SUPREME COURT OF THE STATE OF FLORIDA

J.B. PARKER,	:	
Plaintiff(s),	:	CASE NO. SC01-172
- against -	:	
STATE OF FLORIDA,	:	
	:	
Defendant(s).		

SUPPLEMENTAL REPLY BRIEF

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

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The May 7 Statement Is Inadmissible And Should Have Been Suppressed

In its Supplemental Answer Brief, the State addresses the May 7 Statement suppression issue as if all challenges to admissibility can be answered by the fact that Mr. Parker allegedly wanted to cooperate. The issue, however, is not whether Mr. Parker expressed a desire to cooperate. The question instead is whether, having invoked his right to counsel on May 5, Mr. Parker thereafter initiated the contact with law enforcement that led to the May 7 Statement.

As the Eleventh Circuit held in Parker v. Singletary, 974 F.2d 1562 (11th Cir. 1992) (Parker IV), because Mr. Parker on May 5 repeatedly requested counsel, and because the "counsel" provided could not provide the counsel to which Mr. Parker was constitutionally entitled, all questioning of Mr. Parker "should have stopped . . . to allow Parker to contact other, conflict-free counsel prior to continuing with the taking of the statement." Parker IV, 974 F.2d at 1573. On May 7, the State nevertheless continued its questioning of Mr. Parker without complying with this simple mandate. The only avenue for the State to establish the constitutionality under the Fifth and Sixth Amendments of that further interview is to demonstrate that Mr.

Parker initiated the May 7 interview. See Edwards v.Arizona, 451 U.S. 477 (1981); Michigan v. Jackson, 475 U.S. 625 (1986).[1]

The question of initiation does not present a mere conflict in testimony. Instead, the State's only witness on this subject, Powers, can say only that someone else informed him of Mr. Parker's desire to cooperate. Significantly, Powers admits he has "no personal knowledge as to the basis for that person's belief that Parker wished to cooperate." SR5-672. This hearsay testimony of this unknown person's belief that Mr. Parker wished to cooperate is plainly incompetent to establish the truth of the claim that Mr. Parker in fact initiated the May 7 interview. Powers does not state that he was told that Mr. Parker initiated the contact on May 7, or that this claimed expression by Mr. Parker of an interest in cooperation occurred subsequent to the unconstitutional May 5 interview. The belief that Mr. Parker wished to cooperate thus could well have been drawn not from a new initiative by Mr. Parker but instead from the May 5 interview. No witness has ever testified that Mr. Parker initiated the May 7 contact with law enforcement.

The rights waiver form Mr. Parker signed on May 7 cannot fill this void. Under Edwards and Jackson, because Mr. Parker did not initiate the May 7 interview, any

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[1] Jackson, having been decided before Mr. Parker's October 2000 hearing, unquestionably establishes the constitutional standards concerning the admissibility at that hearing of the May 7 Statement.

police initiated contact without counsel present was constitutionally impermissible rendering the rights waiver form a nullity. That form, in any event, improperly continued the fiction that the Public Defender could provide the constitutionally mandated counsel to which Mr. Parker was entitled and itself constituted an improper interrogation through Powers' improper addition to the rights waiver form of the statement that Mr. Parker wished to show Powers where the knife used in the crimes may be located. See Cribbs v. State, 378 So. 2d 316 (Fla. 1st DCA 1980). Mr. Parker's signature on the May 7 rights waiver form thus does not establish a knowing and intelligent waiver of his right to counsel.

The State has not met its burden of "prov[ing] beyond a reasonable doubt that [the May 7 statement] did not contribute to" Mr. Parker's death sentence. State v. Diguilio, 491 So. 2d 1129, 1135 (Fla. 1986). As this Court has explained, "The court must determine not if there is overwhelming evidence of guilt, but if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error." Ciccarelli v. State, 531 So. 2d 129, 132 (Fla. 1988) (emphasis in original).

Significantly, the State ignores that the jury specifically asked that Power's testimony be re-read during its deliberations. R34-2832. This fact alone establishes that the May 7 Statement cannot be said, beyond a reasonable doubt, to have made

no contribution to the verdict. See Goodwin v. State, 751 So. 2d 537, 545 (Fla. 1999); Evans v. State, 721 So. 2d 766 (Fla. 4th DCA 1998).

The State's reliance on co-defendant Johnson's testimony does not establish that the admission of the May 7 Statement was harmless. There is substantial evidence that Johnson's testimony is not credible. For example, Johnson agreed to testify after the State promised to inform the parole commission of his cooperation. R28-1900-03. Johnson also testified that on the night of the murder he was "drunk, drunk," unable to walk properly, and that his memory had been affected. R28-1953-55. Johnson also signed a sworn affidavit in October 1989 that contradicted much of Johnson's testimony that the State now claims proves that there is no reasonable possibility that the May 7 Statement affected the verdict. R32-2502-13. To the extent the Powers testimony served to corroborate Johnson's testimony, therefore, it necessarily affected the verdict. See Pacheco, III v. State, 698 So. 2d 593 (Fla. 2d DCA 1997) (holding that the erroneous admission of testimony that corroborated accomplice testimony is not harmless).

Dated: July 3, 2003 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, 1515 North Flagler Dr., Suite 900, West Palm Beach, Florida 33402-3432, by U.S. mail, this 3rd day of July, 2003.

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

CERTIFICATION OF FONT

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

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