

SUPREME COURT OF THE STATE OF FLORIDA

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

REPLY BRIEF OF APPELLANT

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

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PRELIMINARY STATEMENT

Appellant J.B. Parker submits this Reply Brief in further support of his appeal from the death sentence imposed by the trial court on December 13, 2000. To the extent issues raised in the State's Answer Brief ("State Br.") are not addressed in this Reply, Parker relies on his Initial Brief ("Parker Br.") for his response.

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

The State argues, based on this Court's decision in *Farina v. State*, 801 So. 2d 44 (Fla. 2001), *cert. denied*, 2002 U.S. LEXIS 4316 (June 10, 2002), that the trial court properly quashed Parker's motion to suppress his May 7, 1982 statement on grounds of res judicata and law of the case. In making this argument, the State inexplicably ignores this Court's earlier decision, cited by Parker in his Initial Brief, in *Preston v. State*, 607 So. 2d 404 (Fla. 1992), *cert. denied*, 507 U.S. 999 (1993), and overlooks the key factors distinguishing *Farina* — the lack of the required evidentiary hearing here and the fact that Parker has shown, based on the Supreme Court's intervening decision in *Michigan v. Jackson*, 475 U.S. 625 (1986), and the

evidence submitted in support of his motion to suppress, *see* R3-368-553, that new grounds exist to support his motion to suppress.

In *Farina* this Court only held that when, after an evidentiary hearing on the motion, a defendant does not establish new grounds in support of a motion to suppress at a resentencing proceeding sufficient to justify revisiting an issue that could have been raised at the original trial, under the doctrines of res judicata and law of the case, the defendant is precluded from relitigating the suppression issue. *Farina*, 801 So. 2d at 51. Here, as in *Spaziano v. State*, 433 So. 2d 508, 511 (Fla. 1983), *aff'd*, 468 U.S. 447 (1984), Parker has demonstrated the requisite new grounds

In *Spaziano*, this Court held that the resentencing court did not expand the scope of the remand by considering defendant's previous conviction as an aggravating factor, even where the original sentencing court had rejected the conviction as an aggravating factor because that conviction had not yet been resolved on appeal. This Court recognized that an intervening change in the law, which permitted a sentencing court to consider convictions which were still on appeal as an aggravating factor, permitted the reconsideration of the aggravating factor. *Id.* Because *Jackson* represents a change in the law similar to that which occurred in *Spaziano*, the trial court was not bound by the prior decision regarding

the admissibility of the May 7 statement.

In *Jackson*, the Supreme Court of the United States held that “if police initiate interrogation after a defendant’s assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant’s right to counsel for that police-initiated interrogation is invalid.” 475 U.S. at 636.¹ The State here does not (and cannot) dispute that on May 7, 1982, the day Parker “waived” his right to counsel, he had previously been arraigned on May 5 and his right to counsel under the Sixth Amendment had attached. Under the teachings of *Jackson*, the claimed waiver of Parker’s right to counsel was invalid, and Parker’s May 7 statement should have been excluded from evidence.

Moreover, this Court in *Farina* failed to address its prior decision in *Preston*

¹ *Jackson* was the law at the time of Parker’s resentencing proceeding and therefore governed at that trial. By definition, because Parker’s sentence had been vacated, the proceedings in his case were not “final.” See *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) (final decisions are those where “a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied”) (citations omitted); *Richardson v. Gramley*, 998 F.2d 463, 465 (7th Cir. 1993) (Posner, J.) (a criminal case is not final if case has been remanded for resentencing), *cert. denied*, 510 U.S. 1119 (1994); *People v. Lyles*, 567 N.E.2d 396, 399 (Ill. App. Ct. 1990) (defendant’s case was not final when the Supreme Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986), because defendant was not resentenced until after 1986)). Thus, it is irrelevant that the Supreme Court did not decide *Jackson* until after Parker’s initial death sentence.

establishing that a resentencing proceeds on a “clean slate.” In recognition of the principles established in *Spaziano*, this Court held in *Preston* that a trial judge in a resentencing proceeding “may properly apply the law and is not bound in remand proceedings by a prior legal error.” 607 So. 2d at 409 (citing *Spaziano*, 433 So. 2d at 511). Thus, under *Preston*, the trial court was not bound by the prior legal error of the trial court in refusing to exclude the May 7 statement in Parker’s first trial, and it is therefore irrelevant whether Parker raised this question in his first appeal because Parker had established the required “new grounds.”

As the State admits in tacit acknowledgment of the teachings of *Preston*, “resentencing proceedings begin with a clean slate” and the “clean slate” rule applies “to issues that relate to sentencing proceedings.” State Br. at 15-16. The issue of the admissibility of Parker’s May 7 statement unquestionably relates to the resentencing proceedings. The State extensively relied on the May 7 statement, introduced through the testimony of Detective Powers, to counter defendant’s position that Cave was the shooter and that Parker was a minor participant, R33-2685-88, R34-2719, and, in its Sentencing Order, the trial court relied upon the May 7 statement with respect to at least two aggravating factors. See Parker Br. at 40-41.

For example, with respect to the aggravating factor that “[t]he 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) (2001), the trial court parroted the inadmissible testimony of Detective Powers, which was drawn from the May 7 statement. *Compare* R7-1329-30 (trial court’s finding that “[t]here was a discussion in the car regarding killing Deputy Bargo who stopped them after the murder of the victim”) *with* R28-1987 (Detective Power’s testimony at resentencing that “[h]e [Parker, in his May 7 statement,] said that the discussion in the car was to kill the deputy sheriff that was going to stop them”).

Yet the trial court admitted this critical evidence despite the intervening Jackson decisions without even holding the required evidentiary hearing on the motion to suppress. Unlike *Farina* where the trial court held the required hearing on a motion to suppress, here the trial court refused to hold a hearing and thus could not have properly addressed whether Parker presented new grounds.

Farina, 801 So. 2d at 51. The trial court, however, is required to hold a hearing on a motion to suppress evidence prior to commencement of trial. *Bailey v. State*, 319 So. 2d 22 (Fla. 1975); *Ferrazzoli v. State*, 442 So. 2d 1056, 1057 (Fla. 1st DCA 1983) (holding that the trial court erred in denying a pretrial motion to suppress on the basis of its review of the record only, without conducting a formal evidentiary hearing; *Foster v. State*, 255 So. 2d 533 (Fla. 1st DCA 1971) (requiring

that the trial court hold a hearing on a motion to suppress before the trial begins), *cert. dismissed*, 260 So. 2d 520 (1972); *see also Gadson v. State*, 600 So. 2d 1287,1289 (Fla. 4th DCA 1992); *Williams v. State*, 548 So. 2d 898, 899 (Fla. 4th DCA 1989). At the very least the trial court committed reversible error by its refusal to hold an evidentiary hearing and address Parker's suppression motion on the merits.

Parker's suppression motion, in contrast to *Farina*, is expressly based on constitutional violations which are governed by exclusionary principles in a penalty proceeding.² In contrast, *Farina's* second motion to suppress was based on technical violations of booking procedures, statutory provisions prohibiting juvenile inmates from having contact with adult inmates, and a failure to obtain the statutorily required authorization prior to recording the conversation.

Rather than respond on the merits of Parker's points, the State imposed an improper defense of avoidance and moved for and obtained an order to quash Parker's legally sufficient motion without giving Parker the benefit of a required evidentiary hearing. A resentencing should proceed de novo on all issues bearing

² Specifically, in addition to *Jackson*, Parker argued the application of the intervening Florida Supreme Court authority of *Traylor v. State*, 596 So. 2d 957 (Fla. 1992) (R3-377) and *Phillips v. State*, 612 So. 2d 557 (Fla. 1992) (R3-389).

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), *cert. denied*, 525 U.S. 880 (1998). Parker specifically argued below that this authority was applicable and an evidentiary hearing was necessary to establish the application of this intervening case law. R17-265-275.

Absent Parker's May 7 statement, the sufficiency of the evidence turns upon the testimony of a convicted co-defendant whose prior sworn statements conflict with the testimony he presented at Parker's trial and the testimony of a co-defendant's girlfriend. The jury requested a read back of the Power's testimony. R8-1431. It obviously was important to them in their deliberations. "Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached." *Hill v. State*, 768 So. 2d 518, 521 (Fla. 2d DCA 2000). Accordingly, the May 7 statement introduced through the Powers testimony cannot be said to be harmless beyond a reasonable doubt in its effect on Parker's trial.

POINT II

THE TRIAL COURT IMPERMISSIBLY

EXCLUDED DEFENSE EVIDENCE

The State argues that the trial court did not err by excluding mitigating evidence offered by Parker — namely, letters Parker wrote to Audrey Rivers, affidavits of unavailable family members, and testimony from Richard Barlow — because it did not have an opportunity to rebut this allegedly hearsay evidence and because the letters were self serving. The evidence proffered by Parker, however, was not offered for the truth of the matters asserted and therefore was not hearsay. In any event, the State had a fair opportunity to rebut the evidence. By excluding this evidence, the trial court prevented Parker from offering relevant evidence in mitigation in contravention of *Hitchcock v. State*, 578 So. 2d 685, 689 (Fla. 1990), *vacated on other grounds*, 505 U.S. 1215 (1992) and *Lockett v. Ohio*, 438 U.S. 586 (1978). *See Garcia v. State*, No. SC95136, 2002 WL 571672 (Fla. Apr. 18, 2002).

A. Testimony of Audrey Rivers

The State misunderstands the nature of Parker's objection to the trial court's decision excluding from evidence Parker's letters to Audrey Rivers. These letters were offered to rebut the State's contention that the friendship between Rivers and Parker was contrived. *See Parker Br.* at 44-45. The relevance of whether this was a contrived friendship is obvious from the trial court's findings with respect to

Parker's non-statutory mitigating factor concerning his friendship with Rivers, wherein the trial court found that "[a]bility to establish a friendship and to be a generous, caring, and giving person are mitigating circumstances as to this *possibly contrived* friendship and are given little weight." R7-1334 (emphasis in italics added). The trial court found that the friendship was "possibly contrived" at the same time as it noted defendant communicated with Rivers "quite extensively." *See id.* Through exclusion of the letters themselves, the jury and trial court, were deprived of a fair opportunity to review their correspondence to assess the seriousness of the friendship. It is, however, not possible to say on this record whether the trial court would have accorded this finding something more than "little weight," if there had been stronger evidence that the relationship between Parker and Rivers was not contrived.

Parker's letters to Rivers should have been admitted into evidence because they were not hearsay and were not cumulative of Rivers' testimony. Rather, these letters, as noted by Parker's counsel during the resentencing hearing, *see* R31-2354-55, were being offered to display Parker's character, and as such were non-statutory mitigation. These letters were offered for their effect upon Rivers in the formulation of her opinions about Parker (and not for the truth or the falsity of the matters asserted in those letters) and, therefore were not hearsay. *See Drayton v.*

State, 763 So. 2d 522, 524 (Fla. 3d DCA 2000); *King v. State*, 684 So. 2d 1388, 1389 (Fla. 1st DCA 1996) (citing *State v. Baird*, 572 So. 2d 904, 904 (Fla. 1990)).³ Accordingly, the State was not required to be given a fair opportunity to rebut in accordance with Fla. Stat. § 921.141(1).

Because these letters were being offered to show the basis for Rivers' opinion about Parker, evidence that is distinct from River's opinion itself, they were not cumulative. The State portrayed Rivers' friendship with Parker as contrived because of her work on behalf of other death row inmates and because of Parker's continuing efforts to overturn his death sentence. *See* R31-2377-78. The letters themselves, had they been admitted, graphically demonstrate a sincere, warm, caring relationship developed over more than eleven years in the extensive correspondence between this elderly woman and a death row inmate and conclusively refute any suggestion that Parker and Rivers contrived their eleven-year relationship in the hope that Parker would some day obtain a new sentencing hearing. The trial court, through its exclusion of this compelling evidence, was left

³ Any claim by the State that these letters were inadmissible hearsay should, in any event, be rejected because the State failed to make that objection at the sentencing hearing. R31-2354-56. *Cf. Kloster Cruise Ltd. v. Grubbs*, 762 So. 2d 552, 555 (Fla. 3d DCA 2000). Accordingly, the only question is whether these letters were relevant, probative, and not cumulative.

with no evidence showing the basis for Rivers' opinion of Parker. Parker was essentially asking the Court to believe that he is a generous, caring and giving person through his relationship with Rivers. Only by considering the basis for that opinion would Parker have been able to rebut the contention that Rivers' friendship (and by implication, her testimony) was contrived.

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

The State objects to the admission into evidence of the authenticated and proffered affidavits of Elmira Parker, Douglas Smith, Katie Lee Parker, Rosie Lee Parker, Gloria Marshall and Martha Rahming, all of whom were found to be unavailable. These affidavits show substantial, non-statutory mitigation by Parker's family members, putative father, family friends, his teacher and counselor. The only question on this appeal is whether the State had a reasonable opportunity to rebut in accordance with Fla. Stat. § 921.141(1). As explained by Parker in his Initial Brief (at 48-49), the State has had all the opportunity it needed to rebut the contents of these affidavits.⁴

⁴ The State's argument that Parker failed to preserve this claim because he merely referenced the affidavits without detailing the mitigating evidence contained therein should be rejected. The affidavits themselves were proffered into evidence at the resentencing hearing (Defendant's N, O, P, Q and R for

C. Testimony of Richard Barlow

The issue with respect to Barlow’s testimony is whether the trial court committed error by not permitting Barlow to testify about what Bryant told him regarding the conversation he heard between Cave and Bush implicating Cave, not Parker, as the triggerman. Contrary to the State’s disingenuous assertion, Parker, in clear and explicit terms, raised the question below, and accordingly he has preserved the issue. *See* R29-2055-58.⁵

Contrary to the State’s assertion, this evidence was not offered to prove the truth of Bryant’s statements, but rather was offered for its effect upon Barlow in deciding, on behalf of the State, to present the Bryant testimony at the 1993 Cave resentencing in support of the State’s argument that Cave, not Parker, was the shooter. As this Court expressly concluded in *Parker V*, in which it affirmed the

Identification).

⁵ Parker’s counsel asked Barlow, “What did Bryant tell you he had heard?” R29-2055. The State objected on hearsay grounds and because the Bryant testimony was going to be read into the record. Parker’s counsel explained, “This is not being offered to prove the truth of the matter asserted, this is being offered to prove that the statements made at trial and the statements made to Mr. Barlow are consistent. It is not being offered to prove the truth of the matter asserted but that they are statements and identical forms *so that he could assess the credibility of Bryant.*” R29-2056-57 (emphasis added). Parker’s counsel then proffered what Barlow would have testified to — Bryant told Barlow that he overheard Cave admit to being the actual shooter, which Bryant later repeated to jailer Art Jackson. R29-2057-58.

trial court's decision granting Parker a new resentencing proceeding, "confidence in the jury's recommendation of death ha[d] been undermined[,]” in part, because “Parker would have been able to use this evidence to show that the State introduced this evidence in Cave’s resentencing to prove that Cave, rather than Parker, was the shooter.” *State v. Parker*, 721 So. 2d 1147, 1151 (Fla. 1998). Barlow’s testimony concerning what Bryant told him was admissible to demonstrate the basis for the State’s inconsistent position, and to counter the State’s more recent argument, made at Parker’s resentencing hearing, that Barlow was mistaken.

In *Green v. Georgia*, 442 U.S. 95 (1979), a case with facts strikingly similar to this case, the Supreme Court of the United States held that the defendant was denied a fair trial, in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978), when the trial court excluded the testimony of a witness, who previously testified at Green’s co-defendant’s trial. The witness, one Pasby, would have testified that Moore, the co-defendant, had admitted to him that he was the shooter. The Court held that the exclusion of this evidence, regardless of whether it was hearsay, denied the defendant’s right to present mitigation evidence. As the Court noted, “the hearsay rule may not be applied mechanistically to defeat the ends of justice.” *Green*, 442 U.S. at 97 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

The excluded evidence bears directly upon the basis for the State's determination, advanced at the 1993 Cave resentencing, which it then sought to disavow, at Parker's resentencing, that Cave was the triggerman. Armed with Bryant's statements to him, corroborated by Bryant's consistent statements to Jackson, Barlow was able to determine that Bryant's claim to have overheard Cave's confession was credible evidence that should be presented at the 1993 Cave resentencing. This evidence, thus contradicts the State's argument here that it somehow erred by arguing that Cave was the triggerman at Cave's 1993 resentencing. Most importantly, it is also plainly relevant to the evidence presented to the jury and found by the trial court in support of the non-statutory mitigating factor of "[i]nconsistent evidence and position by the state during the trials arising out of the same facts." R7-1335.

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

The harmless error standard (not the abuse of discretion standard) governs the review of the confrontation clause violation committed when the State improperly introduced in its closing argument the alleged out of court declaration of

Parker's co-defendant, John Earl Bush, that Parker was the shooter and when the trial court failed to issue a curative instruction. In *Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999), a case relied upon by the State in support of its assertion that the abuse of discretion standard is applicable here, this Court, after reviewing the history of harmless error analysis and upholding the applicability of the rule of *Chapman v. California*, 386 U.S. 18 (1967) and *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986) (applying harmless error analysis to constitutional violations on direct review) in the face of a new Florida statute governing appellate review, held that the abuse of discretion nevertheless applied, where "the trial court recognized the error, sustained the objection and gave a curative instruction."

There was, however, no curative instruction here. Instead, the Court told the prosecutor to "correct the argument." R33-2709-10. Rather than curing the error, the State repeated the improper reference to Williams' testimony and left the impression that the State did not want the jury to consider such "evidence" rather than expressly informing the jury that it could not consider such "evidence." In light of the strong re-affirmance of the principles of harmless error analysis in *Goodwin*, this Court should hold that to reduce the level of review from harmless error analysis to abuse of discretion, the curative instruction must be given by the trial court and must indeed cure the constitutional violation. As neither of these

factors apply to this case, this Court must apply harmless error analysis.

The prosecutor's reference to Bush's alleged statement to his girlfriend, Georgeanne Williams was not inadvertent. As noted in Parker's Initial Brief, the prosecutor acknowledged during Williams' testimony that he could not ask her to testify to what Bush said about Parker's involvement. *See* R27-1759 ("Q. Without saying what John Earl Bush said because I'm not allowed to ask you that about this crime . . ."). In light of the prosecutor's awareness of the confrontation clause problems presented by introducing an inculpatory statement by Parker's co-defendant, it is simply unbelievable for the State to suggest that his reference in closing argument to what Bush told Williams was inadvertent. When confronted with Parker's counsel's objection, the prosecutor first denied making the remark, then suggested the remark was inadvertent and said that he did not "mind correcting that." R33-2707-09. Without being accused of making the remark intentionally, the prosecutor nevertheless felt compelled to state "I certainly did not intend for this Jury to convict this person because they think that Bush said that." R33-2709.⁶

⁶ And, even if the statement was not inadvertent, Parker's rights would still have been violated because that fact does not alter the effect of the statement, which placed before the jury William's inadmissible statement that Bush said Parker was the shooter. Inadvertent or not, the jury heard inadmissible evidence.

The “correction” then offered by the prosecutor only served to compound the violation of Parker’s rights under the Sixth Amendment. Without ever checking the record of what he had said to the jury during closing argument, the prosecutor first noted that “apparently he [Parker’s counsel] picked up that I said that Georgeann Williams testified that John Earl Bush told her that Parker did the shooting.” R33-2713. Thus, the prosecutor repeated the very testimony that violated Parker’s sixth amendment rights, rather than simply stating that anything that Bush may or may not have told Williams about Parker’s involvement in this case was not evidence in this case and must not be considered.

The State’s focus on the fact that it never sought to introduce Williams’ testimony concerning what Bush told her about Parker’s involvement misses the point because a prosecutor’s extrajudicial statement to the jury is the equivalent of testimony. *See Douglas v. Alabama*, 380 U.S. 415, 419 (1965). By referring to the inadmissible hearsay testimony of what Bush allegedly said, the State violated Parker’s rights under the Confrontation Clause, *see Hutchins v. Wainwright*, 715 F.2d 512, 515-16 (11th Cir. 1983), *cert. denied*, 465 U.S. 1071 (1984), because Bush, who has been executed, was not available and Parker, thus, had no opportunity to rebut this evidence. Moreover, the prosecutor’s attempt to cure the violation of the Confrontation Clause by denying he ever made the statement and

stating that, if he did, it was not evidence, while in fact repeating the inadmissible testimony and leaving the jury with the impression that Bush had in fact made the statement implicating Parker, but it was not evidence in this case, hardly cured the violation of Parker's rights under the Confrontation Clause. *See Bruton v. United States*, 391 U.S. 123, 137 (1968).⁷

Thus, the only question at issue is whether the prosecutor's confrontation clause violation was harmless error. In *Schneble v. Florida*, 405 U.S. 427, 430 (1972), the Supreme Court of the United States, held that violations of *Bruton* are subject to the familiar harmless error standard applied to constitutional violations.

In light of the highly questionable nature of the only other evidence bearing on whether Parker was the triggerman, it is not possible to say that the admission of Bush's statement through the prosecutor's argument was harmless beyond a reasonable doubt. *See Pacheco v. State*, 698 So. 2d 593, 595 (Fla. 2d DCA 1997). In *Pacheco*, the court addressed circumstances like those presented here and held

⁷ This case can therefore be contrasted with *United States v. Sarmiento*, 744 F.2d 755, 764-65 (11th Cir. 1984), where the Court held that a prosecutor's improper remarks were remedied by the *trial court's* curative instructions wherein it indicated that the attorney's beliefs were not relevant. No such curative instruction by the trial court occurred here and the improper remarks at issue here concern not simply the prosecutor's "beliefs" but his affirmative statement that, unsupported by any admissible evidence, Bush had stated that Parker was the shooter.

that admission of a co-defendant's inculpatory statement implicating defendant was not harmless beyond a reasonable doubt, where the only other evidence implicating defendant was the testimony of two witnesses who "had severe credibility problems" and noted that the corroboration of the two witnesses' testimony by the inadmissible statement "may well have caused the jurors to give more weight to the testifying witnesses than they otherwise might have done." Moreover, the importance of the inadequately corrected remark of the prosecutor is plain because the identity of the triggerman was at issue in the HAC and CCP aggravators, R7-1330-31, and Parker's mitigating factors that he was an accomplice and that he was not the actual triggerman. R7-1331, 1335. In addition, the jurors plainly focused on the question of whether Parker was the triggerman. *See* R8-1430 (jurors' question during deliberations seeking identity of person who said "I couldn't stand her moaning. . . so I shot her").

The only admissible evidence that Parker was the shooter was Williams' highly questionable testimony. Williams had a motivation to lie because she was Bush's almost fiancée, has convictions for crimes of dishonesty and has admitted to the State that she did not actually know who shot the victim. R27-1765-77, 1779-97, 1803-04. Moreover, Parker's co-defendant, Terry Wayne Johnson, could not say who was the triggerman. R28-1925, 1936. The State's "inadvertent"

reference to Bush’s testimony implicating Parker as the shooter, therefore, was not 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

Again the State misstates the record in the trial court and incorrectly argues that the abuse of discretion standard applies to review of the trial court’s error.

First, the State argues that Parker did not preserve its objection to the trial court’s opening remarks. However, it is plain from the excerpts quoted by the State in its Appellee’s Brief that Parker’s counsel objected to the trial court’s initial statement that Parker had been convicted of first degree murder.⁸ Moreover, any argument

⁸ Parker’s counsel objected, stating that the trial court “[m]isstated that he was convicted of premeditated murder.” State Br. at 40 (quoting R19-436-37). Parker’s counsel then argued that “error has occurred” and he “move[d] for a mistrial and [to] strike this panel.” *Id.* (quoting R19-437). When the trial court proposed to cure its error by informing the venire that “I’m going to say the case was submitted to the jury under two theories, premeditated murder and felony murder, and he was found guilty of first degree murder and leave it at that because I think that’s accurate[,]” Parker’s counsel indicated the he would “stand on [his] objection.” *Id.* at 42 (quoting R19-439-40). The trial court then overruled the objection and instructed the jury as he indicated that he would during the conference with counsel. *Id.* (quoting R19-440-41).

that Parker did not preserve the error is belied by the fact that counsel also specifically requested a closing instruction that the 1983 jury, in convicting Parker of first degree murder, “did not specify whether it found defendant guilty of First Degree Premeditated Murder or First Degree Felony Murder.” R7-1188. The trial court, however, refused to so instruct the jury.

Second, contrary to the State’s argument, the review of the trial court’s refusal to strike the panel and grant a mistrial is governed by harmless error analysis, and not by the abuse of discretion standard. In *Goodwin v. State*, 751 So. 2d 537, 542-43 (Fla. 1999), this Court noted that most constitutional errors, other than those requiring *per se* reversal, are governed by the harmless error analysis approved in *Chapman v. California*, 386 U.S. 18 (1967) and *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986) and include “a jury instruction misstating an erroneous conclusive presumption” and “a jury instruction misstating an element of the offense.” *Goodwin*, 751 So. 2d at 543 n.4 (citing *Arizona v. Fulminante*, 499 U.S. 279, 294 (1991)). This Court should apply harmless error analysis because the trial court’s incorrect statement regarding the first jury’s verdict is akin to the type of errors detailed by the Supreme Court in *Fulminante* in that they all concern the defendant’s due process rights to a fundamentally fair trial. Moreover, because the curative instruction provided by the Court was inadequate to remedy the

misperception that the first jury convicted Parker of premeditated murder, abuse of discretion review for the denial of Parker's motion for a mistrial is inappropriate.

See supra Point III at 15.

After Parker objected to the trial court's initial statement to eight of the twelve jurors that were eventually empanelled, the trial court attempted to cure its error by indicating that the State presented two different theories of first degree murder and that Parker was convicted of first degree murder, *see* R19-440-41, without clarifying that the jury did not specify whether it found that Parker was guilty of premeditated murder or felony murder. The trial court thus compounded its earlier error by leaving two-thirds of the jury in doubt about the crucial issue of whether the original jury found beyond a reasonable doubt that Parker was guilty of premeditated murder. Moreover, by failing to give Parker's proposed closing instruction, *see* R7-1188, the error was only compounded.

The importance of this issue is plain from the fact that the State argued at the resentencing that the "cold, calculated and premeditated" aggravator applied in this case, the jury recommended the death sentence, and the trial court found that this aggravator was proven beyond a reasonable doubt. If the trial court had made it clear that the original jury did not determine either way whether Parker was guilty of premeditated murder and that this jury could find the CCP factor only if it

determined beyond a reasonable doubt that Parker acted with premeditation, the jury would have properly understood its duty to independently assess the presence of the CCP aggravator. In light of the trial court's uncorrected misstatement as to facts already found against Parker, the jury may well have improperly concluded that it could instead rely on the prior jury verdict, and, because of the relevance of the question of premeditation to the crucial question of the identity of the triggerman, it is simply not possible to say that the this error was harmless beyond a reasonable doubt.

POINT V

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

As explained more fully in Parker's Initial Brief, this Court should reject the HAC, CCP, avoid arrest and pecuniary gain aggravating factors because the trial court did not apply the correct rule of law to these factors and because the factors are not supported by substantial evidence. *See Willacy v. State*, 696 So. 2d 693, (Fla.), *cert denied*, 522 U.S. 970 (1997).

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

The State focuses its argument in support of upholding the HAC aggravator upon only one of the two distinct requirements for that factor identified in this

Court's recent decision in *Hertz v. State*, 803 So. 2d 629 (Fla. 2001). In *Hertz*, this Court held that to qualify for HAC, "the crime must be both conscienceless or pitiless **and** unnecessarily torturous to the victim." *Id.* at 651 (quoting *Richardson v. State*, 604 So. 2d 1107, 1109 (Fla. 1992) (emphasis added). Although the State goes on at length explaining why this crime was torturous to the victim, it does not address at all the state of mind required of the defendant (*i.e.*, that of being conscienceless or pitiless). Moreover, the trial court improperly based its finding with respect to the HAC aggravator solely upon the alleged torture of the victim and not Parker's state of mind. *See* R7-1330.

In its sentencing order, the trial court concluded that Ms. Slater was "begging that her life not be taken." *See* R7-1330. This finding, however, is flatly contradicted by co-defendant Johnson, who testified that Ms. Slater was told, and believed, that she would be let go. R28-1920. This was the only evidence bearing on what occurred after Ms. Slater was abducted and is plainly inconsistent with a finding that Parker acted without conscience or pity.

The HAC aggravator is also inapplicable because this finding is not supported by substantial evidence proving that the murder was unnecessarily torturous. Not only does Johnson's testimony that Ms. Slater believed that she would be let go negate Parker's required state of mind, but it also negates any

argument that the ride from the convenience store was unnecessarily torturous. Moreover, this Court has held that “‘an instantaneous or near-instantaneous death by gunfire’ does not satisfy the HAC aggravating factor.” *Hertz*, 803 So. 2d at 629 (quoting *Donaldson v. State*, 722 So. 2d 177, 186 (Fla. 1998) (quoting *Robinson v. State*, 574 So. 2d 108, 112 (Fla.), *cert. denied*, 502 U.S. 841 (1991))). Dr. Wright testified that Ms. Slater died instantaneously, that the voiding of her bladder was equally consistent with an abdominal spasm from the stabbing as it was from fear and that she may have suffered no real pain based upon the fact that the stabbing and the gunshot were nearly coincidental. R26-1708-09, 1717-18.

The cases cited by the State in support of the HAC aggravator are inapposite. First, this Court cannot consider the evidence supporting the finding of the HAC aggravator in Cave’s case. The evidentiary record in Cave’s case differs from Parker’s in material respects and includes evidence (including Cave’s statements) that were inadmissible at Parker’s resentencing. To rely here on the factual circumstances supporting Cave’s death sentence thus would result in supporting Parker’s death sentence with evidence not admitted at Parker’s trial in violation of the Confrontation Clause. The remaining cases cited by the State, *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988), *Pooler v. State*, 704 So. 2d 1375, 1378 (Fla. 1997), *cert. denied*, 525 U.S. 848 (1998); *Preston v. State*, 607

So. 2d 404, 409-10 (Fla. 1992) and *Routly v. State*, 440 So. 2d 1257, 1265 (Fla. 1983), *cert. denied*, 468 U.S. 1220 (1984), are plainly distinguishable from this case because they involved: (1) a prolonged walk at knifepoint combined with mutilation and near decapitation (*Preston*); (2) being shot nine times (twice in the head), with death resulting from loss of blood from a chest wound, and sexual battery (*Swafford*); (3) terror inflicted on the victim while being transported bound and gagged in the trunk of a car (*Routly*), and (4) being shot five times, vomiting out of fear and a chasing of the victim as defendant brandished a weapon (*Pooler*). None of these factors are present here.

B. The Cold Calculated and Premeditated Aggravator Does Not Apply

At the resentencing, the State offered little if any evidence having a bearing upon the CCP aggravator. Based on the very authority cited by the State, *Jackson v. State*, the CCP aggravator requires that the murder be the product of “cool and calm reflection[,]” that there be a “careful plan or prearranged design to commit murder before the fatal incident” and that the defendant exhibit “heightened premeditation[.]” 648 So. 2d 85, 89 (Fla. 1994). However, the only evidence that even barely suggests that Parker acted with the requisite cool and calm reflection and premeditation of a plan or scheme to commit murder is that Parker was in the

store two to three hours before the robbery. This suggests nothing other than that Parker and his co-defendants planned to rob the store.

Moreover, the trial court's conclusion that "[t]here was no discussion among the defendants as to what they would do with her; her fate was a foregone conclusion[,]” *see* R7-1330, is not borne out by the record. Johnson, in fact, testified that the plan was to release Ms. Slater unharmed. R28-1919-22.

C. The “Avoid Arrest” Aggravator Does Not Apply

Contrary to the State's assertion, there is not substantial evidence supporting the trial court's finding of the avoid arrest aggravating factor. The State incorrectly focuses on whether the trial court's factual findings are supported by the record, rather than on the proper question of whether these facts support a finding that the avoid arrest aggravator has been established. As noted by Parker in his Initial Brief, this aggravating factor requires “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.” *Jackson v. State*, 599 So. 2d 103, 109 (Fla.), *cert. denied*, 506 U.S. 1004 (1992). Significantly, the *Jackson* court also held that the fact that the victim could potentially identify the defendant is insufficient to prove intent to kill to avoid a lawful arrest. *Id.*

Here, the only evidence offered by the State and accepted by the trial court

in support of the avoid arrest aggravator does not establish the defendants' motive for killing the victim. Both the State and the trial court make much of the fact that Parker's identity was known to the victim because he had been present in the store without concealing his identity once when he was supposedly "casing" the store and again when the actual robbery occurred. However, *Jackson* renders this fact legally insignificant to the avoid arrest aggravator. The only other evidence – Parker's testimony about the defendants' alleged discussion to kill Officer Bargo – should have been suppressed. *See supra* Point I.

The cases cited by the State do not support a finding that the avoid arrest aggravator is applicable to this case. In *Preston*, 607 So. 2d at 409, and *Swafford*, 533 So. 2d at 273-74, the only reasonable inference was that defendant's motive was to avoid arrest.⁹ Here, by contrast there is no admissible evidence supporting such an inference. That the victim could possibly identify Parker and that the victim could have been restrained in the store does not have any bearing on what transpired after Ms. Slater was removed from the store.

D. The Evidence Does Not Support the Trial Court's Finding

⁹ As previously explained, *see supra* Point V.A at 25, the State's reliance on Cave's case should be rejected because it would be tantamount to supporting Parker's conviction with evidence admitted in a co-defendant's trial in violation of the Confrontation Clause.

that the Murder Was Committed for Pecuniary Gain

As explained in Parker's Initial Brief, to establish the Pecuniary Gain aggravating factor, the motive for the *murder*, not the robbery, must be pecuniary gain. See *Chaky v. State*, 651 So. 2d 1169, 1172-73 (Fla. 1995); *Elam v. State*, 636 So. 2d 1312, 1314-15 (Fla. 1994). Because the evidence in no way supports the inference that the defendants took Ms. Slater's life for the purpose of retaining the proceeds of the robbery, it cannot be said that there is substantial evidence supporting this aggravating factor. The facts cited by the State – the defendants robbed the Lil General Store of \$134.00, the defendants split the proceeds and the manager of the store testified that the store had been robbed – establish only that a robbery had taken place and, given that Ms. Slater had been killed during the course of the robbery, that the defendants were guilty of felony murder. If the State's implicit assertion that proof of the underlying robbery is sufficient to support a finding of the pecuniary gain aggravating factor, then any robbery/felony murder would result in the finding of the pecuniary gain aggravating factor. This cannot be the law because the purpose of aggravating factors is to narrow the class of persons subject to the death penalty. *Zant v. Stephens*, 462 U.S. 862, 876-77 (1983).

POINT VI

THE DEATH PENALTY IS DISPROPORTIONATE

The State cites several cases in support of its argument that the death penalty is proportionate in this case. Apart from *Alston v. State*, 723 So. 2d 148 (Fla. 1998), these cases bear little if any resemblance to Parker's case and, therefore, do not support the proposition that the death sentence is proportionate. Plainly, this Court cannot conclude that the death penalty would be proportionate if applied to Parker on the basis of a single similar case.

For example, in *Card v. State*, the evidence showed that the victim's "blouse was torn, her fingers severely cut to the point of being almost severed and her throat had been cut." 803 So. 2d 613, 617 (Fla. 2001), *petition for cert. filed* (01-9152, Mar. 20, 2002). The evidence in *Card*, therefore, is much stronger than in Parker's case, particularly with respect to the HAC aggravator, and therefore does not support the State's argument that the death penalty here is proportionate to other cases.

In *Loft v. State*, another case relied upon by the State in support of proportionality, the evidence showed that "[t]he right side of Connors' throat had been slashed, her larynx had been fractured, she had been struck in the head with a blunt object and she had a single stab wound in the back." 695 So. 2d 1239, 1240 (Fla.), *cert. denied*, 522 U.S. 986 (1997). The evidence additionally established

that the victim had been bound and gagged, had the imprint of a pair of pliers upon her arm, and there was evidence of sexual battery. *Id.* at 1241. Like *Card*, this case is distinguishable from Parker's case. The violence in *Loft*, therefore, stands in stark contrast to Parker's case and weighs in favor of a finding that the death penalty would be disproportionate.

Perhaps most strikingly different from Parker's case is *Wike v. State*, 698 So. 2d 817 (Fla. 1997), *cert. denied*, 522 U.S. 1058 (1998). In *Wike*, the defendant entered the home of his ex-girlfriend and kidnapped her two daughters, aged six and eight. The defendant then sexually abused the eight year old, slit her throat and stabbed her in the neck. Although she survived and was able to escape, her sister did not survive after having her throat slit multiple times. *Wike*, therefore, has little bearing upon proportionality of the death penalty in this case because in *Wike* there were multiple victims, both of whom were young children, and one of whom was sexually abused. *Wike*, therefore, has very little relevance to this case.

The State also relies on the fact that Bush and Cave received death sentences in arguing that the death penalty would be proportionate if applied to Parker. The death sentences in both cases, however, were based in large part on their own statements, which were admissible at their trials but not at Parker's. To rely on the underlying facts that support their death sentences would deprive Parker of his right

of confrontation. In comparing this case to Cave's and Bush's, the State in any event fails to address Johnson's life sentence. Johnson could not say at Parker's resentencing who shot the victim. The only directly inculpatory testimony given by Johnson implicated Bush in the stabbing of the victim. R28-1936. Parker has maintained that he did not shoot the victim (and there is no evidence that he was involved in the stabbing), and any argument that he did shoot her was either inadmissible or should have been rejected because William's testimony was incredible. Therefore, Parker's relative culpability is more akin to Johnson's than it is to Cave's or Bush's. Because Johnson received a life sentence, it would therefore be disproportionate for this Court to uphold the death sentence against Parker.

POINT VII

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

With respect to this Point, Parker relies upon the arguments and authorities set forth in his Initial Brief and the well-reasoned opinion of Justice Anstead in *Blanco v. State*, 706 So. 2d 7, 12 (Fla. 1997) (Anstead, J., specially concurring), *cert. denied*, 525 U.S. 837 (1998).

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 RIGHT TO CONFRONTATION**

With respect to this Point, Parker relies upon the arguments and authorities set forth in his Initial Brief.

**POINT IX
PARKER’S DEATH SENTENCE VIOLATES DUE PROCESS**

The State’s attempt to muddle the record by comparing Cave’s 1996 resentencing to this current proceeding, and to ignore its own actions at Cave’s 1993 resentencing should be rejected. That the State decided it was necessary to be consistent among co-defendants by not arguing during Cave’s 1996 resentencing that Cave was the triggerman has little bearing upon the fact that the State previously presented evidence (Bryant’s testimony) that Cave was the triggerman and, based on that evidence, argued to that jury it had established beyond a reasonable doubt that Cave, not Parker, was the shooter. The State, by virtue of its position in Cave’s 1993 resentencing, has now committed the very error condemned in *Green v. Georgia*, 442 U.S. 95 (1979) and *Drake v. Kemp*, 762 F.2d 1449, 1478-79 (11th Cir. 1985) (en banc) (Clark, J., specially concurring), *cert. denied*, 478 U.S. 1020 (1986).

POINT X

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

With respect to this Point, Parker relies upon the arguments and authorities set forth in his Initial Brief.

POINT XI

THE DEATH SENTENCE VIOLATES APPRENDI

The State is incorrect when it argues that Parker did not preserve this claim because it was not presented below. State Br. at 80. In *Apprendi v. New Jersey*, 530 U.S. 466, 496-97 (2000), the Supreme Court of the United States attempted to distinguish death penalty cases from the ambit of its decision, rendering any attempt by Parker to make that argument in the trial court futile. Despite the seemingly clear effort by the Supreme Court to distinguish death penalty cases from the holding in *Apprendi*, the Supreme Court subsequently granted *certiorari* to address the question of whether death penalty statutes of states such as Florida, which require a judge to determine the existence of and to weigh aggravating and mitigating factors, violate the Sixth Amendment. *See Ring v. Arizona*, 122 S. Ct. 865 (2002). Parker asserts that the outcome of this issue will be controlled by the Supreme Court's decision in *Ring* and intends to brief the issue as soon as the Supreme Court renders its decision, which is expected next week.

POINT XII

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

Contrary to the State's argument, as shown in his Initial Brief, Parker has demonstrated undue prejudice resulting from the delay between Parker's indictment and resentencing, which the trial court found (and the State concedes) was attributable to the State, resulting in an eighth amendment violation.

POINT XIII

**WITH RESPECT TO THIS POINT, PARKER RELIES UPON THE
ARGUMENTS AND AUTHORITIES SET FORTH IN HIS INITIAL
BRIEF.**

CONCLUSION

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

Dated: June 21, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 343401-2299, by U.S. mail, this 21st day of June 2002.

David M. Lamos
Attorney for Appellant J.B. Parker

CERTIFICATION OF FONT

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

David M. Lamos
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