

SUPREME COURT OF THE STATE OF FLORIDA

----- X
J. B. PARKER, :
Appellant, : CASE NO: SC01-172
v. :
STATE OF FLORIDA, :
Appellee. :
----- X

INITIAL BRIEF OF APPELLANT

On Appeal from the Nineteenth Judicial Circuit of Florida, in and for Martin
County, Florida.

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PRELIMINARY STATEMENT

In 1998 this Court affirmed the vacature of appellant J.B. Parker's sentence of death for the 1982 robbery, kidnaping and murder of a convenience store clerk. *State v. Parker*, 721 So. 2d 1147 (Fla. 1998) ("Parker V"). In so ruling this Court determined that Parker's original death sentence had been obtained in violation of his constitutional rights based on the State's wrongful suppression of material exculpatory evidence. As a result of that ruling, a new sentencing hearing was held in October 2000. Based on the jury recommendation that a death sentence be imposed, the trial court, on December 13, 2000, entered its order again sentencing Parker to death. R7-1328-36.¹ This appeal followed.

As demonstrated below, Parker's death sentence should again be vacated based on the substantial prejudicial errors and constitutional violations that occurred in the proceedings in the court below.

STATEMENT OF THE CASE

Prior Proceedings

In 1982 Parker was charged with the robbery, kidnaping and murder of Frances Julia Slater. Prior to his January 1983 trial on these charges, Parker moved for a change of venue. His motion was granted and the case was transferred from the 19th Judicial Circuit to the 5th Judicial Circuit. Parker was not alone in the commission of these

¹ Record citations are to the volume and page of the record as follows: "R7-1328-36" refers to volume seven of the record at pages 1328 to 1336.

crimes. Three others – John Earl Bush, Alphonso Cave and Terry Wayne Johnson – were also convicted at separate trials of each of these crimes. Bush and Cave were also sentenced to death. Johnson received a life sentence without eligibility for parole for 25 years. In 1995 Bush was executed. Cave remains on death row. None of Parker’s co-defendants testified at Parker’s 1983 trial.

Following this Court’s affirmance of Parker’s 1983 conviction and sentence, *Parker v. State*, 476 So. 2d 134 (Fla. 1985) (“Parker I”), Parker filed motions for post-conviction relief pursuant to Rule 3.850, which were denied, and petitions for writs of habeas corpus with this Court. This Court affirmed the trial court’s denial of the 3.850 motions and denied the habeas petitions. *Parker v. State*, 542 So. 2d 356 (Fla. 1989) (“Parker II”); *Parker v. State*, 550 So. 2d 459 (Fla. 1989) (“Parker III”).

Parker then filed a petition for writ of habeas corpus in federal district court, which was denied. On appeal, the United States Eleventh Circuit Court of Appeals affirmed the denial of Parker’s habeas petition but in so doing determined that the first of Parker’s two statements to law enforcement officers, which implicated him in these crimes, was inadmissible. *Parker v. Singletary*, 974 F.2d 1562 (11th Cir. 1992) (“Parker IV”). The Eleventh Circuit, however, affirmed the denial of the habeas corpus petition because it found the error to be harmless.

The current phase of these proceedings has its origin in the 1993 resentencing proceeding of Parker's co-defendant, Alphonso Cave. During the Cave resentencing the State relied upon the testimony of Michael Bryant to support its claim that Cave, not Parker, was the shooter. Based on Bryant's testimony that Cave acknowledged his role as the person who shot Ms. Slater, the State argued to the Cave jury at the 1993 resentencing that it had established beyond a reasonable doubt that Cave was the shooter. See Parker V, 721 So. 2d at 1151.

Based on the discovery of Bryant's 1993 testimony at Cave's resentencing proceeding, Parker filed a new rule 3.850 motion alleging that he had discovered material exculpatory information that would have changed, within a reasonable probability, the outcome of his trial. In the eleven years between Parker's original trial and his 1994 3.850 motion Parker's original defense attorney -- Mr. Robert Makemson -- had been appointed to the Circuit Court of the Nineteenth Judicial Circuit. Parker's post conviction counsel listed Judge Makemson as a witness to establish his post conviction claims. In response to this listing, and to avoid having one member of the Circuit Court of the Nineteenth Judicial Circuit assess the credibility of a fellow member of the Court, the late Chief Judge of the Nineteenth Judicial Circuit, Hon. L.B. Vocelle, requested that this Court appoint an out of Circuit Judge to hear Parker's 3.850 motion. This Court agreed and appointed Hon. S. Joseph Davis to hear Parker's motion. See R5-884-911.

Judge Davis held an evidentiary hearing on the issues. After the hearing the trial court granted Parker a new penalty phase proceeding. The current resentencing was held upon this Court's affirmance of Judge Davis's order. See Parker V.

Pretrial Proceedings in the Court Below

Prior to trial, Parker filed a number of motions, see, e.g., R1-126-86, R2-187-367, R3-368-559, including a motion to suppress a statement Parker made on May 7, 1982. R3-368-553. In anticipation of an evidentiary hearing on the motion to suppress, Parker listed Judge Makemson and another sitting Circuit Court Judge as witnesses. After Judge Schack learned of Parker's intention to call Judge Makemson as a witness, he disclosed his close personal friendship with Judge Makemson. Upon request of Parker's counsel based on this disclosure, Judge Schack disqualified himself from the case. R4-625-26, 645-46, 671-72.

After Judge Schack's disqualification, 19th Circuit Chief Judge Paul B. Kanarek, was appointed as a successor judge to hear the case. In November, 1999 Parker moved to disqualify Judge Kanarek. That motion was supported by Parker's affidavit and earlier letters from Judges Kanarek and Vocelle noting that, in connection with prior proceedings, in light of Judge Makemson's involvement as a witness for Parker, Judges Kanarek and Vocelle did not believe that any Nineteenth Circuit Judge could preside over Parker's

case. R5-884-911. Judge Kanarek agreed and disqualified himself from presiding at Parker's trial.

After determining that Parker's motion to disqualify was legally sufficient Judge Kanarek subsequently held a meeting with other judges of the 19th Judicial Circuit and "polled" or "screened" the other sitting judges in the 19th Judicial Circuit to determine who would be willing to sit on the case. R5-884-911, R16-210. Judge Dwight L. Geiger, who had previously heard and denied one of Parker's earlier 3.850 motions² stated that he would be willing to hear the case. Judge Kanarek wrote to this to this court requesting Judge Geiger's appointment to hear Parker's resentencing. The request was granted. Defense counsel's motion to disqualify Judge Geiger was denied. R5-884-911, 922.

Prior to resentencing Parker noticed for hearing several pretrial motions including the motion to suppress his May 7 statement. The State filed a motion to quash defendant's motion to suppress based on the claim that Parker had previously litigated and lost the suppression issue at his original trial. R3-560-74, R17-240-85. The court

² Parker II. In that proceeding, Judge Geiger presided over an evidentiary hearing at which he heard evidence tending to incriminate Parker that was not and could not have been admitted into evidence at the October 2000 resentencing proceeding at which he was called upon to make the ultimate sentencing determination.

granted the States' motion to quash and thereby denied Parker's request for a hearing on his suppression motion and refused to address the motion on the merits. R5-937-38.

Trial Proceedings in the Court Below

Jury Selection for the resentencing commenced on Monday, October 15, 2000. Two panels of potential jurors were ultimately assembled over three days for the jury selection process. When speaking to the first panel of prospective jurors and outside the hearing of the second panel, the trial court erroneously informed the panel that Parker had been "convicted of the unlawful and premeditated death of a human being by killing and murdering Frances Julia Slater, a human being, on or about April 27, 1982, in Martin County, Florida." R19-436-37. The trial court made this comment despite the fact that no such verdict had been entered at the original trial and that Parker had made plain in the pretrial motions that the jury should be told only that Parker had been convicted of first degree murder without further elaboration. See R2-355-57. The trial denied Parker's motions for mistrial, and to strike the panel, or, in the alternative, for a curative instruction. R19-435-440. The trial court also rejected Parker's proposed jury instruction designed to correct the Court's misstatement. R33-2603-10.

The trial court's misstatement that Parker had been found guilty of the premeditated killing of Ms. Slater was never corrected. Although subsequent venire panels, R21-688-90, 709-11, and ultimately the whole jury were told simply that Parker had

been convicted of first degree murder, R25-1429-30, that instruction did not correct the earlier affirmative misstatement. Eight of the twelve jurors who ultimately served on Parker's jury, and who made the sentencing recommendation, R24-1398-99, were drawn from the first panel. See R21-687, R22-1000-22, R23-1025-40.

During its deliberations, the jury asked that testimony bearing directly on the disputed issues surrounding the extent and nature of Parker's participation be re-read. R7-1431. The jury also asked who had stated: "I couldn't stand her moaning – so I shot her." R7-1430. This question plainly refers to the Bryant testimony concerning Cave's confession to shooting Ms. Slater and further evidences the critical importance in the jury's eyes of the conflicting evidence regarding Parker's involvement. The trial court declined to provide the jury any guidance on these issues and instead instructed the jury that it must rely on its recollection. R34-2858-59. The jury recommended death by a vote of eleven (11) to one (1). R34-2861. The trial court imposed the death penalty. R7-1328-36.

STATEMENT OF FACTS

The State introduced evidence concerning the facts of the crimes and the nature and extent of Parker's alleged participation in the crime. Although many facts concerning the crimes are uncontested, the nature and extent of Parker's knowledge and participation in these events is very much in dispute. Parker contested the State's evidence through which it attempted to portray Parker as an active participant, and demonstrated that, in

contradiction of the State's witnesses at this trial, the State previously relied upon the testimony of a witness, who the State acknowledged was credible, to prove that co-defendant Cave admitted to shooting Ms. Slater. Parker also submitted substantial, un rebutted evidence in mitigation that, although largely accepted by the trial court as proved, without explanation, was given little or no weight in the sentencing determination. R7-1328-36.

Background Facts of the Crimes

The State established that at around 3:00 A.M. on April 27th, 1982 a Li'l General Convenience store was found open but empty. R25-1560-64. The store manager confirmed that \$134.00 was missing. R26-1600-04. Later, on the afternoon of April 27, 1982, Ms. Slater's body was found some thirteen miles from the convenience store. R26-1611. The State introduced numerous photographs to illustrate the location and area where the body was found and the body position. R26-1606-36.

The State called Dr. Ronald Wright, M.D., who had examined Ms. Slater's body, as an expert in forensic pathology. R26-1693. Dr. Wright found two wounds — a stab wound to the abdomen and a gunshot wound to the back of the head. R26-1695-96. He opined that the stab wound occurred while the decedent was alive, but that it was not an incapacitating wound. R26-1695-1699, 1713. With respect to the gunshot wound, Dr. Wright testified that the decedent was shot in the head from a range beyond three feet and

that the gun shot wound resulted in instantaneous brain death. R26-1704-09. According to Dr. Wright, the characteristics of the bullet wound were consistent with Ms. Slater first being stabbed and falling to her knees and someone then coming behind her and pointing the gun downward while shooting her in the back of her head. R26-1714.

Dr. Wright testified that although the stab wound was a painful wound, Ms. Slater may have suffered virtually no real pain based upon the sequence of events and that it was equally consistent with the facts that the gunshot and stab wound were nearly coincidental. He noted that while one could envision a scenario of physical pain lasting some period of time that it was also true that the scenario could have been virtually instantaneous. He stated that both scenarios are equally consistent with the physical evidence in the case. R26-1718.

Dr. Wright also testified that decedent's clothing was stained with urine. R26-1694-1695. Dr. Wright opined that the decedent voided her bladder while alive. R26-1709. He noted that a voiding of the bladder could have resulted from fear or an abdominal spasm upon being stabbed and that both theories were equally consistent with the evidence. R26-1710, 1717.

The State called Daniel Nippes, who the trial court considered to be qualified to testify in the area of hair and fiber comparison. He testified to the presence of carpet fibers and to an individual hair follicle found inside Bush's car. R27-1872-83. The carpet fibers

matched those found on Ms. Slater's clothing. R27-1876-77. When Nippes was questioned concerning the presence of a "bulbous root" on the individual hair follicle found in Bush's car, the defense objected on the grounds that whether hair was forcibly removed from someone's head was beyond the witness's area of expertise. The trial court overruled the objection. R28-1890-91. Nippes, in response to further questioning, over defense counsel's objection, characterized the hair follicle as being "prematurely" removed from the scalp. R28-1891-92.

The Conflicting Evidence Concerning the Nature and Extent of Parker's Involvement

As the summary of the trial testimony concerning the actions allegedly taken by Parker and his co-defendants set forth in this section shows, the evidence establishes Parker's presence with Bush, Cave and Johnson in Bush's car on the night of April 26 and early morning hours of April 27. Parker's role in the crimes, and whether it was sufficient to justify imposition of a death sentence, particularly in light of the substantial evidence in mitigation, was very much in dispute. In particular, Parker contended in the trial court and contends here that he took no active part in the robbery, kidnaping or murder and that the error of which he complains on this appeal prejudiced his ability to persuade the jury and trial judge on these points. The trial witnesses and a summary of their testimony concerning these issues follows.

Marilyn McDevitt – Ms. McDevitt was present in the Li'l General store between 11:00 pm and 1:00 am on April 26-27, 1982 and testified that she saw Parker come into the store and leave between 12:00-12:30 A.M., more than an hour before the robbery. R25-1524-26. During her testimony the prosecutor asked: “By the way, did you testify to this many times over the years in particular back around the time the crime was committed? . . . Did you describe his hair and his height and so forth?” R25-1527. The court overruled defense counsel’s objection that the State was improperly bolstering the witness. R25-1527.

Danielle Girouard – Ms. Girouard testified that at 2:30 A.M. on April 27th, 1982, while stopped at a traffic light some distance from the store, she saw three black men in the store and one black man in a car outside the store. She specifically identified John Earl Bush but was unable to identify Parker as one of the three men in the store. R25-1541-56. Another witness, Johnny Johnson, a Detective Sergeant with the Stuart Police Department, testified that when he drove by the convenience store at around 2:30 am on the morning of April 27, 1982, he saw two people plus the clerk in the store. R30-2276-78.

Timothy Bargo – Officer Bargo testified that he stopped the defendants who were in Bush’s car at around 4:00 A.M. He testified that an individual who identified himself as “Mike Goodman” and who gave a birth date that is the same as Parker’s was in the front seat with Bush. R26-1660-61. Officer Bargo when confronted with his prior deposition

testimony stated he had never been able to identify the occupants other than Bush. R26-1659-61. On redirect the state sought to rehabilitate the witness with unidentified voices noted in the deposition transcripts. The defense objected noting that any unidentified statements were inadmissible hearsay. The trial court overruled the objections. R26-1681-86.

Georgeanne Williams – At the time of the commission of the crimes, Williams was the girlfriend of co-defendant John Earl Bush. The state called Williams to testify concerning a statement Parker allegedly made to her when she was visiting the jail after Bush and Parker had been arrested. According to Williams, on one visit, after talking to Bush, she talked to Parker. R27-1759. She testified that Parker told her “that John stabbed her and he shot her.” R27-1760. The State, acknowledging that it was precluded from doing so, did not elicit any testimony concerning any statements Bush had made to Williams. R27-1759.

On cross-examination Williams admitted: 1) her relationship with Bush was very close – he had asked her to marry him and she was considering that offer at the time of the crimes, R27-1765-67; 2) she had been convicted for felonies and crimes involving dishonesty and false statements, R27-1779-97; and 3) she had used false names in connection with several arrests. R27-1774-78. In addition, Williams admitted that in 1996

she had written letters to members of the State Attorney's office involved in the initial trials in which she stated:

If you really want to know the whole truth of the matter, I don't know who shot or who stabbed who, I don't know if John Earl told me events at his house before he turned himself in or at the jail when I went to visit him. I do know I was young, scared and most of all very stupid for repeating what, if anything, I heard.

R27-1803-04. In another 1996 letter to the State Attorney's office, Williams solicited assistance with her pending criminal difficulties concluding with the request that the State "do something" for her. R27-1818-19. Williams's letters plainly reflect that her claim that Parker admitted to being the shooter in fact was not true and that Williams wanted assistance with her troubles with the law in return for her continued cooperation.

Arthur Jackson – The State called Lieutenant Jackson to testify concerning the location of the co-defendants within the Martin County Jail while awaiting trial. Lieutenant Jackson testified that in 1982 he was the Assistant Director for Corrections at the Martin County Sheriff's Office. He gave testimony regarding the locations of the cells where Cave, Bush, and Parker were housed in the facility. His testimony purported to shed light on Williams's opportunity to speak to Parker. R27-1834-46. On cross examination, jail records were admitted and the questioning of Lieutenant Jackson showed that Parker's mother, Elmira, had visited with him at the time when Williams claimed Parker had admitted

to shooting the decedent thus casting further doubt on the veracity of her claims. R27-1846-71.

Terry Wayne Johnson – Parker’s co-defendant Johnson, although he had testified before the grand jury, had not been called as a witness to testify at any of his co-defendants’ original trials in 1982 and 1983. Johnson also was convicted of robbery, kidnaping and first-degree murder for his involvement in this case and is currently serving a life sentence with eligibility for parole after 25 years. In return for his cooperation and willingness to testify against Parker, the State agreed to make known his cooperation to the parole commission. R28-1900-03. Johnson is eligible for parole in 2007.

Johnson testified that he was in the car with Bush, Cave and Parker throughout the night of April 26, 1982 and early morning of April 27, 1982. Earlier in the evening they bought a two-liter bottle of gin and spent several hours at two different bars. R28-1909-10. According to Johnson, when they made their first visit to the convenience store, all four men went in. They bought some potato chips. R28-1913.

Johnson testified that on the second visit to the convenience store, Cave, Bush, and Parker went into the store, while Johnson remained in the car. At that time Cave had a gun but Johnson did not remember someone handing Cave the gun. R28-1916. Johnson was asked to review his prior grand jury testimony and whether it refreshed his memory. In response to the question he stated “it says [Parker] handed the gun”. R28-1917. The prosecutor then asked: “[Parker] handed Cave the gun at that point before going into the

store. When did that happen?” Johnson did not respond. R28-1917.³ Johnson then testified that Cave brought Ms. Slater out of the store, that Cave had the gun, and that Bush and Parker followed him. R28-1918.

After Ms. Slater got into the car she asked what was going to happen to her. R28-1919. Johnson testified that she was told that she was going to be let go and that she believed she was going to be let go. R28-1920. Johnson repeatedly declined to accept the State’s characterization of Ms. Slater’s statements as “begging” and stated that he did not recall that she acted in that way. Instead, she took them at their word that she would be let go. R28-1921-22.

Johnson testified that, after driving some distance, Bush got out of the car. At that time Ms. Slater was in the back seat between Johnson and Cave. R28-1922-23. Johnson related that, when Bush told Ms. Slater to get out, Cave moved just enough to let the decedent out of the car. R38-1924. Johnson said that Bush “cut around to the other side and - and he stabbed her.” Id. According to Johnson, Parker then got out of the car and stated to Cave “hand me the gun.” R28-1925. Johnson then heard a shot go off but did not know who shot her. R28-1925, 1936. When the prosecutor asked Johnson:”Do you

³ In a 1989 affidavit Johnson stated that he was asleep at the time of the robbery and did not wake up until Cave came back into the car with Ms. Slater. R32-2509-10. Johnson thus could not have known what role, if any, Parker played in the robbery and kidnaping.

remember who had the gun the next time you saw it?”, Johnson replied “not to my knowledge.” He later acknowledged that he had earlier testified that he was not sure but that he thought it was John Earl Bush that had the gun the next time he saw it. R28-1927.

Johnson testified that when they were pulled over by a deputy sheriff after leaving the murder scene, Bush gave the deputy his driver license and Parker, Cave, and Johnson all gave false names. R28-1928-30. Ultimately they drove to the rooming house where Cave lived in Fort Pierce, where they divided the one hundred thirty four dollars between them. R28-1930-33.

Johnson testified they had been drinking on the night of the murder, that he was “drunk, drunk” and unable to walk properly, and that he was intoxicated to the extent he could not tell what road they took to get to Martin county. He admitted his memory had been affected “up into a certain point” but that he was also affected by fear. R28-1953-55. Johnson testified that Bush was a violent man, and that if Johnson “wouldn’t have went along with what was going on at the time . . . I feel that I probably would have end up just like her.” R28-1957-58.

During cross-examination, defense counsel marked for identification and showed Johnson an affidavit bearing a signature and Johnson’s name. Johnson initially denied that he had signed the affidavit stating: “I’m saying that I don’t know where that document came from period. That’s what I am saying.” R28-1944. Once a handwriting expert

testified that the signature on the document matched the examples she had obtained from Johnson, R32-2491, Johnson's affidavit, sworn to in October 1989, was admitted into evidence and read to the jury. R32-2501-13.

In his 1989 affidavit, Johnson states: 1) Bush was a leader and a planner and a violent person who, if he had a gun, was likely to use it, R32-2506; 2) Parker, in contrast, was not a violent person, R32-2505, and was not capable of hurting anyone, R32-2512; 3) Georgeanne Williams was afraid of Bush and, in Johnson's view, lied when she stated that Parker admitted to being the shooter, R32-2507; and 4) Johnson was asleep at the time the store was robbed and did not wake up until after Cave came out of the store to get back into the car, R32-2509 (and Johnson thus could not have known whether Parker went into the store).

Most importantly, in his 1989 affidavit Johnson contradicted his testimony that Parker had asked for the gun just prior to the murder:

John [Bush] took the girl around the back of the car and J.B. opened his door then. I don't remember where J.B. was and I don't remember him going to the back of the car. I don't remember how John got the gun, but I heard a holler and then a shot. That was the last time I saw — The last time I saw the gun was when Cave had it and was getting in the back seat with the girl.

R32-2511. After the close of the defense case, the State re-called Johnson. This time he acknowledged that the affidavit contained his handwriting and "that's what made me figure

that I had to write it when I looked at that.” R33-2569. Johnson then testified that although the affidavit was true in part, his testimony at the resentencing concerning Parker’s request for the gun prior to the shooting was the truth. R33-2570-72.

David Powers – The State called Detective Powers for purposes of introducing the statements Parker allegedly made to him on May 7, 1982. It was those statements that Parker had sought to suppress on his pretrial motion that the court quashed based on the State’s motion. At the time of these events Detective Powers was employed in the Martin County Sheriff’s Office.

Powers testified that on the morning of May 7th, 1982 he met with Parker, based on Power’s understanding that Parker had “agreed to cooperate,” for the purpose of having Parker show him the route taken from the convenience store to the murder scene. R28-1981. He testified that it was not his intent to interrogate Parker but that nevertheless he had Parker sign a Miranda waiver form. Powers had Parker direct him on the route taken on the night of the kidnaping. When Parker pointed out the spot where the body was found, Powers testified that Parker stated that was the location “where they let her out of the car,” “that she had been killed there,” and that “Bush had both stabbed and shot her.” R28-1982-85.

Powers also testified that Parker stated that, when the car had been stopped by Officer Bargo on the night of the crimes, the defendants had discussed killing Officer

Bargo. According to Powers, Parker stated that the only reason Officer Bargo was not killed was because the defendants knew that he would already have run their tag and would have known that the car belonged to Bush. R28-1987. Powers testified that Parker also admitted that he had received his share of the robbery proceeds. R28-1989.

The State ended its case with victim impact evidence through the reading of prepared statements to the jury. R29-2014-21. A photo of the decedent during life also was admitted. R29-2012-13, 2021.

On the critical issue of the scope and nature of Parker's involvement, Parker introduced evidence establishing the State's previous reliance on contradictory evidence to establish that Cave was the shooter. This evidence was presented in the form of testimony from the Assistant State Attorney, Richard Barlow, responsible for the 1993 Cave resentencing proceeding, and the testimony of Michael Bryant that had been introduced at that proceeding.

Richard Barlow — Barlow testified that, in preparing for the 1993 Cave resentencing, he learned that in 1982 Michael Bryant had made a statement to Art Jackson, at the time the superintendent of the Martin County Jail, that when Cave and Bryant were sharing a cell, in a conversation between Bush and Cave that Bryant overheard, Cave admitted to shooting Ms. Slater. As a result of his assessment of the evidence, including the testimony Bryant could supply, with the concurrence of the State Attorney, Bruce

Colton,⁴ R29-2086-88, Barlow contended on behalf of the State of Florida at the 1993 Cave resentencing that Cave was the shooter. R29-2048-51, 2077-78, 2128.

Before introducing this evidence at the 1993 Cave resentencing and deciding to put the State's imprimatur on Bryant's credibility, Barlow spoke with Jackson to corroborate the facts Bryant had relayed to him. Jackson confirmed Bryant's statements and established to Barlow's satisfaction that, based on their placement in the jail, the Cave/Bush conversation was feasible. R29-2071-73, 2077-78. After the close of the defense case, the State re-called Jackson in an effort to support its contention at Parker's resentencing, in contradiction of its claims at the 1993 Cave resentencing, that Bush's cell was too far from Cave's for the conversation Bryant overheard to have occurred. Although Jackson testified that Cave's and Bush's cells in June 1982 were too far apart for them to speak with each other, R32-2522-26, 2538, he had previously testified at the 1993 Cave resentencing to a different placement for Cave, R32-2544-47, and had no records showing where Bush and Cave were in fact housed on July 21, 1982, the date on which Bryant overheard the Cave/Bush conversation. R32-2555-58.

Michael Bryant — Bryant's statements concerning what he overheard in the Cave/Bush conversation on the night of July 21, 1982 was presented to the Parker resentencing jury in three ways: 1) Bryant's trial testimony at the 1993 Cave resentencing

⁴ Mr. Colton also represented the State at Parker's resentencing.

was read to the jury, R29-2131-42; 2) Jackson confirmed what Bryant had said to him at the time of his investigation into the July 1982 Cave assault on Bryant, R32-2550; and 3) Barlow confirmed Bryant's deposition testimony concerning the Bush/Cave conversation, R29-2116-17. At the 1993 Cave resentencing trial, Bryant testified that Bush was a couple of cells down and that, in a conversation that Bryant overheard, Cave told Bush:

we wouldn't never be in here if you didn't try to burn her with a cigarette butt. He says, well, you stabbed her in the stomach and Bush told Cave, he says, well, you popped a cap in the back of her head.

R29-2133. On redirect, Bryant affirmed that Cave admitted shooting the decedent in the head. R29-2141. Jackson confirmed that Bryant had told him in July 1982 that Cave admitted to shooting Ms. Slater:

Mr. Bryant advised me that Cave was stating that they had apparently stabbed the victim, and he got sick of hearing her holler and he shot her.

R32-2550. At Bryant's 1993 deposition, which was presented as well at Parker's resentencing, Bryant testified: "Bush stabbed her in the stomach . . . and Cave says, I just popped a cap in her head." R29-2117.

Other Mitigation Evidence

In support of Parker's evidence in mitigation, in addition to contending that the State had failed to establish that Parker had a principal role in the robbery, kidnaping or murder, Parker presented a number of witnesses to testify concerning his character and

background. Parker also presented testimony from Dr. Brad Fisher, Ph. D., who was qualified and admitted to give expert opinion testimony in forensic psychology and testified concerning his evaluation of Parker based on his interviews and review of Parker's prison and other records.

Before presenting this testimony, Parker sought to introduce affidavits from Elmira Parker, Douglas Smith, Katie Lee Parker, Rosie Lee Parker, Martha Rahming, Gloria Marshall, and Curtis Lee, each of whom was unavailable to testify at trial. R29-2039, 2155. The court sustained the State's objection and denied the introduction of affidavits of Elmira Parker (Parker's now deceased mother), Douglas Smith (the companion of Parker's mother who was the only father figure Parker had and who is also deceased), Katie Lee Parker (Parker's sister who is now suffering from Alzheimer and is therefore incompetent to testify), Rosie Lee Parker (Parker's sister), Gloria Marshall, and Martha Rahming. R30-2176.

Christine Parker — Christine Parker, although Parker's niece, is close in age to Parker and grew up with Parker as one of fourteen people in a small two-bedroom, one bathroom house. R30-2188-89, 2191-92. The Parker family moved from Mississippi when Christine and Parker were young. R30-2188. Growing up in the Parker family was very rough — they had to work as fruit pickers starting at the age of seven or eight, had little food when they were young and no medical care. R30-2190-92, 2201. As Christine

testified, it was not a normal life. R30-2190. Picking fruit was hard work. R30-2199-2201. While the older children worked the laundry was done by the smaller children in the bathtub. The family had no washing machine and only one set of hand down clothes for each family member. R30-2192-96. They received used toys at Christmas from charity. R30-2197.

Parker was not violent growing up, but was a gentle person, and an obedient son. R30-2198. Parker in his youth would carry, clean, and sell bottles and would make sure that others had what they needed first before spending on himself. R30-2198-99. Parker was a hard and dependable worker rising around 5:20 am and working harder than the rest picking fruit without complaint. R30-2199-2201. She testified that while initially after Parker was sent to death row they would visit him at first monthly, and then every three months or so, that after the death of Elmira Parker she had not seen her uncle in 12 years. R30-2206. Christine testified that she tried to maintain a close family while Parker was on Death Row but that it had been very hard. R30-2208.

Christine testified she loved her uncle, that he is a good person, that he had always been good to her, that when growing up she never had to want for things because he gave it to her, he never harmed her, would sit and talk to her. R30-2208-09. Christine testified that when Parker was growing up he would follow the older kids, that people in the neighborhood teased him because he was bigger and that they would call him “slow”. He

had difficulty learning and the kids picked on him. They called him “poor,” a “fruit picker”, and “dirty.” They said his mother did not love him. Kids also teased Parker for wearing clothes falling off him, raggy shoes, and things like that. R30-2213-15.

Thorns on the fruit trees would stick and catch pickers, including Parker. Parker’s mother carried a needle in her clothes to pick out the thorns. R30-2215-16. They grew up without medicines. When Christine and Parker suffered from worms, Elmira Parker would put turpentine in her mouth and around her navel to make the worms go away. R30-2217. Christine also testified that as medication for cuts her mother would put sulfur and cooking grease on the cuts and that she did the same for Parker. R30-2217-18.

Robert Makemson— Judge Makemson was Parker’s attorney in connection with his original trial. R30-2232. Judge Makemson testified that Parker was very pleasant and cooperative, and that he had no problems with Parker on either a personal or professional level. R30-2238. Parker did not maintain hostility toward the prosecutors who were seeking his death. He related that Parker was always a gentleman towards him. R30-2238-39.

Origin Colebrook — Colebrook was Parker’s Physical Education instructor and basketball coach when Parker was in the 7th and 8th grades. He testified that Parker: loved to play basketball; was eager and enthusiastic; worked hard to be a good athlete; responded well to Colebrook’s authority as a coach; and was not mouthy, cocky,

arrogant, or rude. R30-2249-53. Colebrook testified that the crime was inconsistent with Parker's character. R30-2254-55.

Charlene Dickerson — Dickerson was Parker's girlfriend. She testified she loved and still loves Parker. He was faithful, nice, kind, non-violent towards her, and treated her mother with utmost respect. R30-2261-62. Examples of his kindness were taking her and her sister to Dairy Queen, and playing with her younger sister, and teaching her to read and drive. R30-2263, 2268-70.

Dickerson had accepted Parker's marriage proposal. R30-2263-64. In her view, Parker was a good worker. He gave money to his mother to help her pay the bills. He always took care of his mother. R30-2264. Parker gave Dickerson gifts, which included a Christmas jumper. He still sends Christmas and Easter cards every year. R30-2271. She testified that she valued Parker's life and that if he died it would hurt her. R30-2273.

Vera Hunter — Hunter was Parker's 5th grade teacher. She remembered Parker well. He was a slow learner who enjoyed school. She testified that he lacked supervision at home, had low self-esteem, and may have had emotional problems. Parker was responsive to her teaching methods to improve self-esteem. R31-2306-07.

Amy Kenty — Kenty was Parker's teacher when he lived at the Eckerd School for Boys as an adolescent. He was not reading on his grade level. He bonded to her as a mother figure. R31-2308-12. Parker treated Kenty with "very deep respect." R31-2312.

He was a follower, and non-aggressive. R31-2313. Kenty testified that Parker did very well within the structure of an institutional setting. R31-2318.

Clara Ardley — Ardley worked for the Eckert School for Boys between 1977-1979 where she came to know Parker. She testified that she would counsel with Parker and other children about discipline and encouraged them to avoid disciplinary problems. R31-2322. Ardley believed Parker was sincere in wanting to improve himself and that Parker's participation in the crime was out of character for the Parker she knew. Ardley testified that Parker did well within a structured environment. R31- 2324-26, 2332.

Audrey Rivers — Rivers was employed by the Florida Volunteer Lawyers Resource Center between 1989-1996. During those years she met and developed a relationship with Parker and that the relationship continued on after she left the Resource Center. Through their correspondence and her visits to the prison, she and Parker became close friends. R31-2340-47. Rivers testified that Parker was likeable, good, and decent with a very gentle spirit. R31-2347-48. He was very caring of her and her family. R31-2348. She corresponded regularly with Parker. He had worked very hard to educate himself as best he could given the limited opportunities of death row and with his limited abilities. R31-2350. Rivers described Parker as a “deeply spiritual person” who has kept her and her family in his prayers. R31-2350-51. After describing the difficult

circumstances of life on death row, Rivers testified to how Parker had done a remarkable job in adjusting to these conditions:

He works very hard at keeping himself level, at trying to keep as good a outlook as he can. To abide by the rules, to not let anything provoke him into any action that would make his situation even worse. He writes a lot, a lot of correspondence. Reads whatever he can, that he can get.

R32-2370.

When the State objected to Parker's efforts to have Rivers read from a selection of Parker's letters and to introduce the letters themselves, the trial court ruled that Rivers could characterize the letters but the court would not permit their introduction into evidence and would not allow Rivers to read from them. R31-2353-56. When on cross-examination the State attempted to portray her correspondence with Parker as contrived, she testified: "the personal correspondence between J.B. and me, it had no purpose from my standpoint, and I'm sure from his other than just sharing a friendship." R32-2381.

Dr. Brad Fisher — Dr. Fisher was qualified and admitted to give expert opinion testimony in the area of clinical forensic psychology. Dr. Fisher based his conclusions on an extensive review of Parker's institutional and school records, evaluations of Parker based on two personal interviews and testing, and a review of Parker's family history and affidavits provided by those who knew him. R31-2394-98. Dr. Fisher concluded that, although Parker had compensated since in prison for earlier educational difficulties, he was

generally slow, having tested with low IQ in his school years and having been assigned to special education classes. R31-2398-99.

Dr. Fisher testified that Parker was a follower, describing it as a “dependency issue,” and that this was an important feature of his character and personality. R31-2399-2400. As Dr. Fisher explained:

Not the planner, not the leader, but the follower who will go along with others, and that has again to try to be specific to my sources, that wasn't just my impressions of him, the two evaluation sessions, but this was said in nearly each and every witness I heard who knew him then, deposition that was taken . . . [a]ffidavit that was given, this information came up again and again, and no one said the opposite.

R31-2399.

As part of his evaluation of Parker's character and personality, Dr. Fisher assessed whether Parker was malingering by checking the consistency between Parker's statements and the records and other evidence available to Dr. Fisher. Based on this assessment, Dr. Fisher concluded that Parker was not malingering and that what he presented in his interviews presented an accurate picture of his personality and character. R31-2400-02, 2404-05. This conclusion is consistent with reports from the staff on death row and the lack of any evidence of malingering or lying in the institutional records. R31-2405-06.

After describing the records concerning Parker's prior experiences with law enforcement which, with the exception of a guilty plea to accessory after the fact, did not

involve violence, occurred in a group setting and were property crimes “for a kid that I’ve described that is available as a follower and a drifting — from a non-structured household” R31-2406-08. These incidents reinforced Dr. Fisher’s conclusions regarding Parker’s followership traits:

I’ve described him as a follower, a dependent kid. He was that way early on by all descriptions, continued to be that way through his development. And when the influences are available and around . . . these kids that are older, older kids, that he is susceptible to being influenced by the wrong set of peers, and he was, and it happened.

R31-2409.

Dr. Fisher testified also concerning Parker’s disciplinary record while on death row which he had taken into account in forming his opinions. Dr. Fisher noted that during eighteen years on death row, Parker had relatively few, minor disciplinary reports with the most serious being a 1987 incident in which, in self-defense, Parker was found to have kicked another inmate down the stairs. R31-2411-12, R32-2456-57. Although in 1992 Parker had also been written up for allegedly “inciting” a riot, no discipline was imposed. R31-2412-14, R32-2461-62, 2472-73. Dr. Fisher concluded, based on his analysis, that: 1) Parker acted under extreme duress or under the substantial domination of another person, R31-2422; 2) Parker’s capacity to appreciate the criminality of his conduct or to confirm his conduct to the requirements of law were substantially impaired, R31-2423; 3) Parker was at the time of the crimes functioning well below his age of 19, R31-2423; and

4) Parker's deficiencies in maturity on the night of the crimes were exacerbated by alcohol making Parker's dependency/followership characteristics worse, R31-2424.

SUMMARY OF THE ARGUMENT

The key to Parker's resentencing proceeding was the introduction and consideration of evidence bearing on the scope and extent of Parker's participation in the murder and statutory and non-statutory mitigation. Among other errors, the trial court, however, improperly permitted the introduction of evidence that impermissibly enhanced the State's case concerning Parker's participation, improperly misinformed the jury, without correction, that Parker already had been found guilty of the premeditated killing of Ms. Slater, and improperly deprived Parker of a full and fair opportunity to develop his case in mitigation. Moreover, the evidence does not support the trial court's findings concerning the aggravators and demonstrates that the sentence is disproportionate.

The trial court erred in quashing Parker's detailed and legally sufficient motion to suppress. The quashing of that motion and the corresponding denial of a mandatory evidentiary hearing on the motion led to the improper introduction of inadmissible evidence supporting several aggravating circumstances all in violation of Fla. Stat. 921.141(1) and *Preston v. State*, 607 So. 2d 404 (Fla. 1992), cert. denied, 507 U.S. 999 (1993).

Further harmful error resulted from the improper and continuously uncorrected comments of the trial judge during the jury selection process which remained uncorrected notwithstanding repeated requests by the defense during the preliminary and final jury instructions. These improper and uncorrected comments incorrectly advised a venire panel

that included eight of the twelve jurors that ultimately passed judgment that another jury at his guilt phase trial had previously convicted Parker of premeditated murder. This uncorrected misstatement violated *Hitchcock v, State*, 673 So. 2d 859, 863 (Fla. 1996), and improperly told the jury that it need not weigh the conflicting evidence on whether Parker was the shooter because that fact had already been established. This error predisposed the jury to find, at a minimum, the CCP aggravator and, at a maximum, to find other aggravators which determined Parker's intent, i.e., witness elimination and pecuniary gain.

The trial court also improperly excluded and limited defense evidence which established non-statutory mitigation, and improperly limited Parker's ability to present evidence of the inconsistent evidence and argument utilized by the State showing that Parker was not a major participant in the crimes. Moreover, the trial court denied Parker his right to perpetuate pretrial testimony favorable to him and denied Parker the right to present admissible hearsay evidence in his defense. Moreover, Parker has suffered significant case specific prejudice and which deny him due process due to unreasonable delay attributable solely to the State contrary to Justice Stevens's opinion in *Lackey v. Texas*, 514 U.S. 1045 (1995) and it's progeny.

Harmful error also occurred when the trial court denied Parker's motion for mistrial arising from the State's improper introduction in its closing argument, in violation of the Sixth Amendment, of a co-defendant's statement implicating Parker as a major participant in the crimes. These improper comments were improperly emphasized by the State in a purported "curative instruction" which rose to the level of fundamental error because the "cure" did more harm than good. Even if this Sixth Amendment violation were capable of being cured, the trial court engaged in further fundamental error when it improperly delegated its independent duty to properly instruct the jury to the prosecutor who in response to this fundamental error made the improper curative instruction.

The cold calculated and premeditated and especially heinous atrocious and cruel aggravators were not established beyond a reasonable doubt insofar as the State's own evidence did not negate a reasonable hypothesis of innocence sufficient to establish the aggravators. Moreover, the evidence did not establish that Parker's dominant motive was witness elimination. Moreover, the un rebutted statutory mental health mitigators and non-statutory mitigation either render the death penalty improper in Parker's case or disproportional in light of the admissible evidence in support of aggravation.

As shown below, the trial court committed additional errors requiring the reversal of the judgement from which Parker appeals.

ARGUMENT

POINT I

THE TRIAL COURT ERRED WHEN IT REFUSED TO HEAR AND ADDRESS ON THE MERITS PARKER'S MOTION TO SUPPRESS HIS MAY 7 STATEMENT

A. The Trial Court Improperly Quashed Parker's Motion to Suppress

Standard of Review: De Novo, State v. Moore, 791 So. 2d 1246 (Fla. 1st DCA 2001).

Under Florida Rule of Criminal Procedure 3.190(h), a court is required to hold a hearing on a motion to suppress evidence prior to commencement of trial. See Gadson v. State, 600 So. 2d 1287 (Fla. 4th DCA 1992); Foster v. State, 255 So. 2d 533 (Fla. 1st DCA 1971) (rule 3.190(h) requires that the trial court hold a hearing on a motion to suppress before the trial begins and that the court make its ruling on the motion before the trial begins, upon the basis of the evidence adduced at the hearing on the motion); Williams v. State, 548 So. 2d 898 (Fla. 4th DCA 1989)(trial court is obligated to hear a pretrial motion to suppress before proceeding with the trial). Prior to trial, in compliance with Rule 3.190(h), Parker moved to suppress all statements he made, including the statements he made to Detective Powers on May 7, 1982 (the "May 7 Statement"). R3-368-94. Section 921.141(1) specifically provides for the

exclusion in penalty proceedings of evidence obtained in violation of the United States and Florida constitutions.

Rather than respond on the merits to Parker's Art. 1., Sec. 9, 16, Fifth and Sixth Amendment arguments, the State imposed a defense of avoidance and moved to quash Parker's legally sufficient motion on the grounds that Parker had previously litigated and lost at his original trial the issue of the admissibility of the May 7 Statement and that Parker sought improperly to apply retroactively the Supreme Court's decision in *Michigan v. Jackson*, 475 U.S. 625 (1986).⁵ R3-560-74, R17-240-85. Rather than hold an evidentiary hearing and address the motion on the merits, the trial court granted the State's motion to quash. R5-937-38.

As this Court held in *Preston v. State*, 607 So. 2d 404 (Fla. 1992), cert. denied, 507 U.S. 999 (1993), however, the trial court was not bound to follow any determinations on the admissibility of the May 7 Statement made in Parker's original proceedings:

This Court has applied the 'clean slate' rule to resentencing proceedings. We have held that a resentencing is a completely new proceeding and a resentencing judge is not obligated to find mitigating circumstances found by the first judge.... [W]e have held that a trial judge

⁵ At his original trial, Parker's motion to suppress all statements he made was denied. The May 7 Statement was admitted. On appeal, the courts ultimately held that he had not properly preserved any claim that the May 7 Statement should be suppressed. *See Parker IV*, 974 F.2d at 1575 n.72.

may properly apply the law and is not bound in remand proceedings by a prior legal error.... The basic premise of the sentencing procedure is that the sentencer consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine the appropriate punishment. This is only accomplished by allowing a resentencing to proceed in every respect as an entirely new proceeding.

Id. at 408-09 (emphasis added). “A resentencing should proceed de novo on all issues bearing on the proper sentence which the jury recommends be imposed.” *Teffeteller v. State*, 495 So. 2d 744, 745 (Fla. 1986); see also *King v. Dugger*, 555 So. 2d 355, 358 (Fla. 1990); *Phillips v. State*, 705 So. 2d 1320, 1322 (Fla. 1997).

That Parker’s conviction was upheld, and the original jury had considered the May 7 Statement in determining Parker’s guilt, does not undermine the clear mandate of Preston that the trial court at re-sentencing is not bound by a prior legal error at the original trial. The State did not introduce the May 7 Statement at resentencing simply as relevant background to the guilty verdict. Rather, the State used it to establish several aggravators, to counter the defense position that, as the State had admitted, Cave was the shooter, and to rebut Parker’s claim that he was a minor participant. R33-2685-88, R34-2719. Accordingly, the admission of the May 7 Statement was not only relevant to the re-sentencing proceedings, it was crucial to the State’s efforts to establish aggravation and rebut Parker’s evidence in mitigation.

The purpose of a resentencing hearing is for the jury and judge to determine whether the State has proved beyond a reasonable doubt, through admissible evidence, the presence of aggravating circumstances and, if so, whether they outweigh evidence in mitigation. The State thus needed to establish aggravation, by legally competent and admissible evidence, to justify the death penalty. See *Way v. State*, 760 So. 2d 903, 918 (Fla. 2000), cert. denied, 531 U.S. 1155 (2001). If the May 7 Statement, as Parker contends, is not admissible evidence, it cannot be used to support the trial court's findings.

On his motion to suppress at Parker's resentencing, not only did Parker seek to present evidence in support of the motion that had not been presented and considered on the motion to suppress at his original trial in 1983, see R3-368-553, Parker also relied upon the Supreme Court's 1986 opinion in *Jackson*. R5-933-36. In *Jackson*, the Supreme Court conclusively resolved a previously uncertain area of the law concerning custodial interrogations when it held that, after the defendant's right to counsel has been asserted and has attached, any waiver permitting police-initiated interrogation is invalid under the Sixth Amendment. 475 U.S. at 636 (holding that the Fifth Amendment principles established in *Edwards v. Arizona*, 451 U.S. 477 (1981), applied equally to claims based on the Sixth Amendment).

Having already appeared before a magistrate on May 5, Parker's right to counsel was asserted and had already attached. See Parker IV, 974 F.2d at 1571 n.41; Brewer v. Williams, 430 U.S. 387, 397-401 (1977). The evidence Parker sought to introduce at the improperly refused suppression hearing would have established that the police, not Parker, initiated the May 7 interview during the unconstitutional custodial interview on May 5, requested it again on May 6, and then again on May 7. The waiver form Parker signed before Powers took him on a tour of the crime scene was therefore invalid under Jackson and Edwards. Indeed, the evidence Parker sought to introduce in support of suppression establishes that the waiver form, through which the State sought to obtain incriminating statements from Parker, itself was an unconstitutional interrogation. See R3-374-75. The trial court, however, in quashing the motion to suppress, improperly deprived Parker of the right to establish the facts at a hearing.⁶

Contrary to the State's argument in the court below, Parker is not seeking the retroactive application of Jackson, which would be impermissible under Henderson v. Dugger, 522 So. 2d 835, 837 (Fla. 1988). The doctrine of retroactivity only

⁶ To surmount the Jackson bar the State would need to prove that Parker, and not the police, initiated the May 7 interview. Not only has the State failed to come forward with such evidence, the evidence Parker proffered demonstrates that the police initiated the May 7 interview. See R3-368-553.

precludes the application of new precedents when the original proceedings are final. A re-sentencing proceeding, by definition, is not final — the sentence is still to be determined based on admissible evidence to be submitted to a judge and jury. Because a re-sentencing hearing is a new proceeding, the law governing that hearing is the law at the time of resentencing. The question regarding the admissibility of evidence at Parker’s resentencing hearing thus is whether the evidence was admissible at the time of the resentencing or at the time of this direct appeal, not whether it was admissible at Parker’s original trial in 1983.

In addition to establishing a violation of Jackson, the evidence proffered in support of Parker’s motion to suppress plainly established that the May 7 Statement is the inadmissible fruit of the unconstitutionally obtained May 5 Statement, and suffered from the same constitutional infirmities as those that the Eleventh Circuit found rendered the May 5 Statement inadmissible. See Parker IV. If Parker had not been improperly questioned on May 5, he would not have given the May 7 Statement, rendering the May 7 Statement inadmissible as well. See *Johnson v. State*, 660 So. 2d 648 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996). Nothing had changed for Parker between May 5 and May 7. His purported counsel was still the conflicted public defender. In fact, at the time on May 7 when Detective Powers informed Parker that he was represented by counsel and that counsel had advised him not to

make any statements,⁷ Parker's appointed counsel had moved to withdraw on grounds of conflict, see R3-374-76, leaving Parker as unrepresented as he was at the time of the May 5 Statement. Parker had invoked his right to counsel and his right to silence, and had still not received the advice from an attorney to which he was entitled.

B. The Trial Court's Refusal to Hear Parker's Motion to Suppress Was Not Harmless

The introduction of Parker's May 7 statement at his resentencing trial was not harmless error beyond a reasonable doubt, the constitutionally required standard under *Chapman v. California*, 386 U.S. 18, 24 (1967). For one, the State used the Powers testimony to prove Parker's level of participation in the crimes, to establish witness elimination as a motive, and to counter his claim that Cave was the shooter with Parker's inconsistent alleged statement that Bush shot the victim. R33-2685-88.

Not only did the State rely on the May 7 Statement, but the jury clearly gave it careful consideration. The jury specifically requested that the Powers testimony be re-read, R34-2832, thus establishing the importance of this evidence in the jury's deliberations. In its sentencing order, the trial court accepted each of the State's

⁷ Powers noted on the rights waiver form that Parker knew that his lawyer advised him not to speak. By making this statement, Powers improperly perpetuated Parker's mistaken belief that his appointed attorney could provide effective, non-conflicted counsel. See, *Parker IV*, 974 F.2d at 1571-73; R3-370-76.

arguments concerning the significance of the May 7 Statement in establishing aggravation when it found, in reliance on Detective Powers’s testimony, in support of the witness elimination and pecuniary gain aggravators that: 1) “Parker advised Bush regarding disposing of the knife used to stab the victim”; 2) “There was a discussion in the car regarding killing Deputy Bargo who stopped them after the murder of the victim”; and 3) the murder was committed to gain \$134 (Powers testified that in the May 7 Statement Parker admitted to sharing in the proceeds of the robbery). R7-1329-30. This extensive reliance on the May 7 Statement demonstrates that the introduction of this unconstitutionally obtained evidence was not harmless beyond a reasonable doubt.

POINT II

THE TRIAL COURT IMPERMISSIBLY EXCLUDED DEFENSE EVIDENCE

Standard of Review: Abuse of Discretion; Vannier v. State, 714 So. 2d 470 (Fla. 4th DCA 1998)

At the resentencing, the trial court improperly excluded evidence Parker sought to introduce in support of mitigation. This improperly excluded evidence included: 1) testimony and documentary evidence from Audrey Rivers, a witness called to testify to Parker’s character as she has come to know it through her extensive

correspondence with and visits to Parker while on death row; 2) affidavits obtained from Parker's relatives and others who knew him who were declared unavailable to testify at the resentencing where the State had ample opportunity in connection with this and prior proceedings to examine these affiants and the trial court had improperly denied Parker's motion to perpetuate testimony from some of these witnesses; and 3) testimony from Richard Barlow, the former Assistant State Attorney who conducted the 1993 Cave resentencing, proffered in support of Parker's evidence that the State itself acknowledged at the 1993 Cave resentencing that Cave, not Parker, was the shooter.

In *Vannier v. State*, 714 So. 2d 470, 471-72 (Fla. 4th DCA 1998), the court noted:

As the Court said in *Chambers v. Mississippi*, 410 U.S. 284, 302 . . . (1973), "few rights are more fundamental than that of an accused to present witnesses in his own defense." Although this quotation refers to "witnesses", the principle obviously includes other forms of evidence as well. Our own supreme court has held that "where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission." *Rivera v. State*, 561 So. 2d 536, 539 (Fla. 1990).

The trial court's exclusion of this evidence was based on its conclusion that it was inadmissible hearsay. In so ruling, the trial court ignored the only relevant inquiry under Section 921.141(1), which relaxes the evidentiary rules during the

penalty phase, and expressly permits the introduction of hearsay provided there is a fair opportunity to rebut.⁸ The only relevant inquiry under Section 921.141(1) is whether the State had a fair opportunity to rebut. See *Blackwood v. State*, 777 So. 2d 399 (Fla. 2000), cert. denied, 122 S. Ct. 192 (2001). As we show below, because much of this evidence was not offered for the truth of the matters asserted, it was not excludable as hearsay, and was admissible, in any event, because the State had a fair opportunity to rebut.

A. Testimony of Audrey Rivers

Audrey Rivers came to know Parker through her extensive correspondence and visits to Parker since 1989. Her testimony was introduced to establish non-statutory mitigation concerning Parker's character. In particular, Parker contended that the testimony of Rivers and others established both that Parker had developed a positive outlook and sought to educate himself as best he could while on death row and that he is a generous, caring and giving person. Although Rivers testified to an extensive correspondence with Parker, Parker marked only a small

⁸ The section literally provides that the defendant must have a fair opportunity to rebut the hearsay. However, this Court has ruled that the State must also have a fair opportunity to rebut the proffered hearsay. See *Wuornos v. State*, 644 So. 2d 1012, 1017-18 (Fla. 1994), cert. denied, 514 U.S. 1070 (1995).

number of letters and sought to have them introduced into evidence.⁹ This correspondence provided concrete examples of Parker's growth, development and adjustment while on death row.

Parker sought to introduce these letters not for the truth of the matters Parker stated therein but to illustrate Rivers's testimony and evidence the factual basis for her conclusions. R31-2351-53. The State objected stating that they were cumulative, unduly prejudicial, and self-serving statements¹⁰ of the defendant. Although the trial court agreed that the Rivers testimony was relevant and probative, the objection was sustained. R31-2355-56.

The letters, however, were not inadmissible hearsay and were relevant for the jury and the trial court to consider in light of the State's effort to characterize the Parker/Rivers friendship as contrived in anticipation of a new sentencing hearing or clemency petition.¹¹ R31-2381. Indeed, the trial court in ultimately assigning "very

⁹ The letters were placed in the record as Defendant's V for identification. R31-2356.

¹⁰ The letters, as part of a mutual correspondence, plainly were not self-serving. See *Buchanan v. State*, 575 So. 2d 704 (Fla. 3d DCA 1991).

¹¹ Parker's clemency petition had already been rejected in 1987. There is no evidence that in 1989, when Rivers first met Parker, Parker had any expectation of any additional clemency proceedings. In fact, he was at the time under warrant of execution.

little weight” to the Rivers testimony, accepted this characterization of the friendship as “possibly contrived.” R7-1334. The letters Parker sought to introduce and that Rivers was not allowed to read from as part of her testimony, conclusively rebut any suggestion of a “contrived” friendship. They instead speak of Parker’s genuine feelings for Rivers and her family and his respect for her as a person. These letters would have supplied compelling evidence of Parker’s redeeming virtues, his growth on death row, and, as Rivers put it, his “deeply spiritual” nature. R31-2350-51. Without the letters themselves, the judge and jury were deprived of an essential tool that would have enabled them to evaluate the reliability of Rivers’s conclusions.

As in *Drayton v. State*, 763 So. 2d 522 (Fla. 3d DCA 2000), because these letters were not offered to prove the facts asserted therein but instead were designed to provide the basis for Rivers’s conclusions, they are not inadmissible hearsay. See also *King v. State*, 684 So. 2d 1388, 1389 (Fla. 1st DCA 1996)(“The hearsay rule does not prevent a witness from testifying as to what he has heard. It is rather a restriction on the proof of fact through extrajudicial statements.”) Just as Rivers was properly permitted to testify concerning her impressions of Parker as she came to know him through his letters, so too the letters themselves were not hearsay. Yet by their exclusion, the State unfairly prevented consideration of the basis of Rivers’ opinions in the face of the State’s claim of a contrived relationship.

As this Court has recently stated:

We must never lose sight of the important values being balanced in death penalty proceedings. On the one hand society has invoked the ultimate sanction of death because an innocent life has been taken by the defendant under especially egregious circumstances. On the other hand that same society cautions that “death is different” and extraordinary safeguards must be taken to insure that only those whose guilt is certain and that are truly deserving of the forfeiture of life are ultimately put to death. We in the courts have the major responsibility for insuring that these values are properly reflected and balanced in our procedures and oversight of the death penalty process.

Amendments to F.R. Crim. P. 3.851, 3.852, and 3.993 and Fla. R. Jud. Admin 2.050 n1, 2001 Fla. LEXIS 1408, at *60-61; 26 Fla. L. Weekly S 494, July 12, 2001.

Moreover, the State had ample opportunity to rebut the conclusions and character opinions Rivers drew from her correspondence and meetings with Parker through its cross-examination of Rivers. The letters were therefore admissible pursuant to Section 921.141(1).

B. The Trial Court Improperly Denied Parker the Ability to Perpetuate Testimony and to Present Evidence in Mitigation of the Death Penalty

Parker by legally sufficient motion asserted his right to perpetuate witness testimony pursuant to F.R. Crim. P. 3.190(j). R5-961-82. The trial court denied the motion notwithstanding the mandatory language of this rule and despite the fact that no objection to the legal sufficiency of the motions was ever made by the State. R5-

990. At trial Parker sought to introduce affidavits obtained from a number of unavailable witnesses in support of mitigation. As to some of these witnesses, had the motion to perpetuate been granted, Parker would have been able to instead introduce their deposition testimony. As to the others, who would not have been able to testify at a deposition even had the trial court granted Parker's motion to perpetuate, the affidavits should not have been excluded as hearsay because the State had a fair opportunity to rebut and the affidavits were therefore admissible pursuant to Section 921.141(1).

Parker proffered the authenticated affidavits¹² of Elmira Parker (Parker's now deceased mother), Douglas Smith (the only father figure in Parker's life), Katie Lee Parker and Rosie Lee Parker (Parker's sisters), Gloria Marshall, and Martha Rahming (both teachers who could testify to Parker's character and followership traits), all of whom were found to be unavailable. R29-2039. The affidavits show substantial non-statutory mitigation by Parker's family members, putative father, family friends, his teacher and counselor. The affidavits demonstrate the dimension and depth of Parker's proffered mitigation.

¹² Defendant's N, O, P, and Q and R for identification.

The State did not take the position at trial that it did not have the opportunity to rebut this evidence. Rather it objected on hearsay grounds. In *Blackwood*, this Court held that at sentencing proceedings out-of-court declarations should not be excluded on hearsay grounds. Instead, such evidence should be excluded only if the State had no fair opportunity to rebut the proffered statements. See 777 So. 2d at 407-08. Here the State had ample opportunity to rebut but obstructed the effort both pretrial and at trial. When Parker sought to perpetuate witness testimony, the State objected. At trial Parker sought to admit the affidavits themselves and again the State objected.

Had the trial court properly addressed the only relevant issue, i.e., whether the State had a fair opportunity to rebut the statements made in these affidavits, the background and use of these affidavits in prior proceedings would plainly have established their admissibility under Section 921.141(1). These affidavits were obtained in connection with Parker's prior Rule 3.850 motions filed in 1987 and 1989. In the 1987 proceeding, because Parker was unable to obtain the attendance of several witnesses at the hearing, the State asserted no objection to the introduction of the 1987 affidavits at the February 1988 hearing. Again, in the 1989 proceedings, although no hearing was held, the State contended that no hearing was necessary, and that the motion should instead be denied on the basis of the papers, including the

1989 affidavits. Again, the State certainly could have sought to examine these witnesses who even years later at Parker's resentencing were no longer available to testify.

The only person with any credible claim of prejudice is Parker. The record thus demonstrates that the trial court barred relevant mitigating evidence from being presented and considered during Parker's resentencing in contravention of *Hitchcock v. State*, 578 So. 2d 685, 689 (Fla. 1990), vacated on other grounds, 505 U.S. 1215 (1992). Because a defendant in a capital case has a right to introduce non-statutory mitigating evidence at the penalty phase of his trial, *Lockett v. Ohio*, 438 U.S. 586 (1978), Parker's resentencing was fundamentally and reversibly compromised.

C. Testimony of Richard Barlow

In *Parker V*, 721 So. 2d at 1150, this Court determined that Parker was not precluded from presenting, through an appropriate witness, evidence of inconsistent positions and inconsistent evidence utilized by the State in his prior trial and in the prior trials of his co-defendants. See also *Parker II*, 542 So. 2d at 358.

In accordance with this Court's determinations, Parker called former Assistant State Attorney Richard Barlow to testify. Barlow testified that in 1993 he was the Assistant State Attorney in charge of the 1993 Cave resentencing proceeding. Barlow concluded, after conferring with the elected State Attorney, Bruce Colton,

that credible evidence, in the form of the Bryant testimony, established that Cave was the shooter. R29-2086-88. Parker then established, through Barlow, that the State presented the Bryant testimony at the 1993 Cave res-sentencing proceeding as credible evidence upon which the jury should conclude, beyond a reasonable doubt, that Cave, not Parker was the shooter. R29-2048-51, 2077-78, 2128. In an effort to undermine the significance of this testimony, the State rebutted with evidence that the determination to rely on the Bryant testimony at the 1993 Cave resentencing was all a big mistake. R33-2671-74.

The limitations imposed on Barlow's testimony, however, improperly excluded evidence that would have established the basis for Barlow's conclusions and thereby countered the State's claim to have been mistaken when it told a judge and jury in 1993 that the evidence established that someone other than Parker was the shooter. Defense counsel asked Barlow to relay to the jury what Bryant had told him. The trial court sustained the State's hearsay objection. R29-2059. The statements sought to be elicited from Barlow were not hearsay because they were not being offered to prove the truth of the matter asserted but rather to show that the statements made to Barlow were consistent with what Bryant told Art Jackson and therefore supported his credibility conclusions. R29-2055-58.

In *Drayton v. State*, 763 So. 2d 522 (Fla. 3d DCA 2000) the court reversed and remanded defendant's conviction for first-degree murder and armed robbery with a firearm under circumstances similar to those presented here. In *Drayton*, the defendant testified that he was not involved in the murder, and that while driving his mother's car, he had been flagged down by two acquaintances. While in the car, the two men discussed the crime they claimed they had just committed. The *Drayton* court held that the overheard conversation was not inadmissible hearsay because it was not offered to prove the truth of the statements but rather was offered to establish how defendant learned the details of the crime. *Id.* at 524; see also *Ehrhardt*, Florida Evidence § 801.2; *King*, 684 So. 2d at 1389.

The ability to show the credibility of the Bryant testimony was key to Parker's presentation and involved a two-fold strategy. First, Parker sought to show the credibility of his position by having the State's own former prosecutor testify in support of Parker's defense. Second, Parker sought to show the credibility of the prior inconsistent position, i.e., that Cave was the shooter as shown by the Bryant testimony, by showing the jury the number of times that Bryant asserted the position and how it was consistent with what he told Barlow. In this way the defense could argue credibly that not only was Cave the sole possessor of the gun but also the triggerman. This presentation would, at the very least, cast a reasonable doubt on the

credibility of the testimony of Georgeanne Williams and Terry Wayne Johnson. The ultimate point was that this position was the truth because the State had itself taken that same position.

Parker's presentation of Barlow's testimony was further improperly undermined by trial court rulings that prevented Barlow from testifying concerning other details of his investigation. In connection with the Bryant testimony Barlow was asked whether he considered the medical examiner evidence in conjunction with what Bryant had told him. When asked to detail to the jury those considerations the State objected. The court sustained the objection determining that this testimony went to the professional thought process of Barlow. R29-2074-2075. However, it was precisely because such evidence concerned the thought processes of the State's representative at a prior trial, in contrast to the State's claim at this trial that the State was mistaken at the earlier trial, that this proffered testimony was probative and admissible.

The trial court's limitations on the Barlow testimony ruling seriously undermined Parker's defense in so far as it limited Barlow's relating to the jury his diligent investigation into the facts that supported the State's prior position. Because the jury asked for a read back of Barlow's testimony, R34-2832, its significance to the jury's deliberations is apparent. Whether they would have resolved the case in

Parker's favor with more detailed corroboration of the sound basis for the State's previous conclusion that the evidence established that Cave was the shooter cannot be said with certainty beyond a reasonable doubt.

POINT III

THE STATE'S IMPROPER INTRODUCTION DURING CLOSING ARGUMENT OF AN INADMISSIBLE STATEMENT OF A CO-DEFENDANT STATING PARKER WAS THE SHOOTER VIOLATED PARKER'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM

Standard of Review: Sixth Amendment violation was harmless beyond a reasonable doubt. See Looney v. State, 2001 WL 1338488 (Fla. Sup. Ct. Nov. 1, 2001).

A. The Prosecutor Improperly Introduced Bush's Statement

In closing argument, the prosecutor stated that Williams had testified to the Bush's inadmissible hearsay statements:

But Georgeanne Williams is the one who knows what was said and done. So what you have to look at is, can she be believed? Is her testimony worthy of belief? Why is it? Well, first of all, the testimony that she gave here in this courtroom was consistent, completely consistent with the testimony that she gave not only against this Defendant, but against her own boyfriend. She testified in both of their trials.

When she went to the jail to visit John Earl Bush and he told her, "I stabbed the girl but Parker shot her." She wanted to believe that. But

she couldn't be sure if she could believe that. She had to hear it from Parker. So she said she went over to his cell.

R33-2688-89 (emphasis added). Williams, however, never testified at Parker's trial concerning any statements by Bush. Indeed, as the State recognized in its examination of Williams, it could not elicit such testimony. R27-1759. To do so would put before the jury, as the prosecutor ultimately did through his closing argument, the inadmissible out-of-court declarations of a co-defendant in violation of Parker's Sixth Amendment Rights to confront the witnesses against him.

Because through his closing statement the prosecutor had now improperly put before the resentencing jury Bush's alleged out-of-court statement, Parker moved for a mistrial. R33-2708. The trial court denied the motion, but told the State to "correct the argument." R33-2709-10. The prosecutor then addressed the jury:

Ladies and Gentlemen, what Counsel just brought to the attention of the Judge is that at sometime during my argument . . . I said that Georgeanne Williams testified that John Earl Bush told her that Parker did the shooting. That's not evidence in this case. That's not evidence at all. I don't recall saying that, but I don't doubt it if that's what he said that I did. That is not evidence and it's not something you should consider because that wasn't said If I said anything other than that I didn't intend to and certainly wouldn't want you to consider what's not evidence in this case. So let's move on.

R33-2713-14. This "correction" missed the point entirely and, in addition to causing jury to hear again the extremely prejudicial Bush statement that Parker was the

shooter, told the jury that the State did not want the jury to consider such evidence rather than expressly informing the jury that it could not consider the alleged Bush statement.

B. The Introduction of Bush's Statement Violated Parker's Art I, Sec. 16 and Sixth Amendment Rights

The right of an accused to confront witnesses against him is a fundamental requirement for a fair trial. *Dutton v. Evans*, 400 U.S. 74, 79 (1970). Even though the prosecutor is not a witness, the introduction through a prosecutor's remarks of an inadmissible extrajudicial statement is the equivalent of testimony to the jury. *Douglas v. Alabama*, 380 U.S. 415, 419 (1965); see also *Mattes v. Gagnon*, 700 F. 2d 1096, 1102 (7th Cir. 1983). Thus, a prosecutor's reliance on inadmissible hearsay testimony in closing argument constitutes a violation of the Confrontation Clause. See *Hutchins v. Wainwright*, 715 F. 2d 512 (11th Cir. 1983), cert. denied, 465 U.S. 1071 (1984).

Here there can be no question that the Bush statement put before the jury through the prosecutor's statement is inadmissible hearsay and that the witness is not available for cross-examination. See *Hutchins*, 715 F. 2d at 516. Bush has been executed and therefore was not available for cross-examination. Any statements he made to Williams were inadmissible hearsay. It is fundamental that a prosecutor may

not rely on evidence outside the trial record to obtain a conviction. *Id.* at 516. Here, not only did the prosecutor do so, the extra-judicial “evidence” was of the type most prejudicial to Parker — a claim that Parker’s co-defendant, Bush, had identified Parker as the shooter.

**C. The Prosecutor’s Comment to the Jury
Did Not Cure the Sixth Amendment Violation**

Bruton v. United States, 391 U.S. 123 (1968), established that cautionary instructions cannot be relied upon to cure a deprivation of the right of confrontation. It is a basic premise of the Confrontation Clause that certain kinds of hearsay “are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instructions the trial judge might give.” *Id.* at 138; accord *Williams v. State*, 611 So. 2d 1337 (Fla. 2d DCA 1993); *Roundtree v. State*, 546 So. 2d 1042 (Fla. 1989); *Conner v. State*, 748 So. 2d 950 (Fla.), cert. denied, 530 U.S. 1262 (2000).

When there is a substantial risk that the jury, despite instructions to the contrary, will look to the incriminating out-of-court statements in determining the defendant’s guilt, the curative instruction is inadequate to remedy the Sixth Amendment violation. *Id.* Although *Bruton* involved a joint trial, its principles apply equally to the assessment of the adequacy of a corrective instruction at the trial of a

single defendant. See *Simmons v. United States*, 440 F. 2d 890, 892 (7th Cir. 1971); *Toolate v. Borg*, 828 F. 2d 571, 574 (9th Cir. 1987).

The prosecutor's remarks were inadequate to remedy the prejudice created through the introduction of the claimed Bush statement that Parker was the shooter. The risk is great that the jury simply could not follow the prosecutor's request that it not to rely on the Bush statement because it was not evidence in this case. Here the risk of jury reliance on the inadmissible hearsay statement of a co-defendant is great because the "correction" was brief and did not specifically instruct the jury that it could not rely on, and must disregard, the prosecutor's statement. See *United States v. Newman*, 490 F. 2d 139, 143-44 (3d Cir. 1974).

Moreover, the prosecutor's "corrective" remarks served to amplify, not correct the constitutional error by suggesting that there was evidence that Bush said that Parker was the shooter, but that this evidence was not on the record, not evidence "in this case". R33-2713-14. The correction reinforced the inference drawn from Williams's statement, because it "left the jury with the impression that the government could have introduced evidence" that Bush was said to be the shooter but was prevented from doing so. See *United States v. Blakey*, 14 F. 3d 1557, 1560 (11th Cir. 1994).

The fact that the prosecutor, not the judge, made the “correction,” further demonstrates the inadequacy of the purported cure. In cases that consider whether a correction to the jury can remedy a constitutional error, that correction is by way of clear instruction from the judge and not by way of remarks from the erring prosecutor. See *Simmons*, 440 F. 2d at 891; *United States v. Valdez-Soto*, 31 F. 3d 1467, 1473 (9th Cir. 1994), cert. denied, 514 U.S. 1113 (1995). The prosecutor’s remarks are not jury instructions and therefore even less able to counter the prejudicial introduction of a co-defendant’s statement in violation of the Sixth Amendment.

The jury was likely to be influenced by the prosecutor’s remarks concerning the out-of-court Bush statement because of the “special relationship” between Bush and Parker as accomplices. See *United States v. Lyons*, 703 F. 2d 815, 819 (5th Cir. 1983). Such “[s]pecific testimony that ‘the defendant helped me commit the crime’ . . . is more vivid than inferential incrimination, and hence more difficult to thrust out of mind.” *Richardson v. Marsh*, 481 U.S. 200, 208 (1987).

D. The Sixth Amendment Violation Was Not Harmless

This Court must reverse unless the violation of Parker's right to confront the witnesses against him through the improper introduction of the Bush statement was harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. at 24; *United States v. LeQuire*, 943 F. 2d 1554, 1567 (11th Cir. 1991), cert. denied, 505 U.S. 1223 (1992). The curative instruction is one of three factors affecting whether the prosecutor's misconduct is harmless beyond a reasonable doubt. The other two factors are the magnitude of the statement's prejudice and the strength of the evidence of the defendant's guilt. *United States v. Montgomery*, 210 F. 3d 446, 454-455 (5th Cir. 2000).

A curative instruction is more likely to be an adequate remedy that renders the error harmless when there is already a quantum of evidence to support the conviction absent the prosecutor's misconduct. But where evidence of the defendant's guilt is not so strong that it can be characterized as "overwhelming," courts have found that the misconduct casts serious doubt upon the correctness of the jury's verdict. *Blakey*, 14 F. 3d at 1561; *United States v. Thomas*, 943 F. Supp. 693, 702 (E.D. Tex. 1996); *Simmons*, 440 F. 2d at 892. Even if the prosecutor's "correction" that the Bush statement was not evidence were the equivalent of a curative instruction, such an instruction is inadequate to remedy the Sixth Amendment violation when the

improperly introduced out-of-court declaration is clearly inculpatory and vitally important to the prosecution's case. *Lozado v. LeFevre*, 583 F. Supp. 1174, 1178 (S.D.N.Y. 1984).

The introduction of the Bush statement directly identifying Parker as the shooter was extremely prejudicial and, when viewed against the fact that the quantum of evidence identifying Parker as the shooter is far from overwhelming, cannot be said to be harmless. The only admissible direct evidence that Parker shot Ms. Slater is the highly questionable Williams testimony. Williams was Bush's almost fiancée with a clear motive to lie. R27-1765-67. She had previously been convicted of crimes of dishonesty, R27-1779-97, and admitted in her 1993 correspondence with the prosecutors that the "truth" was she really did not know who shot Ms. Slater. R27-1803-04. This otherwise questionable Williams testimony was reinforced through the prosecutor's erroneous admission of Bush's statement. There is no other direct evidence that Parker was the shooter. Johnson expressly did not identify Parker as the shooter. See R28-1925, 1936. The prosecutor's remark was not a brief slip of tongue but a deliberate part of the argument made to corroborate the testimony of the State's only witness that could provide evidence bearing directly on whether Parker was the shooter.

The prosecutor's improper introduction of the Bush statement was a plain violation of Parker's Sixth Amendment rights. Given the inadequacy of the prosecutor's "correction," the significance of the evidence to the jury's deliberations, particularly as evidenced by the jury's questions directed at the conflicting evidence concerning the extent of Parker's participation, R34-2832-60, and the insubstantial other evidence of Parker's guilt as the shooter, the "correction" did not render the constitutional error harmless beyond a reasonable doubt.

POINT IV

PARKER'S RIGHT TO A FUNDAMENTALLY FAIR TRIAL WAS IRREPARABLY COMPROMISED WHEN THE TRIAL COURT ERRONEOUSLY INFORMED THE VENIRE THAT PARKER HAD BEEN CONVICTED OF THE UNLAWFUL AND PREMEDITATED MURDER OF THE DECEDENT

Standard of Review: Parker asserts that, because the comments made were made by the court, a De Novo Standard should be applied.

Before trial, Parker moved to preclude any claim at resentencing that Parker had been found guilty of premeditated murder. R2-355-57. The State's response made clear that, although it did intend to inform the jury that Parker was charged with both premeditated and felony murder, it did not intend to mislead the jury concerning the verdict. R5-782-83. The parties thus made clear in advance of trial that the jury should not be told that Parker had been convicted of premeditated murder.

Despite this fact, in his initial remarks to the first panel of prospective jurors, the trial court stated:

This is a case, and I'm going to read from the original charge, where Mr. Parker has been charged and as I indicated found guilty of the crime of first degree murder and he has been convicted of the unlawful and premeditated death of a human being by killing and murdering Frances Julia Slater, a human being, on or about April 27, 1982 in Martin County, Florida.

R19-436-37 (emphasis added).

No such verdict, however, had ever been entered against Parker. At his 1983 trial Parker was charged with first degree murder either as the person responsible for the premeditated killing of Ms. Slater or as a participant in a felony that resulted in the unlawful killing of Ms. Slater. The jury verdict simply found Parker guilty of first degree murder and made no specification as to whether the jury found Parker guilty of the premeditated killing of Ms. Slater. Indeed, when determining that his 1983 conviction should stand despite the wrongful introduction of an unconstitutionally obtained statement, the Eleventh Circuit expressly concluded that the error was harmless as to the conviction because the remaining evidence was sufficient to support the conviction on a felony murder charge. Parker IV, 974 F.2d at 1576.

Similarly, as this Court found:

Bryant's testimony goes only to a determination regarding premeditated murder. The testimony does not undermine confidence in the outcome

of the verdict as to Parker's participation in the underlying felonies, which, as in codefendant Johnson's case, supports a finding of felony murder.

Parker V, 721 So. 2d at 1152.

The trial court's statement to the first panel thus plainly misinformed the jury as to an alleged finding by a prior jury on the most critical issue presented for this jury to decide — i.e., has the State established beyond a reasonable doubt that Parker shot and killed Ms. Slater? If anything, based on the conclusions of the Eleventh Circuit and this Court, the jury should have been informed instead that the admissible evidence at the 1983 trial established only that Parker was guilty of felony murder.

Parker immediately objected to the Court's misstatement. The motion for a mistrial, to strike the panel and for a curative instruction were all denied. Instead the trial court proceeded with its remarks by informing the first panel that Parker had been convicted of first degree murder without correcting its previous misstatement that he had been found guilty of the premeditated killing of Ms. Slater. R19-435-41.¹³ Although the trial court made this misstatement only to the first panel of prospective jurors, eight members of the twelve person jury that ultimately recommended a death

¹³ When the second panel of prospective jurors was brought in, at defense counsel's suggestion the trial court gave the standard instruction pursuant to *Hitchcock v. State*, 673 So. 2d 859 (Fla. 1996), that Parker had been found guilty of first degree murder without further elaboration.

sentence for Parker heard the trial court's uncorrected misstatement that a previous jury had already concluded that Parker was guilty of the premeditated shooting of Ms. Slater.

At the conclusion of the trial, Parker again sought to have the jury informed through a jury instruction that: "In reaching its verdict of guilty of first degree murder, the jury at defendant's 1983 trial did not specify whether it found defendant guilty of First Degree Premeditated Murder or First Degree Felony Murder." R7-1188. Parker's proposed instruction would also have informed the jury as to the different elements for premeditated and felony murder. Only through such an instruction could the trial court's misstatement to the eight members of Parker's jury that came from the first panel be corrected and the jury clearly informed that it was for it to decide based on the evidence at the resentencing trial, not some previous jury determination, whether the State had established beyond a reasonable doubt that Parker was the shooter.

The trial court nevertheless rejected Parker's proposed jury instruction on the ground that premeditation was defined in the standard instruction for the "cold, calculated and premeditated" aggravator. R33-2603-10. But Parker was not seeking to ensure that the jury understood the definition of premeditation. Rather, the proposed instruction was designed to make clear that the jury could not rely on the

prior guilty verdict as a finding of Parker's guilt of the premeditated murder of Ms. Slater.

Evidence regarding the identity of the triggerman is critical to the jury deliberations. See *Jacobs v. Singletary*, 952 F.2d 1282, 1289 (11th Cir. 1992); *Garcia v. State*, 622 So. 2d 1325, 1330-31 (Fla. 1993); *Hawkins v. State*, 436 So. 2d 44 (Fla. 1983); *Malloy v. State*, 382 So. 2d 1190 (Fla. 1979). Indeed, the very purpose of Parker's resentencing was to enable a sentencing determination by a judge and jury that had the benefit of hearing Bryant's testimony that Cave admitted that he was the shooter. See *Parker V*, 721 So. 2d at 1151. The trial court's misstatement told the eight jurors from the first panel that Parker had already been found to be the shooter thereby removing from their consideration the impact of the very evidence that had been improperly suppressed.

The impact of this error is heightened by the fact that it was the trial judge himself, not one of the advocates for the parties, who told the jury that it need not concern itself with whether Parker was the shooter because that had already been decided.

The dominant position occupied by a trial judge in the trial of a cause before a jury is such that his remarks or comments, especially as they relate to the proceedings before him, overshadow those of the litigants, witnesses and other court officers. Where such comment expresses or tends to express the judge's view as to the weight of the

evidence, the credibility of a witness, or the guilt of an accused, it thereby destroys the impartiality of the trial to which the litigant or accused is entitled.

Hamilton v. State, 109 So. 2d 422, 424-25 (Fla. 3d DCA 1959); Fogelman v. State, 648 So. 2d 214, 219 (Fla. 4th DCA 1994); Ehrhardt, Florida Evidence, § 106.1, p. 22.

Accordingly, the trial judge should avoid making any remark “which is capable of conveying directly or indirectly, expressly, inferentially, or by innuendo, any intimation as to what view he or she takes of the case or as to what opinion the judge holds concerning the weight, character, or credibility of the evidence adduced.” Del Sol v. State, 537 So. 2d 693, 694 (Fla. 3d DCA 1989); see also Whitfield v. State, 452 So. 2d 548, 549 (Fla. 1984); Speights v. State, 668 So. 2d 316 (Fla. 4th DCA 1996).

Here the trial court misstated as a binding factual determination from a prior proceeding that Parker was guilty of the premeditated killing of Ms. Slater. This error was much more than simply an ill chosen comment to the prospective jurors because it not only destroyed their ability to decide the case fairly but told them from the outset that Parker was a major participant and had already been determined to have acted with the premeditation necessary to a finding that the cold calculated and premeditated aggravator applied. The comment was without any foundation in any

evidence adduced at Parker's resentencing, injected improper comment upon the inner workings of a prior jury in Parker's own case, and flew in the face of a proper Hitchcock instruction. 673 So. 2d at 863.

POINT V

THE EVIDENCE DOES NOT SUPPORT THE AGGRAVATING FACTORS FOUND BY THE TRIAL COURT

Standard of Review: This court's task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding. *Willacy v. State*, 696 So. 2d 693 (Fla.), cert. denied, 522 U.S. 970 (1997).

"It is axiomatic that the State is required to establish the existence of an aggravating circumstance beyond a reasonable doubt." *Geralds v. State*, 601 So. 2d 1157, 1163 (Fla. 1992). The lack of known facts surrounding the killing itself prohibits the finding of the aggravating circumstances. *Gore v. State*, 599 So. 2d 978, 987 (Fla.), cert. denied, 506 U.S. 1003 (1992); *King v. State*, 514 So. 2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988). Trial courts may not draw "logical inferences" to support a finding of a particular aggravating circumstance. *Robertson v. State*, 611 So. 2d 1228, 1232 (Fla. 1993). Of course, when relying on circumstantial evidence to find an aggravating circumstance, the evidence must be

inconsistent with any reasonable hypothesis which might negate the aggravator. Geraldts, 601 So. 2d at 1163. In the sentencing order, the trial court found that the State had proved beyond a reasonable doubt five aggravating circumstances: 1) that the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit kidnaping, Fla. Stat. § 921.141(5)(d); 2) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, Fla. Stat. § 921.141(5)(e); 3) the capital felony was committed for pecuniary gain, Fla. Stat. § 921.141(5)(f); 4) the capital felony was especially heinous, atrocious, or cruel, Fla. Stat. § 921.141(5)(h); and 5) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, Fla. Stat. § 921.141(5)(i). The trial court assigned “great weight” to each of these aggravating circumstances. R7-1328-36.

A. The Especially Heinous Atrocious and Cruel Aggravator Does Not Apply

In *Hertz v. State*, 2001 Fla. LEXIS 2209, at *48-49 (Sup. Ct. Nov. 1, 2001)

this Court recently reaffirmed the law on the HAC aggravator:

To qualify for the HAC circumstance, “the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim.”

Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). On the other hand, this Court has held that “‘an instantaneous or near-instantaneous death by gunfire’ does not satisfy the HAC aggravating factor.” Donaldson v. State, 722 So. 2d 177, 186 (Fla. 1998) (quoting Robinson v. State, 574 So. 2d 108, 112 (Fla. 1991)). Moreover, “execution-style killings are not generally HAC unless the state has presented other evidence to show some physical or mental torture of the victim.” Hartley v. State, 686 So. 2d 1316, 1323 (Fla. 1996).

1. Conscienceless or Pitiless

The only witness giving direct evidence as to psychological issues relevant to HAC was Parker’s co-defendant Johnson. His testimony, however, flatly contradicts the trial court’s conclusion that Ms. Slater was “begging that her life not be taken.” R7-1330. Johnson instead testified that Ms. Slater was told that she was going to be let go and that she believed she was going to be let go. R28-1920.

When Johnson was asked to refresh his recollection with prior testimony as to whether the girl was begging. He stated that he did not remember her saying that. When asked repeatedly Johnson stated “She asked — she asked what was they gonna do to her and he said he was gonna let her go, and I would assume that she took him as his word” R28-1921-22. Despite Johnson’s testimony, which is the only evidence of what occurred between the robbery and murder, the trial court concluded: “[t]he victim suffered fear, emotional strain, and terror during the events leading up to the actual killing” and that “[s]he was frightened and was asking what the defendants were going to do to her, in effect begging that her life not be taken.”

R7-1330. The trial court's findings are directly contradicted by the only evidence on these issues and thus are manifestly unsupported.

2. Unnecessarily Torturous to the Victim

The balance of the trial court's findings in support of this factor focused on the claim that the murder was unnecessarily torturous. According to the trial court, his HAC finding was supported by: 1) "Hair from the victim, consistent with being ripped from her head, was found in the Bush's car;" 2) "[t]he victim's bladder was completely voided;" 3) the "excruciatingly painful stab wound" was inflicted while the victim struggled; and 4) "[t]he killing was not sudden and unexpected." R7-1330.

These findings are not borne out by the evidence at Parker's resentencing. Dr. Wright testified that the decedent was shot in the head from a range beyond three feet R26-1704. He opined that the wound to the head was the cause of death and that it resulted in instantaneous brain death. R26-1708-09. The evidence concerning the voided bladder also does not establish that the murder was especially tortuous. As Dr. Wright testified, the evidence was equally consistent with the voiding having resulted either from fear or as the result of an abdominal spasm upon being stabbed. R26-1717. Dr. Wright stated that she may have suffered virtually no real pain based upon the sequence of events assuming that the gunshot and stab wound were nearly coincidental. R26-1718.

Nor does the evidence concerning the single hair follicle found in Bush's car support the trial court's HAC determination. That a single hair was found with part of the bulbous root does not establish that, as the trial court found, the hair had been "ripped from her head." Rather, the only evidence was that the removal was "premature." R28-1889-92. The evidentiary basis for this conclusion, in any event depends on the improper admission of the Nippes opinion of in an area as to which he lacks the requisite expertise. See *Holland v. State*, 773 So. 2d 1065 (Fla. 2000), cert. denied, 122 S. Ct. 83 (2001); *Goodyear Tire & Rubber Co. v. Ross*, 660 So. 2d 1109, 1111 (Fla. 4th DCA 1997); *Sea Fresh Frozen Prods., Inc. v. Abdin*, 417 So. 2d 218 (Fla. 5th DCA 1987).

Nippes was considered by the trial court to be qualified only in the area of hair and fiber comparison. The court allowed him to testify to the presence of carpet fibers and to an individual hair follicle found inside Bush's car and how they were obtained. R27-1872-83. The trial court nevertheless permitted Nippes to testify outside his area of expertise when he characterized the hair follicle as being "prematurely" removed from the scalp. R28-1889-92. This Court has become previously acquainted with this particular witness. See *Murray v. State*, 692 So. 2d 157 (Fla. 1997). Nothing in the witness's stated qualifications suggest any such expertise. R28-1879-80. In closing argument, this improper testimony allowed the

State to amplify the error when it contended that Ms. Slater was dragged from the car by her hair. R33-2681-82, R34-2718. This error was further compounded when the trial court expressly found, based on the improperly admitted Nippes opinion, that “[h]air from the victim, consistent with being ripped from her head, was found in the Bush’s car.” R7-1330.

Moreover, the only evidence concerning the shooting established that, contrary to the trial court’s findings, the killing was sudden and unexpected. As Johnson testified, Ms. Slater was told that she would not be hurt. There is no evidence that would support the conclusion that the decision to kill was not in fact a sudden change of plan initiated and carried out by a single occupant of Bush’s car.

B. The Cold Calculated and Premeditated Aggravator Does not Apply

To establish the heightened premeditation required for a finding that the murder was committed in a cold, calculated, and premeditated manner, the evidence must show that the defendant had a “careful plan or prearranged design to kill.” *Mahn v. State*, 714 So. 2d 391, 398 (Fla. 1998) (quoting *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988)).

The phrase “heightened premeditation” is used to distinguish this aggravating circumstance from the premeditation element of first-degree murder. See, e.g., *Porter*

v. State, 564 So. 2d 1060 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991); Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988); Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). Heightened premeditation can be demonstrated by the manner of the killing, but the evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit murder before the crime began. Hamblen, 527 So. 2d at 805; Rogers, 511 So. 2d at 533; Koon v. State, 513 So. 2d 1253 (Fla. 1987), cert. denied, 485 U.S. 943 (1988). Hamblen and Rogers show that heightened premeditation does not apply when a perpetrator intends to commit an armed robbery of a store but ends up killing the store clerk in the process.

The evidence does not support the trial court's findings in support of the CCP aggravator. First, the trial court recited facts concerning the planning that went into the robbery. R7-1330. These facts, even if supported as to Parker,¹⁴ are not evidence of premeditation with respect to the murder. As a second "fact" in support of the CCP aggravator, the trial court concluded: "There was no discussion among the defendants as to what they would do with her; her fate was a foregone

¹⁴ The claim that Parker had "cased" the store before the robbery is an inference drawn from the mere fact that a witness claimed to have seen him in the store a few hours before the robbery. R25-1524-26.

conclusion.” Id. This conclusion is directly contradicted by Johnson’s testimony that the defendants had discussed her fate and concluded that she was to be let go unharmed. R28-1919-22. Next the trial court concluded that Parker “initiated her murder” by demanding the gun. R7-1331. This conclusion: 1) is based solely on the testimony of an accomplice, Johnson; 2) ignores Johnson’s prior sworn statement that he did not know how the gun ended up in the hands of the shooter, R32-2511; and 3) even if true, improperly equates the impulsive demand for the gun with the heightened premeditation required for this aggravator. Lastly, the trial court, without even acknowledging the Bryant testimony establishing Cave’s confession to shooting Ms. Slater, or that the State had admitted the credibility of that testimony, relied on the inherently incredible and contradictory Williams testimony that Parker had admitted to shooting Ms. Slater. R7-1331.

C. The “Avoid Arrest” Aggravator Does Not Apply

The Court in Jackson v. State, 599 So. 2d 103 (Fla.), cert. denied, 506 U.S. 1004 (1992), reviewed the standard for evaluating the trial court’s application of the “avoid arrest” aggravator:

In applying this factor where the victim is not a law enforcement officer, we have required that there be strong proof of the defendant’s motive, and that it be clearly shown that the dominant or only motive for the murder was the elimination of the witness. We have also held that

the mere fact that the victim knew and could have identified his assailant is insufficient to prove intent to kill to avoid lawful arrest.

Id. at 109 (citations omitted) (vacating death sentence in part because the “avoid arrest” aggravator was not proven beyond a reasonable doubt because the only evidence of the defendant’s motive was circumstantial and insufficient to prove that the defendant killed the victims for the purpose of avoiding arrest); see also *Geralds* (vacating death sentence in part because the only evidence in support of the “avoid arrest” aggravator was evidence that the defendant was known to the victim); *Scull v. State*, 533 So. 2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037 (1989); *Perry v. State*, 522 So. 2d 817 (Fla. 1988); *Riley v. State*, 366 So. 2d 19 (Fla. 1978).

The “avoid arrest” aggravator “may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender’s thought process.” *Farina v. State*, 2001 WL 920230, at *7 (Fla. Sup. Ct. Aug. 16, 2001). In *Farina*, the Court upheld the finding of this aggravating circumstance because, in addition to evidence that the victim knew and could identify the defendant, there was also evidence that the defendants used gloves; they moved the victims to a confined area, where they could be controlled, but killed them anyway; the defendants discussed eliminating witnesses; and the victims offered little resistance. Id. at *8.

Here, unlike Farina, the trial court could find little to support this aggravator other than the fact that the victim could identify the defendants and she could have been locked in the store to prevent detection. R7-1329-30. These facts do not support a finding of strong proof that witness elimination was the only or dominant factor in the killing of the victim. See *Floyd v. State*, 497 So. 2d 1211 (1986). The only additional evidence cited by the trial court — that Parker discussed disposing of the knife and that one of the defendants suggested killing Officer Bargo, who stopped them after the murder — does not supply the necessary proof that witness elimination was the only or dominant motive and, in any event, is based solely upon the testimony of Detective Powers concerning Parker’s May 7 Statement, which should have been suppressed.

D. The Evidence Does Not Support the Trial Court’s Finding that the Murder Was Committed for Pecuniary Gain

The trial court found that the evidence established the pecuniary gain aggravator solely on the basis of the conclusory assertion (taken verbatim from the State’s sentencing memorandum, see R37-1203-04) that murder had been committed to gain the proceeds of the robbery. R7-1330. Although the robbery plainly was committed for pecuniary gain, there is no evidence to support the conclusion that retaining the robbery proceeds was the motive for the murder. Because there is no

evidence that financial gain played any part in the decision to kill, this factor has not been established. See *Chaky v. State*, 651 So. 2d 1169 (Fla. 1995); *Elam v. State*, 636 So. 2d 1312 (Fla. 1994).

POINT VI

THE DEATH PENALTY IS DISPROPORTIONATE

As this Court held in *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996):

Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different.” *Fitzpatrick v. State*, 527 So. 2d 809, 811 (Fla. 1988). Proportionality review is a consideration of the “totality of circumstances in a case,” and due to the finality and uniqueness of death as a punishment “its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist.

See also *Almeida v. State*, 748 So. 2d 922, 933 (Fla. 1999) (proportionality review requires that circumstances be both the most aggravated and least mitigated). Even if there were sufficient evidence to support the trial court’s finding of at least one aggravating circumstance, the death sentence will be affirmed only where there is either nothing or very little in mitigation as explained by this Court in *Almeida*.

In *Blanco v. State*, 706 So. 2d 7, 10 (Fla. 1997), cert. denied, 525 U.S. 837 (1998), the Florida Supreme Court summarized its role in reviewing trial court determinations on mitigating circumstances as follows:

(1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by [the Florida Supreme] Court; (2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard; and finally (3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.'

With respect to the weighing of aggravating and mitigating factors, the Court in *Campbell v. State*, 511 So. 2d 415 (Fla. 1990), noted:

The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. . . . To be sustained, the trial court's final decision in the weighing process must be supported by 'sufficient competent evidence in the record.'

Id. at 419-20 (quoting *Brown v. Wainwright*, 392 So. 2d 1327, 1331 (Fla. 1981)).

As the trial court found, Parker established several mitigating circumstances. R7-1331-36. Indeed the State failed to rebut Parker's evidence establishing several statutory mitigating factors. The evidence showed : 1) that Parker acted under extreme duress or under the substantial domination of another person, R31-2422; 2) that his capacity to appreciate the criminality of his conduct or to confirm his conduct to the requirements of law were substantially impaired, R-31-2423; and 3) that Parker was at the time of the crimes functioning below his age of 19 and that Parker's deficiencies in maturity were exacerbated by alcohol making Parker's

dependency/followership characteristics worse. R31-2423-24. However, contrary to the great weight the trial court assigned to each of the aggravating circumstances, it assigned little or no weight to any of the evidence in mitigation. The trial court thereby abrogated its responsibilities.

The evidence showed that Parker's life growing up was very rough, that he had to work, and that after school he picked fruit, and that it was not a normal life. R30-2189-90. Parker suffered hunger growing up, was one of 14 people living in a two bedroom/one bath house. R30-2192. That he had no money early on growing up, that Parker was not violent growing up, that he was a gentle person, and that he was an obedient son. R30-2193-98. Later in life Parker would carry, clean, and sell bottles and that he would make sure that others had what they needed first before spending on himself. R30-2198-99. Parker began working picking fruit in the groves between the ages of seven and eight, that he was a hard and dependable worker rising around 5:20 am and working harder than the rest picking fruit without complaint. R30-2199-2201.

Moreover, Parker's behavior during eighteen years on death row establish beyond all doubt his strong potential for rehabilitation. "Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation." *Cooper v. Dugger*, 526 So. 2d 900, 902 (Fla. 1988); *Holsworth v. State*, 522 So. 2d 348,

354-55 (Fla. 1988). Evidence as to the possibility of rehabilitation is so important that its exclusion requires reversal. *Simmons v. State*, 419 So. 2d 316, 320 (Fla. 1982); *Valle v. State*, 502 So. 2d 1225, 1226 (Fla. 1987). As the trial court noted in its findings, Parker's record while on death row has not been without incident. R7-1333. However, simply because the trial court could cite to a single incident in eighteen years on death row in which Parker is alleged to have "kicked another inmate down the stairs" and another in which Parker is alleged to have "incited a riot" (a charge that the prison authorities never pursued, R31-2412-14) without acknowledging his otherwise strong record and the substantial evidence of rehabilitation, including un-rebutted testimony from a psychologist who had conducted an extensive review of the Parker; background and prison records and had interviewed Parker, does not justify its dismissal of this strong mitigating evidence as of "very little weight." R7-1333. Rather, this conclusion is consistent with the inappropriately conclusory fashion in which the trial court treated the substantial mitigation Parker proved. This unjustified and unexplained dismissal of the mitigation evidence violated the well-established rules governing the evaluation of mitigating circumstances. See *Campbell*, 571 So. 2d at 729-20; *Jackson v. State*, 704 So. 2d 500 (Fla. 1997)

POINT VII

THE FELONY MURDER AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED

The felony-murder aggravating circumstance, Florida Statute 921.141(5)(d) renders Parker's death sentence unconstitutional pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Aggravating circumstance (5)(d) states:

The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnaping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

Fla. Stat. § 921.141. All of the felonies listed as aggravators are also felonies that constitute felony murder in the first-degree murder statute. Fla. Stat. § 782.04.

Under the Eighth and Fourteenth Amendments an aggravating circumstance must comply with two requirements before it is constitutional: 1) it must genuinely narrow the class of persons eligible for the death penalty; and 2) it must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder.” *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

The felony murder aggravator fulfills neither of these functions. It performs no narrowing function. Every person convicted of felony-murder qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first-degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there was no intent to kill.

Three different state supreme courts have held this aggravator to be improper under state law, their state constitution, and/or the federal constitution. *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941 (1980); *Engberg v. Meyer*, 820 P.2d 70, 87-92 (Wyo. 1991); *State v. Middlebrooks*, 840 S.W.2d 317, 341-347 (Tenn. 1992), cert. denied, 510 U.S. 1064 (1994). This Court should declare this aggravator unconstitutional.

Assuming *arguendo*, that this Court does not hold this aggravator unconstitutional in all cases, it is unconstitutionally applied in this case. The evidence of premeditation is very limited in this case. It is unconstitutional to use the underlying felonies to make the offense first-degree murder and also to use them as aggravating circumstances.

POINT VIII

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO REHABILITATE A WITNESS WITH INADMISSIBLE STATEMENTS OF UNIDENTIFIED PERSONS IN VIOLATION OF DEFENDANT'S RIGHTS TO CONFRONTATION

Standard of Review: Abuse of Discretion, *Mendoza v. State*, 700 So. 2d 670 (Fla. 1997), cert. denied, 525 U.S. 839 (1998).

Parker contended at resentencing that, as the State acknowledged in the 1993 Cave resentencing, the evidence established beyond a reasonable doubt that Cave, not Parker was the shooter. Establishing that Cave was in the front seat of the car after the shooting would have supported Parker's contention. Officer Bargo's testimony bears directly on this issue. Although he testified at his 1982 deposition to the presence of four men in Bush's car after the murder, he was unable to identify any of the occupants other than Bush. R26-1681. Yet, in contrast to his deposition testimony, Bargo testified at Parker's resentencing that Parker was in the front seat. R26-1660-61. When Parker impeached Bargo with his prior deposition testimony, on redirect, the State was permitted, over Parker's objections, to read into the record the statements of other, unidentified persons at the Bargo deposition. R26-1681-86. These statements by persons other than the witness were to the effect that Bargo was

mistaken and Parker was in fact in the front seat. The introduction of this inadmissible hearsay violated Parker's Sixth Amendment confrontation rights.

Florida courts have consistently condemned testimony which recounts the actual statement made by the out-of-court declarant implicating the accused. See, e.g., *Collins v. State*, 65 So. 2d 61 (Fla. 1953); *Kirby v. State*, 32 So. 836 (Fla. 1902). That condemnation necessarily reaches testimony where the actual statement, although unexpressed, is implicit in the testimony. *Favre v. Henderson*, 464 F.2d 359, 362 (5th Cir.), cert. denied, 409 U.S. 942 (1972); *Postell v. State*, 398 So. 2d 851 (Fla. 3d DCA 1981). *Webb v. State*, 253 So. 2d 715 (Fla. 4th DCA 1971).

POINT IX

PARKER'S DEATH SENTENCE VIOLATES DUE PROCESS

Standard of Review: Parker contends that standard of review is De Novo.

As the trial court found, R7-1335-36, the State has relied upon inconsistent evidence at the separate trials of Cave and Parker. Because the State's reliance on contradictory evidence violated Parker's Due Process rights, the sentence should be vacated and a life sentence should be imposed.

In Parker IV, the Eleventh Circuit determined that Parker had not established a Due Process violation based on the State's inconsistent triggerman contentions at the separate trials of Parker and his co-defendants only because the State had so

relied on inconsistent evidence. 974 F. 2d at 1578. The Eleventh Circuit thus recognized that Parker's Due Process rights would have been violated had the State relied on contradictory evidence at the separate cause and Parker trials.

Here there is no question but that, at Parker's original trial and again at the resentencing, the State introduced the Williams testimony to establish its claim that Parker had admitted to shooting Ms. Slater. The State, however, in reliance on the inconsistent and contradictory Bryant testimony that Cave had admitted that he was the shooter, contended at the Cave 1993 resentencing that Cave, not Parker, was the shooter. Thus the State has committed precisely the violation of Due Process the Eleventh Circuit identified in Parker IV and the sentence should therefore be vacated. See also Michael Q. English, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?* 68 *Fordham L. Rev.* 525, 528 (Nov. 1999) ("the risk of convicting an innocent person is so substantial when a prosecutor argues inconsistent factual theories in successive trials that such conduct cannot withstand due process scrutiny.").

POINT X

THE ORDER APPOINTING THE TRIAL COURT WAS ENTERED BY A PREDECESSOR JUDGE AFTER DISQUALIFICATION AND IS THEREFORE VOID

Standard of Review: Parker contends that standard of review is De Novo

Once an order disqualifying a judge is entered, the judge is prohibited from any further participation in the case. *Dream Inn, Inc. v. Hester*, 691 So. 2d 555, 556. (Fla. 5th DCA 1997). Accordingly, any order entered by a judge after that judge has been disqualified is void. *Bolt v. Smith*, 594 So. 2d 864 (Fla. 5th DCA 1992). The trial court's failure to adhere to this principle is to be reviewed de novo. *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), cert. denied, 121 S. Ct. 1487 (2001).

The trial court's authority resulted from an order of appointment which was induced by a predecessor judge after he determined that Parker's motion to disqualify him was legally sufficient. Accordingly, any later order of appointment of the successor judge was void. Action taken pursuant to the void order is likewise void and Parker should receive a new resentencing.

In prior Rule 3.850 proceedings, because Parker intended to rely on testimony from his original trial counsel, Robert Makemson, who was at the time of the Rule 3.850 proceeding an active Circuit Judge from the Nineteenth Judicial Circuit, the Chief Judge of the Circuit determined that a judge outside the circuit should be

appointed to hear Parker's case. When this issue arose again in connection with resentencing, first Judge Schack, and then Judge Kanarek recused themselves. Judge Geiger, who also is from the Nineteenth Circuit, however refused to do so and Judge Kanarek, contrary to his previous recusal, was instrumental in Judge Geiger's appointment.

Parker's November, 1999 motion to disqualify Judge Kanarek was supported by Parker's affidavit and earlier letters from Judges Kanarek and Vocelle noting Chief Judge Vocelle's concerns that a circuit judge not pass on the credibility of another member of the court. R5-884-911. Rather than follow the prior practice in Parker's case, which was to request this court to appoint outside judiciary, Judge Kanarek assumed responsibility for Parker's case. However, after reviewing Parker's motion to disqualify, Judge Kanarek entered an order of disqualification.¹⁵

Contrary to his obligations, however, Judge Kanarek did not thereafter play no role in Parker's case. Instead, Judge Kanarek held a meeting with other judges of the circuit and "polled" or "screened" the other sitting judges to determine who would be willing to sit on the case. R5-884-911, R16-210. In response to this "screening"

¹⁵ As a successor judge Judge Kanarek apparently passed on the truth of the facts alleged in support of the motion and determined that he was in fact not fair or impartial in the case pursuant to Fla. R. Jud. Admin. 2.160(g).

Judge Dwight L. Geiger, stated that he would be willing to hear the case. He “assumed” the case at the time of Judge Kanarek’s “screening” and carried on from that point. Judge Kanarek then wrote to this court requesting Judge Geiger’s appointment to hear Parker’s resentencing. R5-884-911, R16-210. The request was granted. The trial court thereafter denied Parker’s motion to disqualify Judge Geiger. R5-884-911. Moreover, Parker asserted that Judge Kanarek had crossed jurisdictional lines and hand picked his successor from the Nineteenth Circuit even though his authority rested only within the Fifth Judicial Circuit. R5-922.

Parker acknowledges this Court’s decision in *Card v. State*, 497 So. 2d 1169 (Fla. 1986), cert. denied, 481 U.S. 1059 (1987), wherein this court spoke to the concept of the “defacto judge” in circumstances similar to the issues raised here. However, contrary to *Card*, Parker timely objected to the appointment of Judge Geiger on these and other grounds. The inconsistent handling of his case by Judges Vocelle, Schack, Kanarek, and Geiger coupled with the “screening” of judges by Judge Kanarek after his determination that disqualification was proper and the “assumption” of the case by Judge Geiger all highlight an extraordinary procedure giving Parker no confidence that he received the impartiality to which he is entitled.

POINT XI

THE DEATH SENTENCE VIOLATES APPRENDI

Appellant acknowledges the authority of *Mills v. Moore*, 786 So. 2d 532 (Fla.), cert. denied, 121 S. Ct. 1752 (2001) and preserves this point based upon a good faith claim for modification, extension, or reversal of existing law either before this Court or on federal review.

This issue involves several related errors which combine to render the death sentence unconstitutional under the Florida and United States Constitutions. These errors include: (1) the jury made no finding of aggravating circumstances; (2) the jury made no finding that the aggravating circumstances are of sufficient weight to call for the death penalty; (3) the failure to instruct the jury that this finding must be beyond a reasonable doubt; and (4) the indictment contains no notice of aggravating circumstances.

This case shows several violations of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Under *Apprendi* the jury must find the aggravating circumstances. It is clear that under Florida law the conviction of first degree murder alone does not make a person eligible for the death penalty. The idea that the jury must find aggravating circumstances is further supported by the analysis in *Apprendi*. First, the proof of the aggravating circumstances is often “hotly disputed” as was the bias issue in

Apprendi, 530 U.S. at 475. Secondly, at least two of the aggravators at issue here; that the crime was committed to avoid arrest and that the crime was committed in a “cold, calculated, and premeditated manner” directly relate to Mr. Parker’s intent during the offense. The Court in Apprendi heavily relied on this aspect.

The text of the statute requires the fact finder to determine whether the defendant possessed, at the time he committed the subject act, a “purpose to intimidate” on account of, inter alia, race. By its very terms, this statute mandates an examination of the defendant’s state of mind – a concept known well to the criminal law as the defendant’s mens rea.... [I]t is precisely a particular, criminal mens rea that the hate crime enhancement statute seeks to target. The defendant’s intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense “element.”

530 U.S. at 492-93 (footnote omitted).

Third, it must be noted that four out of five aggravators at issue here directly relate to the offense itself.¹⁶ The Court relied on this factor in Apprendi in explaining why the exception it had previously approved in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), should not be extended.

New Jersey’s reliance on *Almendarez-Torres* is also unavailing. The reasons supporting an exception from the general rule for the statute construed in that case do not apply to the New Jersey statute. Whereas recidivism “does not relate to the commission of the offense” itself, 523 U.S. at 230, 244, New Jersey’s biased purpose inquire goes

¹⁶ These factors are: avoid arrest “cold, calculated and premeditated;” especially heinous, atrocious, or cruel; and during the course of an enumerated felony (kidnaping).

precisely to what happened in the “commission of the offense.” Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilty beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

Apprendi, 530 U.S. at 496. Here, only the prior violent felony aggravator could conceivably fit in this exception. It should be noted that Apprendi specifically notes that Almendarez-Torres may have been incorrectly decided. *Id.* at 488-90. In the concurring opinion of Justice Thomas, he specifically states that Almendarez-Torres was incorrectly decided. *Id.* at 518-22.

The difference between the two potential penalties, death and life imprisonment, is of the greatest magnitude. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The Court in Apprendi relied on the potential difference in finding constitutional significance to the increase:

The constitutional question, . . . is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count. The finding is legally significant because it increased – indeed, it doubled – the maximum range within which the judge could exercise his discretion, converting what otherwise was a maximum 10-year sentence on that count into a minimum sentence.

530 U.S. at 474.

An additional constitutional error is that the jury made no finding that the aggravators were sufficiently weighty to call for the death penalty. Apprendi was also violated in that jury was not instructed that it had to find, beyond a reasonable doubt, that the aggravating circumstances must be sufficiently weighty to call for the death penalty or that it must find, beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating circumstances. As to the first aspect the jury was told:

[I]t is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

R34-2809. The jury was given no guidance as to by what standard it would have to find the aggravators sufficiently weighty to call for the death penalty:

If you find the aggravating circumstances do not justify the death penalty, your advising – your advisory sentence should be one of life imprisonment without possibility of parole for 25 years.

Should you find sufficient aggravating circumstances do exist, – it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

R34-2812-13. Not only does this instruction fail to tell the jury that it must find beyond a reasonable doubt that aggravating circumstances must outweigh mitigating

circumstances, it affirmatively tells them that mitigating circumstances must outweigh aggravating circumstances.

The indictment in this case is also defective pursuant to Apprendi. The indictment contains no mention of any aggravating factors or of any allegation that the aggravating factors are sufficiently weighty to call for the death penalty. The reasoning of Apprendi is consistent with decisions of the Florida courts including *State v. Overfelt*, 457 So. 2d 1385 (Fla. 1984) (Sentence enhancement required jury finding of firearm use); *Peck v. State*, 425 So. 2d 664 (Fla. 2d DCA 1983); *Gibbs v. State*, 623 So. 2d 551 (Fla. 4th DCA 1993); *Bryant v. State*, 744 So. 2d 1225 (Fla. 4th DCA 1999). The requirements of Apprendi must apply to the penalty phase of a capital case under the Florida and Federal Constitutions.

Moreover, Parker asserts that he is denied equal protection of the law under the Florida and Federal constitutions insofar as non-capital defendants, as a class, receive greater protections under Florida law and Apprendi than does Parker as a capital defendant.

POINT XII

THE EIGHTEEN YEAR DELAY BETWEEN PARKER'S INDICTMENT AND THE RESENTENCING VIOLATES THE EIGHTH AMENDMENT

Standard of Review: Parker contends the standard of review is De Novo

Parker initially was indicted in 1982 and tried in 1983. The resentencing trial took place eighteen years later in October 2000. As the trial court found, this eighteen year delay is attributable to the State, see R7-1336, having resulted from the State's unconstitutional suppression of evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). Pursuant to Justice Stevens's opinion in Lackey v. Texas, 514 U.S. 1045 (1995) and Justice Breyer's opinion in Elledge v. Florida, 525 U.S. 944 (1998), such a delay attributable to the State raises serious questions whether the imposition of the death penalty following such a delay would constitute cruel and unusual punishment in violation of the Eighth Amendment. As noted by Justice Stevens, there is particular constitutional significance to delays attributable to the State. See Lackey.

In addition, in violation of the Due Process clause, Parker has been prejudiced by the eighteen year delay here because witnesses who were available to testify and provide evidence in mitigation at the time of his original trial in 1983 were no longer able to testify at the resentencing in 2000. For example, Parker's mother is deceased

and one of his sisters is no longer competent to testify. The concerns expressed in Lackey and Elledge are therefore especially strong in Parker's case. This Court should therefore address the particular circumstances against the background of those opinions and conclude that to uphold Parker's death sentence would not be consistent with the Eighth Amendment and fundamental principles of Due Process.

POINT XIII

THE TRIAL COURT ERRED WHEN IT DENIED PARKER'S REQUESTED JURY INSTRUCTION CONCERNING THE EVALUATION OF CIRCUMSTANTIAL EVIDENCE

The trial court abused its discretion in denying Appellant's proposed jury instruction which provided that evidence in aggravation must not only be consistent with a finding that the aggravating circumstance applies but must also be inconsistent with any reasonable hypothesis that negates an aggravating circumstance. 8 R 7-1189-90; R 33-2649. Like guilt itself, aggravators must be proven beyond a reasonable doubt. See *Geralds v. State*, 601 So. 2d 1157, 1163 (Fla. 1992); *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973). Although an aggravating circumstance may be supported entirely by circumstantial evidence, "the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." *Geralds*, 601 So. 2d at 1163

The evidence in the record is eminently sufficient to trigger application of the proposed instruction. For example: Dr. Wright testified that although the stab wound was a painful wound, Ms. Slater may have suffered virtually no real pain based upon the sequence of events and that it was equally consistent with the facts that the gunshot and stab wound were nearly coincidental. He noted that while one could envision a scenario of physical pain lasting some period of time that it was also true that the scenario could have been virtually instantaneous. He stated that both scenarios are equally consistent with the physical evidence in the case. R26-1718. Dr. Wright also testified that decedent's clothing was stained with urine. R26-1694-1695. Dr. Wright opined that the decedent voided her bladder while alive. R26-1709. He noted that a voiding of the bladder could have resulted from fear or an abdominal spasm upon being stabbed and that both theories were equally consistent with the evidence. R26-1710, 1717. Only through Parker's proposed instruction could the jury be properly guided concerning how to assess such circumstantial evidence bearing on the aggravators it was asked to consider.

CONCLUSION

For the foregoing reasons, Mr. Parker's death sentence should vacated or his case reversed for a new resentencing.

Dated: December 26, 2001

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to LESLIE CAMPBELL, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by U.S. mail, this 26th day of December, 2001.

Attorney for Appellant

CERTIFICATION OF FONT

I certify that Appellant's Initial Brief is typed in Times New Roman 14 point type.