external force or cause." Cave was not

important is that, as in *Chambers*, there is "other evidence" that points to Cave as the shooter. Parker Initial Brief at 24-27.

The admissibility of Bryant's testimony at the guilt/innocence phase is, in any event, mandated under *Chambers*. Under the principles established in *Chambers*, to exclude Bryant's statements would have violated Parker's Due Process rights. As the Supreme Court stated in *Chambers*, exceptions have developed to allow the admission of hearsay statements "made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination." *Chambers*, 410 U.S. at 299.

The State demonstrated its confidence in the reliability of Cave's confession by using Bryant's statement against Cave at his re-sentencing hearing and by touting Bryant's account of the confession as "credible and believable." PCR 1421. On the basis of Bryant's testimony, the State implored the jury to find that Cave "was a major participant in the felonies committed and the actual trigger man in the death of Frances Julia Slater." *Id.* Judge Davis thus correctly determined that Bryant's testimony would have been admissible at the guilt phase of Parker's trial.

II.

PARKER'S DUE PROCESS RIGHTS HAVE BEEN VIOLATED BECAUSE THE STATE HAS NOT SIMPLY MADE CONTRADICTORY CONTENTIONS BUT HAS RELIED UPON INCONSISTENT EVIDENCE

It cannot be true that both Parker and Cave fired the single shot that killed Ms. Slater. At Parker's January 1983 trial, the State introduced the Georganne Williams testimony

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under any coercion to admit to shooting Frances Slater.

that Parker allegedly admitted to her that he fired that shot. Although known by it at the time of Parker's trial, the State never disclosed that Cave confessed that he, and thus necessarily not Parker, was the triggerman. Ten years later, at the Cave re-sentencing proceeding, the State introduced the Bryant statement that Cave admitted that he fired that shot. Although, as shown above, the non-disclosure of the Bryant and Jackson statements regarding Cave's confession is itself a due process violation under *Brady*, by using the Bryant testimony at Cave's re-sentencing hearing, the State's express reliance on necessarily contradictory evidence at two separate criminal proceedings is also in direct violation of the due process requirements recognized in *Parker*, 974 F.2d at 1578. *Parker* establishes that, although the prosecution's inconsistent alternative *arguments* is not a violation of a defendant's due process rights, the prosecution's reliance on inconsistent *evidence* is not permitted under *Green*, 442 U.S. at 97, unless the defendant has had the opportunity to bring all the facts regarding the State's inconsistency to the attention of the jury.

This critical fact distinguishes the issue now before this Court from the issues addressed on Parker's appeal from the denial of his initial Rule 3.850 motion and from those presented to the Eleventh Circuit on the appeal from the denial of his federal habeas corpus petition. In a remarkable attempt to divert the Court's attention from the real issues before it, the State contends that this Court previously rejected Parker's present due process claim. State Answer Brief at 27. As the very language the State quotes from this Court's prior opinion makes clear, the issue previously presented was whether the State had an obligation to disclose its inconsistent positions, not whether it had violated Parker's due process rights by relying on inconsistent evidence at a subsequent trial. This Court rejected the claim because:

> 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 co-defendants' 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).

In stark contrast to the circumstances presented on that appeal to this Court from the denial of Parker's initial Rule 3.850 motion, the State's use of inconsistent evidence through the introduction of Bryant's and Jackson's testimony at Cave's 1993 re-sentencing hearing occurred ten years after Parker's trial. Parker thus has been wrongfully precluded not only from using the Bryant and Jackson testimony at his trial but for presenting to the jury through an appropriate witness the State's repeated assertions at Cave's 1993 re-sentencing hearing in reliance on this suppressed evidence that Cave, not Parker, was the shooter. The assertion that this Court has already rejected Parker's present claim could not be further from the truth. To the contrary, the reasons for rejecting Parker's prior claim expressly validate his present position.

CONCLUSION

For the foregoing reasons, as well as those set forth in Parker's Initial Brief and in his submissions in the court below, Appellee/Cross-Appellant J.B. Parker requests that this Court

affirm the trial court's vacature of his death sentence and reverse the trial court's refusal to vacate Parker's judgment of conviction.

Dated: February 25, 1998

Respectfully submitted,

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