IN THE SUPREME COURT OF FLORIDA

Case No. SC08-1385
(LC Case No. 82-CF-352-C)

J. B. PARKER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

On Direct Appeal from a June 19, 2008, Final Order of the Circuit Court of the Nineteenth Judicial Circuit in and for Martin County, Florida, that denied Parker's Corrected Amended Initial Motion for Post Conviction Relief filed per the provisions of Florida Rule of Criminal Procedure 3.851.

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PRELIMINARY STATEMENT

This is a direct appeal of a June 19, 2008, final order (R8/1099-1124) that denied the appellant's motion for post conviction relief (vacating his death sentence) in a capital case after a retrial of the penalty phase. J. B. Parker, the defendant in the lower tribunal, is the appellant here and will be referred to as "Parker" or "the defendant." The State of Florida, plaintiff below, is the appellee here and will be referred to as "the state."

The post conviction record on appeal is in 23 volumes. Except as noted below, the Clerk of the Circuit Court has placed a sequential page number in the bottom right-hand corner of each page. When referring to a particular page or pages of the record, Parker will use the letter "R" followed by an appropriate volume and page number. The transcripts of the March 7 and 11, 2008, evidentiary hearings regarding certain of the claims set forth in the corrected post conviction motion are found in volumes 20-23 of the record. The clerk did not place a page number at the bottom right- hand corner of these pages. The court reporter's page numbers for these volumes are located in the upper right-hand corner of each page. Thus, when referring to the transcripts of the evidentiary hearing, the appellant will use the letters "PCT" (for post conviction hearing

transcript) followed by an appropriate volume and page number. For clarity, the volume numbers are sequential throughout the record on appeal.

The record on appeal in *Parker v. State*, SC01-172, 873 So. 2d 270 (Fla. 2004) ("Parker VI"), the underlying case involving the direct appeal of the death sentence that was imposed upon Parker after the second penalty phase trial, will be referenced by the letters "OR" (for original record) followed by an appropriate volume and page number. The supplemental record on appeal (that dealt with the issue of the admissibility of a May 7, 1982 statement Parker made to law enforcement) related in that case will be referred to by the letters "SOR" (for supplemental original record on appeal) followed by an appropriate volume and page number.

Parker will refer to this initial brief of appellant as "IB" and to his reply brief as "RB." He will refer to the state's answer brief as "AB." Emphasis added by Parker will be in italics.

STATEMENT OF THE CASE AND OF THE FACTS

A. Nature of the Case:

This is a direct appeal to the Supreme Court of Florida of a June 19, 2008, final "Order Denying Initial Amended Motion" (R8/1099-1124) regarding Parker's September 7, 2006 "Corrected Initial Amended Postconviction Motion" (R3/262-335) brought per the provisions of Florida Rule of Criminal Procedure 3.851. An evidentiary hearing was granted as to some of the claims in the corrected motion. The Rule 3.851 motion sought to vacate a December 13, 2000, death sentence imposed after a second penalty phase trial in Martin County, Florida, Case No. 82-912-CF (Lake County, Florida, Case No. 82-352-CF[1]).

B. Jurisdiction:

The Supreme Court of Florida has jurisdiction because this is a direct appeal as a matter of right of a final order rendered by the circuit court in a post conviction capital case. Art. V, Sec. 3(b)(1) and (9), Fla. Const. "We have jurisdiction over all death penalty appeals." *Parker v. State*, 873 So. 2d 270, 275, f. 1 (2004). The Supreme Court has appellate jurisdiction in post conviction capital cases. *Parker v. State*, 542 So. 2d 356-57 (Fla. 1989).

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[1] Venue for the retrial was moved to Lake County, Florida, due to excessive pretrial publicity.

C. Course of the Proceedings:

On April 27, 1982, Parker, John Earl Bush, Alphonso Cave and Terry Wayne Johnson allegedly robbed a convenience store in Martin County, Florida. The store clerk, Frances Slater, was taken from the premises and later found dead in an isolated area of the county. *Parker v. State*, 476 So. 2d 134, 135 (Fla. 1985) ("Parker I"). She had been shot in the head one time and stabbed in the stomach. (R8/1099; OR26/1695-96, 1704-09) In 1983, after a jury trial during which the state argued that Parker admitted to Georgeann Williams that he shot the victim (OR 27/1759-60), Parker was convicted of kidnapping, armed robbery and first-degree murder. *Parker, supra,* 476 So. 2d at135. Parker's co-defendants did not testify at his 1983 trial. The jury recommended a death sentence by a vote of 8-4. The trial judge sentenced Parker to death for the murder and to prison terms for the other offenses of conviction. (R8/1099)

Parker appealed asserting that the trial court erred during the guilt/innocence phase by : (1) allowing Georgeann Williams' mother to corroborate her testimony; (2) denying Parker's motion to suppress his taped statements and admissions; (3) denying Parker's request for a jury instruction on independent acts of others; (4) limiting the cross examination of Georgeann Williams ; and (5) denying a motion for mistrial on the grounds that the prosecutor

made improper statements in his closing argument. As to the penalty phase, Parker claimed that the trial court erred by: (1) allowing the state to present evidence of Parker's prior criminal history during the cross examination of a mental health professional and; (2) finding as aggravating factors HAC, CCP and that the murder was committed during the course of an armed robbery and a kidnapping, and for pecuniary gain. On August 22, 1985, this Court rejected all of these claims, affirmed the judgments and sentences and found that the death sentence was proportional. Parker v. State ("*Parker* I") 476 So. 2d 134 (Fla. 1985).

Bush and Cave were convicted of the same offenses in separate trials and sentenced to death. *See Bush v. State*, 461 So. 2d 936 (Fla. 1984) and *Cave v. State*, 476 So. 2d 180 (Fla. 1985). Johnson was convicted of felony murder and kidnapping and given two life sentences. *Johnson v. State*, 484 So. 2d 1347 (Fla. 4th DCA 1985), review denied, 494 So. 2d 1151 (Fla. 1986); (PCT21/471-72). Bush was executed in 1995. Cave remains on death row.

On December 3, 1987, Parker filed an initial motion to vacate his judgments of conviction and sentences per Florida Rule of Criminal Procedure 3.850. Parker claimed that his trial counsel was ineffective (a) in presenting a motion to suppress his taped statement and (b) during the penalty phase. Parker also asserted that the

state failed to inform the judge and jury of inconsistent positions it took regarding the triggerman and that the trial court erred in allowing expert testimony regarding the effectiveness of defense counsel. In addition, Parker claimed that his appellate counsel was ineffective. On April 5, 1988, after an evidentiary hearing, the Rule 3.850 motion was denied. This Court affirmed the ruling on direct appeal. *Parker v. State*, 542 So. 2d 356 (Fla. 1989) ("Parker II"). In so doing, this Court rejected Parker's claim of ineffective assistance of appellate counsel. *Id*. at 357.

On August 29, 1989, a death warrant was signed by the governor of Florida calling for Parker's execution on October 27, 1989. On September 27, 1989, a second motion for post conviction relief was filed by the defendant. Parker asserted that: (1) the trial judge failed to give specific, written findings of fact contemporaneously with his sentencing decision, rendering the sentencing proceeding unreliable; (2) this Court failed to provide him with a meaningful review of his death sentence on direct appeal; and that (3) the state attorney improperly used victim impact evidence and discussed the victim's personal traits during closing arguments. Parker also filed a petition for writ of habeas corpus claiming ineffective assistance of appellate counsel. On October 11, 1989, the second Rule 3.850 motion was denied by the trial court. On October 25, 1989, this Court affirmed the denial of the second Rule 3.850 motion. It also denied

Parker's habeas corpus petition and a motion to stay his execution. *Parker v. State*, 550 So. 2d 459 (Fla. 1989) ("Parker III").

On that same date (October 25, 1989), Parker filed a habeas corpus petition in the United States District Court for the Southern District of Florida per the provisions of Title 28, United States Code, Section 2254, contending, among other things, that Parker's initial statement to law enforcement dated May 5, 1982, was obtained in violation of his Fifth and Sixth Amendment rights against self incrimination and to counsel. The district court granted a stay of execution. On August 30, 1990, after a brief hearing, the district court summarily denied the federal habeas corpus petition. Parker appealed. On October 6, 1992, the Eleventh United States Circuit Court of Appeal affirmed. However, in so doing, the circuit court determined that the May 5, 1982 statement was obtained in violation of the aforementioned constitutional provisions but that it was harmless error regarding both the guilt/innocence and penalty phases of the capital trial. *Parker v. Singletary*, 974 F.2d 1562, 1574-77 (11th Cir. 1992) ("Parker IV").

On June 22, 1994, Parker filed a successor Rule 3.850 motion in state circuit court claiming a *Brady* violation as the result of the prosecutor failing to reveal to the defense prior to Parker's original trial that Michael Bryant had overheard a conversation between Bush and Cave during which Cave admitted being the

shooter. Bryant relayed this information to Lieutenant Arthur Jackson who submitted an official report to that effect. "Bryant told him (Jackson) that Cave said they stabbed the victim and then Cave got sick of hearing her holler, so he shot her." *State v. Parker*, 721 So. 2d 1147, 1149 (Fla. 1998). "None of this information had ever been disclosed to Parker." *Ibid*. Parker's defense counsel only learned of it in 1993 after Michael Bryant testified (and the state insisted) in the resentencing of Alphonso Cave that Cave, not Parker, was the shooter. (*Ibid*; R8/1100) On November 12, 1996, after an evidentiary hearing, the state trial court denied the motion to vacate the judgments of guilt but granted a new penalty phase trial. That order was affirmed on direct appeal on September 4, 1998. *State v. Parker*, 721 So. 2d 1147-48 (Fla. 1998) ("Parker V").

On October 25 2000, after a second penalty phase trial, the jury recommended death by a vote of 11-1. (OR34/2861.) Following a *Spencer* hearing, the trial court, on December 13, 2000, resentenced Parker to death. (R8/1100; OR7/1328-36; OR36/2920-40) During the pendency of the appeal that followed, this Court relinquished jurisdiction to the trial court to conduct an evidentiary hearing on Parker's earlier summarily denied motion to suppress Parker's May 7, 1982 statement to law enforcement. (R8/1102) The trial court found that the state had proven beyond a reasonable doubt the same aggravators that had been established in the first trial. It rejected the mitigator that Parker was

not the shooter. *Parker*, supra, 873 So. 2d at 276. The death sentence and the trial court order denying the motion to suppress were affirmed by this Court on direct appeal on January 22, 2004. *Parker v. State*, 873 So. 2d 270 (Fla. 2004) ("Parker VI"). Rehearing was denied on April 28, 2004. The mandate was issued on April 28, 2004.

On January 10, 2005, the Supreme Court of the United States denied Parker's July 23, 2004, petition for writ of certiorari. *Parker v. State*, 543 U.S. 1049 (2005) ("Parker VII").

On January 8, 2006, Parker with post conviction counsel Jo Ann Barone filed an" Initial Postconviction Motion" seeking the vacature of his second, December 13, 2000, death sentence. (R2/54-127) On September 6, 2006, he filed an "Amended Initial Postconviction Motion." (R3/203-261) On September 7, 2006, Parker filed a "Corrected Initial Amended Postconviction Motion." (R3/262-335) On January 16, 2007, the state filed a lengthy "Response to Defendant's Motion to Vacate Judgment and Sentence" that included many exhibits. (R4/377-541, R5/542-726, R6/727-852)

After a *Huff* hearing, two days of evidentiary hearings on some of Parker's post conviction claims were held on March 7 and 11, 2008. (PCT20/172-262; 21/263-381; 22/382-491; 23/492-599)

D. Disposition in Lower Tribunal:

On June 19, 2008, the trial court rendered a final "Order Denying Initial Amended Motion" in which Parker's efforts to vacate his second death sentence were rejected. (R8/1099-1124) On July 17, 2008, Parker filed a timely notice of appeal to this Court. (R8/1125)

E. Statement of the Facts:

Evidence Presented During the First Trial as Found by this Court

The Supreme Court of Florida included the following findings of fact in its opinion ("Parker I") that affirmed Parker's original judgments of conviction and death sentence:

> On April 27, 1982, the 18-year-old victim was working the late shift in a convenience store in Stuart, Florida. The appellant and his codefendants, John Earl Bush, Alfonso Cave, and Terry Wayne Johnson, had set out in Bush's car from Fort Pierce to West Palm Beach. Appellant's taped statement reflects that during the course of the trip, Bush told the appellant, "We're going to rob something." Later Bush and Cave went into the convenience store where the victim was working, after previously visiting the store to stake it out. Bush and Cave took the money and the woman, placing her in the back seat of the car. The victim pleaded, "You aren't going to hurt me," and Bush responded, "Man, I'm going to kill this bitch. I done been to prison for six years and I ain't going back, 'cause this whore going to identify us." At an isolated location the victim was dragged out of the car by her hair. During the course of the 20-minute trip, the victim had pleaded that she not be hurt. At trial, Bush's girlfriend testified that, after the victim was removed from the car, Bush stabbed

her and the appellant shot her. The victim apparently sank to the ground in a kneeling posture after being stabbed and was shot in the back of the head, execution-style, from a distance of approximately two feet. Medical testimony established that the gunshot -- not the stabbing, which was a two-inch shallow wound -- killed the victim. The appellant and the codefendants then drove back to Fort Pierce and split the money four ways, the appellant receiving twenty to thirty dollars.

A few days after the victim was found, codefendant Bush made a statement to the police implicating Parker along with the other codefendants. The appellant was arrested and taken to the Martin County jail where, aware that Bush had made a statement, he advised a jailer that he wanted to talk about the case. The jailer told the appellant that he could not talk to him, and that appellant had to talk to his attorney. The appellant responded that he did not want to talk to his attorney, but indicated that he wanted to talk to the sheriff. The sheriff also told appellant that he could not talk to him and that counsel had been appointed to represent him. The sheriff called the public defender's office, which sent a representative to the jail who advised the appellant not to say anything. Notwithstanding this advice, appellant wanted to go ahead and speak anyway to clear his conscience and to tell them that he did not kill the girl. The sheriff repeatedly advised appellant that a lawyer had been appointed to represent him and that nobody was going to force the appellant to make a statement. In response, Parker advised the sheriff that he still wanted to make a statement. In his statement, appellant denied participating in the killing and stated that Bush both stabbed and shot the victim. The appellant later retraced with law enforcement officials the route he and the codefendants had taken and showed them where they had taken the victim out of the car and where they had put the body.

The evidence also reflects that Bush's girlfriend, Georgeann Williams, went to visit Bush in Jail, during which time she also visited Parker. She testified concerning her conversation with Parker as follows:

Williams: I asked him what had happened. He said, "Didn't John (Bush) tell you." I said, "No, John didn't tell me anything."

I said, "I just want to know who shot the girl, that's all."

Prosecutor: Okay. And after you told J. B. Parker you just wanted to know who shot the girl, what did J. B. Parker tell you, Georgeann?

Williams: He told me, he said, "I shot her and John stabbed her." And he said if I mentioned it, it would be my word against his. He said that John already had a record, it would be on him, anyway.

Parker v. State, 476 So. 2d 134-36 (Fla. 1985).

Pertinent Testimony/Evidence Presented During Second Penalty Phase Trial

In the second penalty phase trial, the state presented the testimony of some of the same witnesses who testified against Parker in the original trial such as Georgeann Williams. She reiterated that, during a visit to the jail to see her boyfriend, co-defendant John Earl Bush, Parker admitted, "John stabbed her and I shot her." (OR27/1760) In addition, the state presented the testimony of co-defendant Timothy Wayne Johnson who claimed that the first time the defendant went to the convenience store, all four went in to buy potato chips and that when they returned to the store later that evening, Parker went into the store with Cave and Bush to commit the robbery. Johnson also testified that when they arrived at the location where Slater was killed, Parker took the gun from Cave. Johnson stated that he heard a shot but did not know who shot Slater, that after the murder Parker told Bush to get rid of the knife, and that the four later split the money taken

from the store. *Parker v. State*, 873 So. 2d 270, 275 (Fla. 2004). The state also introduced in evidence " . . . a statement made by Parker on May 7, 1982, when he went with Detective David Powers to the area where the victim was killed. During this time, Parker stated that Bush both stabbed and shot the victim, indicated where Bush had thrown the knife after the murder and recounted that the four defendants discussed killing a deputy sheriff, Timothy Bargo, who stopped the car in which they were riding on the night of the murder." *Parker*, supra, 873 So. 2d at 275. According to Detective Powers, Parker also advised where the gun and the money had been located in the vehicle and that he shared in the proceeds of the robbery (SOR2/54-5)

Parker countered with the testimony of several witnesses including Assistant State Attorney Richard Barlow who confirmed that he relied on the testimony of Michael Bryant during Alphonso Cave's resentencing to the effect that he (Bryant) overheard Cave acknowledge, while conversing with Bush, that he (Cave) was the one who shot Slater. *Parker,* supra, 873 So. 2d at 275-76. Portions of Michael Bryant's testimony during the Cave resentencing were read into the record including:

> Well what I overheard, Bush was a couple of cells down and what it was, you know, they started talking about it and Bush told Cave, says, 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.

Parker v. State, *supra*, 873 So. 2d at 276.

Evidence Presented During the Rule 3.851 Post Conviction Motion Hearing

Sue Gent was an investigator for Jo Ann Barone, Esq., Parker's post conviction trial counsel. (PCT20/181-83) Gent began her work in December of 2005. (PCT20/183) She studied the court files of Parker and his co-defendants as well as the files of David Lamos, Esq., Parker's counsel during the penalty phase retrial. (PCT20/183-84, 188) Gent also examined family court files regarding Izell Parrish and Georgeann Williams. (RT20/184) She met with Parker and with Tim Ferguson, the father of one of Georgeann Williams' children. (PCT20/185) She also met personally with Alphonso Cave, Judge William Makemson (Parker's trial counsel during the original trial), and with Richard Barlow who prosecuted Cave at his resentencing. (PCT20/186-87)

Gent prepared a time line regarding Georgeann Williams' criminal history (Williams defense Ex. 1 in evidence[2]) based upon records she obtained at the

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[2] The exhibits introduced during the post conviction hearing are not identified as accurately as they might have been as the hearing proceeded. They seem to be referenced to the witness presenting testimony at the time. Parker endeavors to

Martin County Courthouse, the Ft. Pierce Police Department and the Martin County Sheriff's Office. (PCT20/190-91) Gent also reviewed Williams' pretrial statement to the police in the Parker case as well as her November 7, 1996, deposition, and her December 7, 1996 original trial testimony. (PCT20/192-93) Gent pointed out that, according to Williams, Bush told her that he stabbed the victim and Parker shot her. (PCT20/192) Gent also reviewed a "Green Bar Report" regarding Williams. (PCT20/197) This included statements taken from Barbara Fishburn and Ima Jene Galloway to the effect that Bush tried to sell the gun used to kill Slater. (PCT20/198-201) Another part of this report indicated that Williams may have been involved in trying to get rid of the gun. (PCT20/201) The report also included information to the effect that one Timothy Ferguson overheard Williams acknowledge that Bush had made a statement to her to the effect that he shot the victim, not Parker. (PCT20/202) Gent said that, in the course of studying Lamos' files, she did not see the Green Bar Report or the information regarding Ferguson, Fishburn or Galloway. (PCT20/206) The only thing that Gent found in Lamos' files regarding Williams were the police reports. (PCT20/208) Gent recovered some 34 police reports regarding Williams that were generated after the year 2000. (PCT20/209) Gent found letters (Williams defense Ex. 2) written in 1996 in Lamos' files from Williams to law enforcement in which

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identify these exhibits with better specificity in the argument section of this initial brief.

Williams admitted she really did not recall what Bush actually told her about who shot the victim. (PCT20/ 210-14) Gent also saw an FDLE printout reflecting Williams' arrest/conviction records. (PCT20/216) Gent noted that the FDLE reports are not complete in terms of accurately describing a person's conviction record. (PCT20/217) Thus, according to Gent, one would have to go to the courthouse to make sure that the record was complete and accurate. (PCT20/217-18) She was able to get a complete report on Williams' criminal record at the courthouse consisting of some 31 pages. (PCT20/219) Gent also retrieved certified copies of some of Williams' convictions from Lamos' files. (PCT20/220) Lamos' files containing these documents were introduced in evidence as defense Composite Ex. 3. (PCT20/223) Gent noted that there were some 126 reports regarding arrests and civil matters related to Williams. (PCT20/224) Gent found records showing that Williams had been convicted of criminal offenses some 28 times. (PCT20/225) But Lamos' files showed only 8 impeachable offenses. (PCT20/226)

Gent reiterated that Michael Bryant overheard a conversation between Alphonso Cave and John Earl Bush during which Cave did not deny being the shooter and Bush acknowledged stabbing Slater. (PCT20/234) She added that Jailer Arthur Jackson witnessed Cave physically abusing Bryant thereafter. (PCT20/234, 235) Bryant provided law enforcement with a report to this effect

which Gent produced at the evidentiary hearing. (PCT20/236-38) As a result, Cave was charged with aggravated battery on Bryant. (PCT20/241) In this regard, Gent found police reports indicating that Bryant was in the same jail cell as Cave at the time Cave admitted shooting the victim. (PCT20/245) These reports were not in Lamos' files. (PCT246) Gent also found a deposition given by Art Jackson which reflected the interaction between Cave and Bryant. (PCT20/247)

Gent reported that she was able to find Michael Bryant in Rock Island, Tennessee. (PCT20/248, 249) Gent located a subpoena in Lamos' file for Bryant. (PCT20/249-52) However, the effort to serve Bryant with the subpoena was unsuccessful. (PCT20/252) The subpoena and accompanying documents showing the efforts to serve Bryant were entered into evidence as defense Ex. 1A and 1B. (PCT20/254) Gent reviewed Terry Wayne Johnson's criminal history record. (T21/265) She also located a May 5, 1982 statement from Johnson's mother to the effect that Johnson said that " . . . Cave was the triggerman." (T21/267) Gent obtained a copy of a second statement Johnson had given to law enforcement that day. (PCT21/271) In that statement, Johnson indicated that Bush stabbed the victim and that Bush said it was necessary to eliminate her as a possible witness against them. (PCT21/272, 273) Gent also read Johnson's grand jury testimony. According to Gent, Johnson gave conflicting statements before the grand jury. (PCT21/276) Gent read a draft of the cooperation agreement reached between the

state and Johnson regarding his testimony against Parker at the resentencing. (PCT21/280) She found paperwork confirming that Johnson had been arrested on aggravated assault and drug charges despite the fact that he denied that when he first talked to law enforcement regarding the Slater homicide. (PCT21/282-83) She obtained a copy of a deposition Johnson's mother, Christine Watson, gave in 1983 which was in Lamos' files. (PCT21/285, 287) Mrs. Watson identified records showing a series of arrests that Johnson denied. (PCT21/287-289) Gent also reviewed Johnson's affidavit where he reports that John Earl Bush had threatened Georgeann Williams and that Williams was frightened of him. (PCT21/292) Johnson added that Bush was actually the one who confessed to Williams and that Parker was non violent and incapable of killing Slater. (PCT21/293)

Gent reviewed various documents from both the state attorney's and Mr. Lamos' files regarding Johnson's agreement to testify against Parker. (PCT21/300) The documents reflected that the state attorney's office was aware of Johnson's affidavit before the 2000 retrial of the penalty phase. (PCT21/303) They also reflected that Captain Crowder of the Martin County Sheriff's Office told Johnson's mother that his office would take into consideration the fact that Johnson turned himself in. (PCT21/306) Gent examined a December 1, 1999, "State's Notice of Disclosure of Witness Agreement" regarding Johnson.

(PCT21/307) She also examined documents relating to two polygraph tests that were administered to Johnson, the results of which were inconclusive as to the first test and that Johnson was telling the truth in the second test. (PCT21/320, 328)

Richard Barlow was the defendant's second witness. He prosecuted Cave at his first resentencing and was involved in matters related to Cave's resentencing. (PCT21/340) In the Cave resentencing, he put Michael Bryant on the stand to say that he overheard Cave and Bush talking during which time Cave said he shot the victim and Bush said he stabbed her. (PCT21/343-47) Barlow indicated that he felt that Bryant was a very credible witness. (PCT21/348) He added that Lamos had initially been prevented from asking him about his confidence in Bryant's testimony, but that after the state opened the door for his opinion, Lamos did not follow up. (PCT21/350) Had Lamos done so, Barlow would have said that he believed Bryant was telling the truth. (PCT21/350)

Ms. Gent then returned to the witness stand. She identified a letter from Johnson's counsel advising Cave's attorney that Johnson would not be testifying against Cave at Cave's resentencing. (PCT21/353-54) She also discovered a segregation order to keep Cave and Johnson separated at the Martin County jail. (PCT21/355-56) She found a statement from a Reed Watson to the effect that he was afraid of Cave. (PCT21/359) In addition, she found newspaper articles about

the case and the relative involvement of the participants which Lamos would have had access to. (PCT21/362) She also saw a news story from Parker's mother to the effect that Johnson told her that Bush and Cave killed Slater. (PCT21/363) The news stories were introduced in evidence. (PCT21/367) Johnson's grand jury testimony of May 19 and 20, 1982, was marked as Johnson Defense Ex. 5. (PCT21/368)

On cross examination, Gent testified that many of the entries on Georgeann Williams' criminal records were for arrests only and misdemeanors that did not involve dishonesty. (PCT21/371) She acknowledged that she did not have access to all of Lamos' files because some had been lost or damaged in a hurricane. (PCT21/373-74)

David Lamos, Esq., Parker's retrial counsel, was the next witness. He received a set of the files regarding Parker's various court proceedings from co-counsel Francis Landrey. (PCT21/386, 427-28) He read the transcript of Parker's original trial. (PCT21/428-29) He recalled someone from Ms. Barone's office picking up some of his files. (PCT21/388) He denied that the prosecutor contacted him about representing Parker. (PCT21/389) He indicated that he had a "wonderful" relationship with the defendant. (PCT21/390) He acknowledged that Landrey's relationship with the client was better than his was. (PCT21/391) He

read the opinion of this Court that granted Parker a retrial of the penalty phase, and that opinion served as the framework for the second penalty phase trial. (PCT21/392, 401) Landrey prepared matters related to mitigation for use in an earlier post conviction proceeding. (PCT21/393-94) He recalled that a Ms. Wait provided him with investigative services during this time. (PCT21/397) He could not recall using depositions in lieu of live testimony regarding certain aspects of the penalty phase retrial and to stipulating to some of the other evidence regarding that retrial. (PCT21/398) He discussed stipulating to evidence with Parker. (PCT21/399) Michael Bryant would be called to show that Cave was the shooter and the affidavit of Terry Wayne Johnson would be used to impeach him (Johnson). (PCT21/400) Lamos used a new witness, Audrey Rivers, during the second penalty phase as well as Dr. Fisher to put on "a full mental health mitigation." (PCT21/402-03) Lamos had handled one other death case that went to trial but it was settled prior to the actual trial. (PCT21/406-09) He had never been officially sanctioned by the Florida Bar for an ethical violation although he once "received an admonishment over an advertising letter that had the word advertising in the wrong place." (PCT21/411) He could not recall reading the clerk's files related to his client prior to representing Parker, but he did remember looking at the clerk's files regarding the co-defendants. (PCT21/413) He felt that his best issue on appeal was related to the order denying the motion to suppress

Parker's May 7, 1982 statement to law enforcement. (PCT21/414) He did not recall whether he asked to be appointed to handle the direct appeal of the resentencing order. (PCT21/416)

Lamos denied asking the prosecutor for a job at the time he was preparing for trial. (PCT21/417) He was then presented with a faxed letter (R17/2320) from him to the prosecutor in which he did in fact ask State Attorney Bruce Colton for employment. (PCT21/418-19) Lamos attached to that letter a document he entitled "Reply to Rebuttal to Defendant's Objection to State's Motion to Quash" (R17/2321-22) that was generated using a "dialectizer" which was a computer program that modified the supposed dialect of sentences and phrases in a pleading. (PCT21/419) The "Reply to Rebuttal" included the following language:

> De basic premise ud de sentencin' procedure be dat da damn sentenca' consida' all relevant evidence regardin' de nature uh de crime and da damn characta' of de defendant t'determine da damn appropriate puchishment. Man?"

(R17/2321, emphasis added.) Lamos declined to identify the dialect that was used in the motion that he described as a "jest between me and Mr. Mirman." (PCT21/420-21) When Barone asked Lamos whether the language in question could be called an "ebonic dialect," the prosecution objected and the trial court sustained the objection. (PCT21/422)

Lamos said that he used an affidavit obtained from Timothy Wayne Johnson to impeach him. (PCT21/423-24) However, he could not recall whether he studied Johnson's grand jury testimony to impeach him further. (PCT21/424-25) He acknowledged filing a motion to waive the mitigator related to a lack of a significant criminal conviction history. (PCT21/425) He added that he recalled filing a motion in limine to prevent the state from admitting evidence as to Parker's prior criminal history as well as a motion to prevent the state from advising the jury that Parker's original jury recommended death. (PCT21/426) He remembered preparing to cross examine Georgeann Williams. (PCT21/430) He decided to use the recorded testimony of Michael Bryant rather than have him appear live because Bryant was "a live wire." (PCT21/431-32)

Lamos agreed that Parker was shackled during the retrial. (PCT21/438-39) He had no problem communicating with Parker during the trial notwithstanding the fact that restraints were in place, and he did not believe that the jury saw the restraints. (PCT21/440-41)

On cross examination, Lamos said that he did not recall that Parker had any problem standing despite the leg restraint. (PCT21/443) He reiterated that he did not want Michael Bryant's live testimony. (PCT21/444, 461) He did make some effort to locate Bryant in order to establish his unavailability and, therefore, his

(Lamos') right to use his recorded testimony. (PCT21/445-46) By using Bryant's recorded testimony, the state was prevented from cross-examining him. (PCT21/446-47)

Lamos clarified the situation with the decision to have the jury know that Parker had previously been sentenced to death. Lamos said that the strategy was to show that Parker had had his head shaved and came within 48 hours of being executed -- and saved from that fate only when it was learned that the state had withheld information to the effect that Parker was not the shooter. (PCT21/448-50) He noted that Parker agreed to the strategy. (PCT21/455) Lamos added that there was no issue regarding mental retardation. (PCT21/458)

Terry Wayne Johnson was the next witness. He testified at Parker's retrial but refused to testify at Cave's resentencing. (PCT21/468) Johnson claimed that the prosecutor told him that if he would testify a certain way at Parker's resentencing, the state would "inform my officer not to pursue you of getting out of prison." (PCT21/471) He wrote the prosecutor advising that he did not want to testify against Parker, but he had to in order to get help from the state at his parole hearing. (PCT21/473-74) When he went before the parole commission, a presumptive parole release date of the year 2032 was set. (PCT21/476) Johnson was then shown his affidavit. (PCT21/478) He acknowledged that it was his

signature on it. (T21/480-81) He could not recall Lamos asking him about his grand jury testimony or, for that matter, trying to get in touch with him prior to the 2000 penalty phase retrial. (PCT21/484-86)

Attorney Kevin Anderson testified next. He entered private practice in 1996 after working for two public defenders' offices. (PCT23/495) He listened to Lamos' post conviction hearing testimony and read his and Ms. Barone's files regarding the Parke*r* case. (PCT23/497-98) He also studied the repository records regarding Michael Bryant as well as Parker's original trial transcript. (PCT23/499) He reviewed Lamos' motion in which Lamos waived the mitigator of an absence of a significant prior criminal record (PCT23/499) and Lamos' notice of supplemental discovery containing a death row video (PCT23/500). At this point, the state objected to Anderson giving opinion testimony "as to Mr. Lamos' conduct in this 2000 resentencing trial." (PCT23/500) The trial court granted the motion[3] except to allow Anderson to testify as to what a reasonable investigation in the case would have consisted of. (PCT23/502-04)

Anderson indicated that there were family members who could have been called to testify as to Parker's childhood abuse plus his exposure to toxic substances. (PCT23/505) He noted that the trial court denied Lamos' attempt to

[3] On the basis of *Casey v. State*, 969 So. 2d 1055 (Fla. 4th DCA 2007).

move into evidence the affidavit and deposition of Rosa Lee Parker because the state would have been denied the opportunity to cross examine her. (PCT23/506) He also noted that there were other affidavits in Lamos' files from Parker's mother and Douglas Smith, which did not get in evidence. (PCT/23/508-10) He added that Dr. Fisher inadvertently testified as to Parker's prior criminal record based upon Lamos opening the door for this testimony. (PCT23/511)

Anderson saw that Lamos chose not to call Michael Bryant as a defense witness and instead used his prior recorded testimony. (PCT23/511-12) He said that Lamos' files indicated that Bryant had no prior criminal record. (PCT23/513) He indicated that it was normally best to have mitigation witnesses appear in person and to use an investigator to assist in trial preparation. (PCT23/516-17) He saw that Jerry Wait, an investigator, had provided Lamos with a detailed report regarding the case. (PCT23/519) He looked at the correspondence between Lamos and Parker to try to determine whether Lamos addressed Parker's concerns. (PCT521) He noted that there was correspondence to the effect that Parker wanted to testify in his own behalf. (PCT23/524) According to Anderson, the files indicated that Parker may have been chained to the defense table in the view of the jury, but Lamos did nothing about it. (PCT23/525) Anderson noted that Parker's statement of May 7, 1982 was a major part of the state's case-in-chief against Parker and that it would be appropriate to try to suppress that statement.

(PCT23/526-27) Anderson opined that, except for Parker's May 7 statement, there was no other credible evidence linking him to the shooting of the victim. (PCT23/528) He read the materials where Lamos was successful in getting an order to the effect that the state could not mention that Parker had been sentenced to death in the first trial -- and also the material that indicated that at the retrial, the defense itself introduced this evidence in part through the testimony of Dr. Fisher. (PCT23/531) He read the state's and the defense's sentencing memoranda. (PCT23/534) The trial court's sentencing order tracked the state's sentencing memorandum. (PCT23/535) From his review of the file, he could not find where Lamos objected to the court's action in this regard or otherwise preserved this issue for appellate review. (PCT23/536-38) Anderson felt that Michael Bryant's testimony was very important in part because he was an unbiased witness. (PCT539-40) He was familiar with Georgeann Williams' testimony to the effect that Parker admitted to her that he shot the victim. (PCT23/541-42) He carefully reviewed Lamos' cross examination of Williams and determined that he failed to use a lot of impeachable material during that cross examination. (PCT23/542-44)

Anderson reviewed the statement that the prosecutor had provided to Timothy Wayne Johnson's attorney, Mr. Daley, and found that Lamos had not used it to impeach Johnson. (PCT23/344-45) He also noted that there was a difference between what the prosecutor said in his Rule 3.220 disclosure statement

(that Johnson was to testify truthfully against Parker) regarding the substance of a cooperation agreement the prosecutor struck with Johnson for his testimony against Parker -- and the agreement itself (which provided that Johnson was to testify truthfully in a manner consistent with his grand jury testimony and other statements to law enforcement), but that Lamos failed to point out that difference in the course of impeaching Johnson. (PCT23/545-48)

He looked at the correspondence between Lamos and Assistant State Attorney Lawrence Mirman in which Lamos asked the state attorney for a job. (PCT23/550) Anderson felt that Lamos was serious in making this request. (PCT23/551-52) He also studied the so called "Reply to Response" and indicated that it was written in the form of "Ebonics" which he described as an inappropriate, objectionable form of communication that would be offensive to African Americans. (PCT23/553-54) It indicated to him that Lamos was not taking his representation of Parker seriously. (PCT23/554-55) The record also indicated that Parker was shackled to the defense table and Lamos did nothing about it. (PCT23/558) There was nothing in the record to indicate that Parker did not want to testify. (PCT23/559)

He studied the state attorney's files. (PCT23/559) He found Johnson's and polygraphist Coppock's grand jury testimony. (PCT23/ 559) He saw nothing in

Lamos' file that indicated that he prepared to cross examine Johnson. (PCT23/560) He saw the certified copies of Georgeann Williams' criminal record. (PCT23/560) This included information to the effect that Williams was on probation at the time she testified and that at least one jail sentence was reduced around the time she was to testify against Parker. (PCT23/561) He noted that Dr. Fisher's testimony concentrated more on Parker's prior criminal history than on his mental problems. (PCT23/562)

On cross examination, Anderson conceded that Lamos used the Johnson affidavit to impeach him and that he also brought in a handwriting expert to say that Johnson signed it. (PCT23/564) Anderson also acknowledged that Bryant had a reason to be biased against Cave because Cave had physically and sexually attacked him when they were in jail together. (PCT23/565-67) Anderson agreed that the jury did not appear to be in the room during the proceedings where Parker was shackled to the defense table. (PCT23/568-69) He also conceded that none of the letters from Parker entered into evidence indicated that he wanted to testify at the resentencing. (PCT/573) He added that the transcript of the *Spencer* hearing included a statement from Parker to the effect that he did not want to testify. (PCT/575-77)

SUMMARY OF THE ARGUMENT

The trial court erred in rejecting Parker's claims that he was denied constitutionally effective assistance of counsel during the 2000 retrial of the penalty phase of his state court trial in the context of *Strickland v. Washington*, 466 U.S. 668 (1984), the seminal case on the subject. *Strickland* established a two-pronged test for establishing ineffectiveness. First, the defendant must prove that the attorney's performance was so deficient that he/she was not acting as "counsel" within the Sixth Amendment of the United States Constitution as applied to the States via the Fourteenth Amendment. *Strickland*, supra, 466 U.S. at 668. Florida follows the *Strickland* standard. *Ferrell v. State*, 918 So. 2d 163, 170 (Fla. 2005). Second, Parker was required to show that, but for the ineffectiveness, the outcome of the proceeding (the death sentence) would have been different in that there is a reasonable probability that he would have received a life sentence. *Hildwin v. Dugger*, 654 So. 2d 107, 109 (Fla. 1995). The degree of probability required is that which is sufficient to undermine the confidence in that outcome. *Johnson v. State*, 921 So. 2d 490 (Fla. 2005).

In rejecting Parker's claims, the trial court ignored the fact that, during the pendency of the pretrial proceedings, Lamos evinced a bigoted attitude toward his African American client including a strong indication that counsel was more

interested in obtaining employment with the state attorney's office than he was in zealously defending Parker. Thus, in a memorandum to prosecutor Lawrence Mirman, Lamos advised, "I thought you would get a feeling for how difficult lawyering is for me. *Ask Bruce (referring to State Attorney Bruce Colter) if I can have a job? Call me*." (R17/2320, emphasis added.) Lest there be any doubt about Lamos' feeling about his client, Lamos attached a draft "Reply to Rebuttal to Defendant's Objection to State's Motion to Quash" to Mirman that included the name of Circuit Judge Larry Schack in the heading, specifically referenced this Court and included the following language: "His posishun wuz rejected by *de Flo'ida Supreme Court*. Man! He awaits 'esecushun. De state be dig itably distressed cuz' de kicker be on de oda' foot. Man! De languae uh Preson be clear and unambiguous, dig dis:

> De basic premise ud de sentencin' procedure be dat da damn sentenca' consida' all relevant evidence regardin' de nature uh de crime and da damn characta' of de defendant t'determine da damn appropriate puchishment. Man?"

(R17/2321, emphasis added.) This repulsive missive speaks volumes as to <u>why</u> Lamos was derelict in the performance of his duties. The remainder of this brief will focus on precisely what errors and omissions Lamos made and why his client suffered prejudice as a result.

At the retrial, the prosecution used Parker's May 7, 1982, statement to law enforcement to prove that he was a principal in the offenses of conviction, but not his May 5, 1982 statement. This is so in part because, as noted above, in 1992, the Eleventh United States Circuit Court of Appeal determined that Parker's May 5 statement to law enforcement was inadmissible. *Parker v. Singletary*, 974 F.2d 1562, 1574-577 (11th Cir. 1992) ("Parker IV").

Once the May 5 statement was deemed inadmissible, the prosecution was faced with a very serious problem. In order for the prosecutor to introduce the May 7 statement, he would first have to prove that Parker, having invoked his constitutional rights referenced above during the May 5 interview, initiated the making of that May 7 statement by contacting law enforcement in order for it to be admitted in evidence. *Edwards v. Arizona*, 451 U.S 477, 485 (1981). And it is at this point that Lamos made a very serious error. Rather than force the state to assume its burden of proving that Parker initiated the May 7 contact with live, admissible testimony, Lamos entered into a stipulation (SOR2/16-18) with the prosecution whereby the evidence was limited to affidavits, original trial testimony and deposition testimony from various persons. (SOR2/19-714) In agreeing to this use of a written record, Lamos expressly agreed that all of this testimony, whether hearsay or not, would be admissible, thereby, as this Court subsequently held , stipulating away Parker's right to object to testimony that was otherwise

incompetent to prove initiation. In so doing, Lamos gambled on his mistaken belief that these documents, even accepted in the light most favorable to the state, were nevertheless legally insufficient (because they constituted hearsay) and therefore inadmissible to establish that Parker initiated the May 7 contact since there was no direct, admissible testimony to that effect. Lamos guessed wrong and Parker suffered prejudice as a result because the May 7 statement was deemed admissible by the trial court and incriminated Parker. This Court affirmed, holding that by stipulating to the testimony in this stipulated format, Lamos was estopped from attacking the initiation-of-contact issue on the basis of hearsay. *Parker*, supra, 873 So. 2d at 280-81. Had Lamos held the state to its burden of proof and insisted that it establish that Parker initiated the May 7 contact with live testimony, the state could not have done so and that statement would not have come into evidence. Exclusion of the May 5 and May 7 statements would have left the state's case in shambles because all it had left to prove that Parker was anything more than a passive passenger in the car was the flawed testimony of Georgeann Williams and Terry Wayne Johnson.

The record shows that Lamos had at his disposal but did not use compelling proof that Georgeann Williams was lying when she testified that Parker told her that he shot the victim. This included court records confirming her extensive criminal conviction history. It also included potential testimony from former

Assistant State Attorney Richard Barlow that cast even more doubt on Williams' testimony -- which Lamos again failed to present. Likewise, Lamos had strong proof that Terry Wayne Johnson was testifying falsely when he claimed that Parker was involved in the robbery/kidnapping and that he saw Parker with the murder weapon in his hand when he (Parker) supposedly exited the vehicle moments before Ms. Slater was shot. But Lamos did not effectively use the impeachment evidence at his disposal that included a cooperation agreement[4] with the state signed by Johnson in which he agreed to testify in a manner that was consistent with his obviously false grand jury testimony . Parker suffered prejudice as a result because, had Lamos properly impeached Williams and Johnson, there is a distinct likelihood that neither the jury nor the trial judge would have credited their testimony and Parker would not have been sentenced to death. Lamos' ineffectiveness clearly resulted in a constitutionally unreliable death recommendation and sentence in which this Court should not place its confidence. This would have been even more apparent had the trial court allowed attorney Kevin Anderson to testify fully regarding Lamos' ineffectiveness.

A new penalty phase trial must be ordered if justice is to be served.

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[4] In the event the state claims that Lamos was not provided with a copy of the cooperation agreement, then a *Brady v. Maryland*, 373 U.S. 83 (1963) violation would have occurred, and Parker would be entitled to a new penalty phase trial on that basis alone.

ARGUMENT

Point I: The trial court erred in not finding that retrial counsel was ineffective for stipulating to the evidence used as the basis for resolving the motion to suppress Parker's May 7, 1982, incriminating statement to Detective Powers. Parker suffered prejudice as a result.

Standard of Review

This is a claim of ineffective assistance of trial counsel and involves mixed questions of fact and law. As such, the final order (R8/1099-1124) of the circuit court denying Parker's Florida Rule of Criminal Procedure 3.851 motion for post conviction relief is entitled to plenary, *de novo* review except that findings of fact by the trial court are entitled to deference so long as there is competent and substantial evidence in the record to support them. *Lewis v. State*, 838 So. 2d 1102, 1112 (Fla. 2002); *Johnson v. State*, 789 So. 2d 262 (Fla. 2001); *Rose v. State*, 675 So. 2d 567 (Fla. 1996).

Merits

The Ineffectiveness

In Claim I.A.1 of the corrected initial motion for post conviction relief (R. 3/270-72), Parker asserted that Lamos was ineffective because he stipulated to the evidence used to decide whether his May 7, 1982, statement to Detective Powers was admissible at the retrial. The stipulation provided in part that Powers' testimony and affidavit, and the testimony and affidavits of others "shall be

admissible in evidence." (SOR2/16)[5] The trial court rejected this claim because Parker did not

> explain how the stipulated evidence undermined the outcome of the suppression hearing or the outcome of resentencing in light of other admissible evidence; and Parker does not show that the evidence would differ if witnesses had testified at the suppression hearing. Further, Parker does not explain how live testimony at the suppression hearing would demonstrate that Parker's second statement to police was involuntary where the Florida Supreme Court found that Parker signed a waiver of rights form, was allowed to call his mother as requested and did not ask for an attorney during the May 7 interview.

(R8/ 1134) This was reversible error. The trial court totally missed the point.

As Parker has explained above and will discuss further below, Lamos failed to use the impeachment evidence available to him to show that both Georgeann Williams and Terry Wayne Johnson were utterly unworthy of belief. Had he done so, this would have left but one incriminating piece of evidence suggesting that Parker was anything more than a passenger in the vehicle used to kidnap the victim: Parker's May 7, 1982, statement to Detective Powers in which he, according to this Court, " . . . implicated himself in the crimes . . ." *Parker v. State*, 721 So. 2d 1147 (Fla. 1998). This is so in part because, as noted above, in 1992, the Eleventh United States Circuit Court of Appeal determined that Parker's

[5] The stipulation and the exhibits attached to it are found at SOR2/16-180. That is, volume 2, pages 16-180 of the supplemental record on appeal regarding the retrial of the penalty phase.

May 5, 1982, statement to law enforcement was obtained in violation of his Fifth Amendment right to not incriminate himself and his Sixth Amendment right to counsel. In particular, that Court determined that Parker had been appointed counsel and had invoked these rights prior to making the May 5 statement. *Parker v. Singletary*, 974 F.2d 1562, 1574-77 (11th Cir. 1992) ("Parker IV").

The Eleventh Circuit's decision was based in part upon the fact that, after Parker's arrest on May 5, 1982, a magistrate met with him and appointed the public defender to represent him, noting that Parker indicated that he intended to hire private counsel later. (SOR5/656) On that same date, a representative of the public defender's office notified the sheriff to contact that office before seeking to interview Parker. (SOR 5/657-63) The public defender, who had determined that his office had a conflict of interest in terms of representing Parker (SOR2/71-2), dispatched an intern not yet admitted to the Florida Bar, Steven Greene, to meet with Parker. As the Eleventh Circuit found, "Schwar z . . . instructed Greene not to discuss the details of any possible statement with him but only to tell Parker not to confess if that was what Parker planned to do." *Parker v. Singletary*, 974 F.2d at 1566; *see* also SOR2/72, 85; SOR3/221, 232-33. Greene did not tell Parker that his office could not represent him. *Parker v. Singletary*, 974 F.2d at 1571. As a result, Parker provided the sheriff with a recorded statement during which he requested other counsel on at least five occasions -- requests that were ignored.

(SOR4/475-80; *Parker v. Singletary*, 974 F.2d at 1572.) The Eleventh Circuit concluded at 1573:

> Parker did not know of Greene's status or the limitation on his representation. Indeed, Sheriff Holt and Greene misrepresented Greene's true status to Parker. Under these circumstances, Parker could not have knowingly and intelligently waived his Fifth Amendment right to "talk only with counsel present."

The Eleventh Circuit held "(b)ecause Greene's presence did not satisfy Parker's right to counsel, because Parker clearly did request other counsel, and because Parker did not knowingly and intelligently waive his right to conflict free counsel, the resulting statement was inadmissible. " *Parker*, supra, 974 F.2d at 1574.

This meant that the state could not use that May 5 statement against Parker at the retrial because of the exclusionary rule. It also meant that the state would have to establish that Parker, having invoked his constitutional rights referenced above, initiated the making of the May 7 statement before it could be admitted in evidence. *Edwards v. Arizona*, 451 U.S 477, 485 (1981) (" . . . it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel"); *Michigan v. Jackson*, 475 U.S. 625, 636 (1986) (" . . . if police initiate interrogation after a defendant's assertion . . . of his right to counsel, any waiver of the defendant's right to counsel for that post-initiated interrogation is invalid.")

During the pendency of the appeal that followed the retrial, this Court relinquished jurisdiction to the trial court to conduct an evidentiary hearing on Parker's earlier summarily denied motion to suppress Parker's May 7 statement to law enforcement. (SOR2/14; R8/1102). Rather than present live testimony regarding this issue, Lamos entered into a stipulation (SOR2/16-8) with the prosecution whereby the evidence was limited to (a) Parker's 2002 affidavit and 1988 post conviction testimony, (b) Detective David Powers' 1982 suppression hearing testimony, 1982 deposition and 2002 affidavit, (c) Sheriff Holt's 1982 deposition, (d) Parker's original trial counsel's 1988 post conviction testimony, and (e) the 1988 post conviction testimony of Steven Greene, the public defender intern sent to advise Parker on May 5,1982. (SOR2/19-714; *Parker v. State*, 873 So. 2d at 279.) The testimony concerning the circumstances leading to Parker's May 7 statement establishes that Detective Powers could not testify from personal knowledge that Parker in fact initiated the May 7 interview. Instead, as reflected in his affidavit and testimony, the most he could testify to was that he could "not recall who it was who told me that Parker had contacted someone at the sheriff's department and indicated that he wished to cooperate in the investigation" and that he had "no personal knowledge as to the basis for that person's belief that Parker wished to cooperate." (SOR2/672) Despite the fact that Detective Powers' belief that Parker had indicated a desire to meet with law enforcement was inadmissible

hearsay and did not constitute competent evidence of Parker's initiation of the May 7 interview, Lamos stipulated that Detective Powers' testimony and affidavit "shall be admissible in evidence" for purposes of the trial court's determination of the motion to suppress that statement. (SOR2/16)

In so stipulating, Lamos was operating under the mistaken belief that the Powers' evidence was legally insufficient to establish that Parker initiated the May 7, 1982 interview and that he had preserved Parker's right to object to the Powers' evidence as inadmissible to prove that Parker had not waived his Fifth and Sixth Amendments rights in the process. Lamos' miscalculation is reflected in his Supplemental Brief of Appellant (R6/790-811) filed in SC01-172 where he personally argues:

> The trial court's determination that "Defendant initiated contact with Lieutenant Powers," SR-714, is not supported by competent substantial evidence. If the trial court drew this conclusion based on the fact that Detective Powers speculated that Sheriff Holt is the person who told him that Mr. Parker "indicated that he wished to speak with the detective and cooperate with the investigation," SR5-712-13, that does not change the facts that: i) Detective Powers lacked any personal knowledge that Mr. Parker in fact initiated a contact on May 7 SR5-672, and ii) Sheriff Holt has never testified that Mr. Parker in fact initiated a contact with investigators on May 7 and could have no knowledge of such an initiation by Mr. Parker because, as he previously testified, he did not believe that he had any contact with Mr. Parker after the May5 statement. SR4-532. *It is thus clear that what Detective Powers has testified to on this subject is at best hearsay, that he is therefore not competent to testify that Mr. Parker initiated the May 7 contact, and that Sheriff Holt has never so testified and, even if*

> *he were alive today, could not so testify based on personal knowledge. The state introduced no other evidence to support its contention, necessary to establish the admissibility of the May 7 statement, that Mr. Parker was the initiator of the May 7 contact. The only competent evidence on this issue comes from Mr. Parker who denied that he initiated the May 7 interview*. (R5-669.)

(R6/ 806, emphasis added.) The fact that Lamos failed to understand the subject rule of hearsay evidence is also clearly reflected in this Court's holding that,

> (a)lthough Parker asserts that Powers' testimony alone cannot be considered competent to establish that Parker initiated the May 7 interview because it is hearsay, *Parker stipulated to the admissibility of this evidence and cannot now assert that the trial court was precluded from considering Powers' testimony in addressing the motion to suppress*."

Parker, supra, 873 So. 2d at 280-81, emphasis added. There is no doubt but that Lamos was not acting as "counsel" within the meaning of the Sixth Amendment when he failed to understand this basic rule of evidence. The Florida courts have often found that defense counsel are expected to understand and apply the fundamental rules of evidence in order to protect the client, and if counsel does not, the ineffectiveness may be a basis for a new trial under certain circumstances. *See* for example *Zakrzewski v. State,* 866 So. 2d 688 (Fla. 2003) (failure to move to exclude scientific tests after material tested was destroyed; *Murphy v. State*, 930 So. 2d 794 (Fla. 1st DCA 2006) (failure to understand and assert reverse *Williams* rule evidence); *Anthony v. State*, 927 So. 2d 1084 (Fla. 4th DCA 2006) (failure to

raise, as basis for motion to suppress, legally insufficient *Miranda* warnings) ; *Hering v. State*, 973 So. 2d 666 (Fla. 5th DCA 2008) (failure to object to inadmissible fingerprint evidence); *Gordon v. State*, 863 So. 2d 1215 (Fla. 2003).

The Resulting Prejudice

Parker suffered prejudice as a result of his counsel's ineffectiveness for three reasons. First, the statements made by Parker to Powers on May 7, which were presented to the jury and judge, were highly prejudicial.[6] As this Court found:

> The State also introduced a statement made by Parker on May 7, 1982 when he went with Detective David Powers to the area where the victim was killed. During this time, Parker stated that Bush both stabbed and shot the victim, indicated where Bush had thrown the knife after the murder and recounted that the four defendants discussed killing a sheriff's deputy, Timothy Bargo, who stopped the car in which they were riding on the night of the murder.

Parker v. State, supra, 873 So. 2d at 275. Second, had Lamos not entered into the stipulation and instead held the prosecutor's feet to the fire to attempt to prove by direct, live, admissible evidence that Parker initiated contact with law enforcement before making the May 7 statement (evidence which the state obviously did not

[6] This Court found that the May 7 statement established that Parker was guilty of felony murder. *Parker*, supra, 721 So. 2d at 1152.

have), that damning[7] statement would have necessarily been excluded from evidence. This is so because the prosecution had no competent, admissible evidence (from the unknown person who supposedly conveyed to Sheriff Holt that Parker wanted to speak with him) to the effect that Parker actually initiated the May 7 contact with the sheriff's office. Parker specifically denied initiating contact, stating, "I did not initiate the contact with Detective David Powers on May 7, 1982, at which time Detective Powers asked me to accompany him on a tour of the crime scenes." (SOR5/669-70) Likewise, Detective Powers admitted:

> I do not recall who it was that had told me that Parker had contacted someone at the Sheriff's department and indicated he wished to cooperate in the investigation. I have no personal knowledge as to the basis for that person's belief that Parker wished to cooperate. Other than seeing Mr. Parker upon his initial arrest, I had no contact with him prior to arriving at the Martin County Jail on May 7, 1982 . . . Were Sheriff Crowder to testify in this matter, he would state that he was not the person who contacted me on May 7, 1982.

(SOR5/672) According to Powers, this left only Sheriff Holt.[8] Powers averred in this regard:

> The nature of the order I received on May 7, 1982, was such that I believe it came from a person superior to me in the chain of command with regard to criminal investigations. In 1982 I was

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[7] The Eleventh Circuit described the May 7 statement as a "complete confession to participation in the underlying felonies." *Parker V*, 974 F.2d at 1576. This Court concurred. *Parker IV*, 721 So. 2d at 1152.

[8] Sheriff Holt died on December 21, 1992.

> a Detective Lieutenant at the Martin County Sheriff's Office. The only two people who were superior to me in the chain of command with regarding to investigations were Captain Crowder and Sheriff Holt. Because I now know that Captain Crowder did not give me that command, I now believe that Sheriff Holt did.

(SOR5/672) Powers was obviously mistaken because Sheriff Holt testified in his deposition that he did not believe he had any contact with Parker after May 5, 1982. Specifically, Holt said when testifying to his contact with Parker on May 5, "Q. Okay, after the conclusion of this statement, did you have any further contact with Mr. Parker? A. No sir, I don't believe I have had." (SOR4/532) The state admitted as much in its Answer Brief of Appellee, acknowledging:

> In his affidavit filed on December 12, 2002, Powers clarified his response and indicated that he had no personal knowledge as to how anybody knew that Parker wished to cooperate and that Captain Crowder did not instruct him to go to the jail on May 7, 1982 (SR p. 672).

(R6/819) Instead, the state fell back on the same incorrect argument made by the trial court in finding that Lamos was not ineffective in entering into the stipulation by arguing that once Powers made contact with Parker on May 7, Parker then voluntarily agreed to speak with him. (R6/819-23) That is utterly irrelevant. This is not about voluntariness -- it is about illegal initiation of contact with Parker by law enforcement on May 7 after Parker invoked his right to counsel on May 5. The state could not prove that Parker initiated the May 7 contact with a live

witness. Thus, Powers' claim that some mystery person told him that Parker wanted to speak to him on May 7 -- that is, that Parker initiated the May 7 contact with Powers -- was classic inadmissible hearsay. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter." Sec. 90.801(a)(c), Fla. Stat. (2008). "Except as provided by statute, hearsay evidence is inadmissible." Sec. 90.802, Fla. Stat. (2008). Hearsay does not become admissible merely because the case involves a capital offense. *See* for example *Foster v. State*, 778 So. 2d 906 (Fla. 2000). In *Foster*, this Court found that the trial court erred in admitting hearsay testimony from a friend of the victim regarding the victim's stated reasons to report the defendant to law enforcement for committing a burglary. This is similar to the situation at bar where Powers was permitted via the stipulation to assert that Parker initiated the May 7 contact based upon what someone told him. It follows that the May 7 statement was obtained in violation of Parker's constitutional rights to remain silent and to counsel, and was therefore inadmissible at the retrial. *Edwards v. Arizona*, 451 U.S 477, 485 (1981); *Michigan v. Jackson*, 475 U.S. 625, 636 (1986).

Third, this would have left the prosecutor with only the testimony of Georgeann Williams whose Parker-admitted-being-the-shooter claim was destroyed by Assistant State Attorney Richard Barlow -- and the self serving,

inconsistent testimony of co-defendant Terry Wayne Johnson who admitted being drunk and sleeping through the entire robbery/kidnapping/homicide. (R10/1406; OR32/2511) With Johnson's reason to lie properly exposed, there was insufficient remaining evidence to meet the heightened *mens rea* requirement for the imposition of the death penalty on a defendant like Parker who at most is guilty of felony murder. *See Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987). Confidence in the jury's death recommendation would have been nonexistent.

Point II: The trial court erred in not finding that retrial counsel was ineffective for failing to competently cross examine and impeach Georgeann Williams, and that prejudice resulted.

Standard of Review

This is also an IAC claim. Review is de novo except that the trial court's factual findings are afforded deference so long as there is competent evidence to support them. *Lewis v. State*, 838 So. 2d 1102, 1112 (Fla. 2002).

Merits

The Ineffectiveness

As raised by Parker in the corrected initial post conviction motion to vacate the death sentence (R3/281-82), the failure to competently cross examine and impeach a state witness can, under certain circumstances, be a basis for the establishment of an ineffective assistance of counsel claim. *Hannon v. State*, 941

So. 2d 1109 (Fla. 2006); *Johnson v. State*, 921 So. 2d 490 (Fla. 2005); *Marquard v. State*, 850 So. 2d 417 (Fla. 2002). Effective cross examination begins with careful investigation of an adverse witness' background, especially that witness' criminal history, in order to be prepared to cast doubt upon the witness' credibility. "The obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated." *Lewis v. State*, 838 So. 2d 1102, 113 (Fla. 2002). Lamos was clearly deficient in terms of his ineffective impeachment of one of the prosecutor's key witnesses, Georgeann Williams.

Williams testified that she was Bush's girlfriend in 1982. (OR27/1753) She visited Bush at the jail after his arrest. (OR27/1759-60) Parker was in a cell nearby. (OR27/1760) According to Williams, she went over to Parker's cell, at which time he told her that Bush had stabbed the victim and that he (Parker) had shot her.[9] (OR27/1760) She added that Parker said that if she repeated what he had told her, it would be Parker's word against hers. (OR27/1761)

Section 90.610(1), Florida Statutes (2008), provides:

> (a) party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement regardless

[9] Although stranger things have happened, why would Parker, who always denied shooting Slater to law enforcement and who hardly knew Williams except that she was devoted to co-defendant Bush, tell Williams that he was the shooter? Her story was obviously meant to try to protect Bush and lacks the ring of truth.

of the punishment.

Lamos passed up numerous opportunities to use this statute to impeach Williams and to show the jury certified copies of accessible court records reflecting that she was a chronic criminal not worthy of belief. As noted above, Investigator Gent found records showing that Williams had been convicted of criminal offenses some 28 times. (PCT20/225) But Lamos' files showed only 8 impeachable offenses. (PCT20/226) Gent's investigation found that Lamos missed (and failed to introduce in evidence) the following documented, recorded convictions[10] for:

7/9/82 Shoplifting, sentenced to 60 days in jail and put on probation. (R13/1788-89)

4/27/84 Obstruction of justice (conviction date/sentence unclear). (R13/1750-53)

5/5/89 Shoplifting, sentenced to probation. (R13/1772-74)

3/22/91 Shoplifting, sentenced to 6 months in jail. (R13/1737-38)

3/27/92 Shoplifting, sentenced to 10 days in jail. (R13/1749)

3/11/93 Shoplifting, sentenced to 30 days in jail. (R13/1757-58)

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[10] The certified copies of Williams' criminal convictions were collected from various courthouses by Sue Gent as she was assisting Jo Ann Barone, Parker's post conviction trial counsel. (PCT20/190-91, 206, 209, 217-19, 223; R13/1698-1837)

1/21/94 Shoplifting, sentenced to 10 weekends in jail plus probation. (R13/1760-62)

2/11/93 Apparent VOP violations in numerous cases, sentenced in absentia to 30 days in jail. (R13/1732-33)

6/20/97 Battery, sentenced to 90 days in jail. (R13/1717)

8/3/00 Felony driving on suspended license. (R1713, 1790-92)

Lamos did not impeach Williams using these recorded convictions. Thus, the jury and the trial judge never knew just how dishonest Williams really was. It was critical for Lamos to show that Williams was not telling the truth. It is hard to imagine a less reliable death sentence than the one imposed upon Parker based in major part upon the flawed testimony of this witness. How can her testimony possibly have been relied upon when the very same state attorney's office that prosecuted Parker insisted during the Cave resentencing that it had proven beyond a reasonable doubt (based upon the Michael Bryant testimony) that Cave shot Ms. Slater.[11] The trial court denied this claim (R8/1119-21) finding that Lamos' cross examination was adequate. It was not and Parker suffered the consequences.

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[11] "Of significance for the purpose of Parker's appeal is the testimony of Richard Barlow, who was the prosecutor during Cave's 1993 penalty phase. Barlow stated that he relied on the testimony of Michael Bryant, who was in the same cell as Cave at the Martin County jail, to establish that Cave was a principal in Slater's murder. Barlow testified that Bryant went to Arthur Jackson, who was running the jail at the time, and told Jackson that he overheard a conversation

The Resulting Prejudice

Parker suffered prejudice because the trial court and this Court credited Williams almost to the point of finding that her testimony alone was sufficient to determine that Parker played an integral role in the underlying offenses (thus making him eligible for the death penalty on the basis of the felony murder theory) and that he was the triggerman. This Court found after the first trial:

> Furthermore and more important, Parker's case was the only one with direct evidence concerning the identity of the triggerman. *At Parker's trial, the state presented testimony of Geogeann Willams, codefendant's Bush's girlfriend, who stated that, while she was visiting Bush at prison, Parker confessed that he shot the victim after Bush stabbed her*. We find no trial court error regarding this contention.

Parker v. State, 542 So. 2d at 358, emphasis added. In the retrial, the lower tribunal specifically determining in the sentencing order that "(y)ou (Parker) later admitted to actually shooting the victim in the head," and used that supposed admission to support the CCP aggravator. (OR36/2928) Williams was the only witness to make that claim. This Court also credited Williams' retrial testimony, stating in part: "In fact, Williams testified at trial that during her conversation with Parker at the county jail, Parker told her that Bush stabbed Slater and he (Parker) shot Slater." *Parker v. State*, 873 So. 2d at 284. Had Lamos presented the jury and judge with the full extent of Williams' criminal history, it is hard to imagine

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between Cave and Bush, in which *Cave admitted that he 'popped a cap' in the back of Slater's head*." *Parker v. State*, 873 So. 2d at 275-76, emphasis added.

that the jury and judge would have believed her. This is especially true given the fact that the state attorney insisted that Cave was the actual shooter during Cave's resentencing (*Parker v. State*, 873 So. 2d at 276) and that Williams admitted in a 1996 letter that " . . . (i)f 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." (OR27/1803-04)

Point III: The trial court erred in failing to find that retrial counsel was ineffective for not presenting testimony from Richard Barlow that he believed the testimony of Michael Bryant to the effect that Alphonso Cave was the shooter.

Standard of Review

This is another IAC claim. Therefore, review is de novo except that facts found by the trial court are given deference. *Lewis v. State*, 838 So. 2d 1102, 1112 (Fla. 2002).

Merits

The Ineffectiveness

During former Assistant State Attorney Richard Barlow's testimony, Lamos asked him to testify as to his evaluation of the truthfulness of Michael Bryant's retrial testimony. (OR29/2059-50) Bryant testified that he overheard Cave and Bush talking at the jail during which time Cave acknowledged that he was the

shooter. The prosecutor objected, and the trial court sustained the objection (OR29/2060) " . . . ruling that the prosecutor's 'actual professional thought process' in evaluating a witness was not relevant." *Parker v. State*, 873 So. 2d at 283. However, " . . . the trial court subsequently recognized during cross-examination that the State had opened the door to Barlow's mental processes and that *on redirect Parker would be allowed to question Barlow on this issue*." *Ibid*., emphasis added. Inexplicably, Lamos failed to do so. (R29/2115-20, 2126-30) ("It was Parker's responsibility to reopen this line of questioning, which he failed to do." *Parker v. State,* 873 So. 2d at 283.) The trial court considered this ineffective claim (R3/280-81) but rejected it, finding:

> Parker fails to demonstrate deficient performance and prejudice in failing to question Barlow on redirect where the state elicited that Barlow believed Bryant, where Barlow testified that Bryant had no motive to lie in implicating Cave as the shooter, and where Parker does not allege what more would have been brought out on redirect concerning Bryant's credibility. R Vol. 29, 2085, 2093-97, 2117, & 2124.)"

(R8/1109, footnote omitted.) The trial court erred in finding no ineffectiveness here. Lamos should have taken advantage of an opportunity to introduce obviously exculpatory evidence (directly contrary to the testimony of Georgeann Williams that Parker was the shooter) from a person the jury was sure to believe. It is rare that a defendant in a death penalty case will have the occasion to present a jury and

judge with testimony extremely helpful to the accused from a respected prosecutor like Mr. Barlow.

The Resulting Prejudice

Parker suffered prejudice because Barlow would have testified that he had investigated the facts carefully, that he believed that Bryant was telling the truth (PCT21/350) and that he used Bryant's testimony at Cave's resentencing to " . . . establish that Cave was the shooter ." *Parker v. State*, 873 So. 2d at 283. Certainly, if the jury and trial judge had been able to choose between Barlow and Williams as to who the shooter was, they would have believed Barlow. Unfortunately, they believed Williams. (OR34/2861; 36/2928) Had Lamos not once again passed up a golden opportunity to nail down the obvious fact that Williams was lying, there is even more reason to believe that the outcome of the proceedings would have been different.

Point IV: The trial court erred in not finding that retrial counsel was ineffective for failing to impeach Timothy Wayne Johnson based upon the agreement that he entered into with the state whereby he was to testify in a manner consistent with his grand jury testimony.

Standard of Appellate Review

IAC claim. Review is de novo except that facts found by trial court are given deference. *Lewis v. State*, 838 So. 2d 1102, 1112 (Fla. 2002).

Merits

The Ineffectiveness

In Claim I.A.3 (R3/273-74) of the corrected initial motion for post conviction relief, Parker alleged that his trial counsel was ineffective for failing to properly cross examine and impeach co-defendant Terry Wayne Johnson, in part based upon a cooperation agreement (R9/1216-217) struck between Johnson and the state that required Johnson to testify at the retrial in a manner consistent with his grand jury testimony and prior written statements to law enforcement, in exchange for the prosecutor's promise to inform the Florida Parole Commission and the Florida Board of Executive Clemency of the nature and extent of Johnson's cooperation. Failure to adequately cross examine a state witness can, under proper circumstances, be a basis for an ineffective assistance of counsel claim. *Masrquard v. State*, 850 So. 2d 417 (Fla. 2002); *Brown v. State*, 596 So. 2d 1026, 1028-29 (Fla. 1992). The trial court rejected this claim, however, finding that Parker presented no competent evidence to support it. (R8/1116) This was reversible error.

Johnson testified at the retrial that he was in the vehicle with Parker, Bush and Cave the entire night of April 26, 1982, and into the early hours of the next morning. (OR28/1909-10) He claimed that Parker accompanied the others when they first went into the convenience store. (OR28/1909-10, 1913) He said that

Parker went into the store the second time with Cave and Bush while he (Johnson) remained in the car. He asserted that Cave had the gun but could not remember who handed it to him. (OR28/1986) The prosecutor then asked Johnson to recall his grand jury testimony where he (Johnson) indicated that Parker handed Cave the gun. (OR28/1917) Johnson, when again prompted by the prosecutor, said that he did not recall when that happened, thereby leaving the impression that Parker in fact handed Cave the gun. (OR28/1917) Johnson added that Cave was holding the gun when he brought Slater out of the store and that Bush and Parker followed him. (OR28/1918) After driving some distance, Bush got out of the car. At that time Slater was in the back seat between Johnson and Cave. (OR28/1922-921) Bush told Slater to get out of the car and Cave moved just enough to let her out. (OR28/1924) Johnson said that Bush then stabbed Slater. (OR28/1924) Most damaging to Parker, Johnson added that Parker got out of the car and told Cave to hand him the gun. (OR 28/1925) But he did not actually see Parker with the gun. (OR28/1925-26; OR33/2572-73) When again prompted, he said that he thought it was Bush who had the gun the next time he saw it. (OR28/1927)

On cross examination, Johnson at first insisted that he did not sign an October 1989 affidavit (R10/1400-07) bearing his name and apparent signature. (OR28/1944) An expert verified that it was in fact Johnson's signature on the affidavit. (OR32/2491) The affidavit was admitted in evidence and read to the

jury. (OR32/2501-02) In the affidavit, Johnson acknowledged that Bush was a leader, a planner and a violent person who, if he had a gun, was likely to use it (R10/1404; OR32/2505-06); Parker was non-violent (R10/1407; OR32/2505); Georgeann Williams was afraid of Cave, and he would be surprised if Parker admitted shooting Slater (R10/1403); and that Johnson was asleep when the store was robbed and did not awaken until Cave came out and got back in the car, thus he could not know whether Parker went into the store the second time (R10/1405; OR32/2509). More to the point, in the affidavit, Johnson flatly contradicted his trial testimony that Parker had asked for the gun and exited the vehicle just prior to the murder. (R10/1406; OR32/2511)[12]

Thus, it was obvious that Johnson's believability was called into serious question at the retrial -- and that his credibility hung by a thread during cross examination. It was at this point that Lamos failed to take advantage of a powerful impeachment tool at his disposal had he aggressively investigated and presented to the jury the actual contractual relationship between Johnson and his accusers -- and Johnson's self interest in shoring up the state's felony murder theory of the case as far as Parker's involvement with the gun was concerned.

Prior to the retrial, the prosecution submitted to Lamos in the form of a pleading filed with the clerk a "State's Disclosure of Witness Agreement" dated

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[12] When Johnson was recalled to the stand, he admitted that he had in fact signed the affidavit. (OR33/2569)

December 1, 1999 (R17/2365-72). In that pleading, admitted in evidence at trial as defense Ex. 7 (OR28/1959), the prosecutor misstated the actual agreement he had struck with Johnson. The disclosure notice merely provided:

> *(i)n exchange for an agreement of Terry Wayne Johnson to truthfully testify in the upcoming sentencing proceeding of J. B. Parker*, the State of Florida has represented to Counsel for Mr. Johnson that when the (sic) Mr. Johnson's case is reviewed for purposes of parole or clemency, the State Attorney's Office of the 19th Judicial Circuit, will make known to the Parole Board or any agency considering Mr. Johnson's case, that when asked to testify in the resentencing proceeding of J. B. Parker, Mr. Terry Wayne Johnson did comply and assist the State in obtaining a just outcome in the resentencing proceeding by providing truthful testimony.

(R17/2366-67, emphasis added.) The 1999 agreement itself (R9/1219-24), however, provided that Johnson was required to do something quite different. He was also to testify " . . . *in accord with the sworn testimony that I gave to both law enforcement officers and the Grand Jury of Martin County in the year 1982*." (R9/1216) Thus, in order to get help from the state attorney's office with the parole or clemency boards, Johnson was required to make sure that his retrial testimony parroted his grand jury testimony because that was the testimony that was most damaging to Parker and what the prosecutor wanted from him.

So there can be no misunderstanding about this, in Johnson's grand jury testimony, he asserted that Parker went into the convenience store the first time they stopped there (R10/1292). Later, at the scene of the homicide, "Pig had got

out of the car[13] and then he had reached across me and Cave handed him the gun and there was a shot went off." (R10/1306) Johnson also testified when asked:

> Q. Parker reaches over behind, gets the gun from Cave, goes out of the car.
>
> A. Yes, sir.
>
> Q. Okay. How soon after he opened the door and went out of the car did you hear the shot?
>
> A. Wasn't long.
>
> **********
>
> Q. After she screamed and she was stabbed, that's when Parker turns around -- did he ask for the gun or did he say anything?
> Q. What did he say?
>
> A. Say, "hand me the gun."
>
> Q. He told Cave to hand him the gun?
>
> A. Yes.
> Q. And he opened the door and got out?
>
> A. Yes sir.
>
> Q. And then you heard the shot?
>
> A. Yes sir.

(R10/1307-08)

[13] In Johnson's May 5 recorded statement to law enforcement, Johnson claims that Parker was outside the car when Slater was shot. (R9/1234, 1236-37, 1247)

Lamos failed to cross examine Johnson on the cooperation agreement itself. *See* Lamos' cross examination of Johnson at OR28/1946-52 and OR33/2574, where Lamos fails to confront Johnson with the agreement. This may be because he failed to investigate the matter of the disclosure notice in order to obtain a copy of the agreement that should have been attached to it. Or he may have failed to comprehend the critical difference between the two documents assuming he had them both. In any event, Lamos was not prepared to cross examine Johnson with the agreement itself as reflected in this exchange between counsel and Johnson during the trial:

> Q. Mr. Johnson, is that the disclosure agreement[14] that the State of Florida made to you that it would advise the Parole Commission of the fact that you did not testify, that it -- if you did not testify it would make the Parole Commission aware of that fact?
>
> A. I have never talked to Mr. Colton.
>
> Mr. Mirman: That's not the document that he received, that's a document I sent to you. The gist of it is the same.[15] See what I mean? That's the disclosure to the Defense, not to the witness.
>
> **********
>
> Q. So, my question -- my question is, you were made aware by Mr. Mirman that if you testified before this Jury, that the Parole Commission would be made aware of that fact?
>
> A. That I -- that I did cooperate by testifying truthfully.

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[14] In other words, Lamos was confusing the notice with the agreement.

[15] No, the gist was not the same.

Q. Right, and you were likewise were told that if you did not testify before this Jury that the parole commission would be made aware of that fact?

(OR28/1961-62)

The Resulting Prejudice

Johnson was the state's contingency plan "B." He was used in case the jury did not believe Georgeann Williams' testimony that Parker was the triggerman. This back up felony murder theory was that Parker was involved in the robbery/kidnapping when he went in the store the second time and that he handled the gun right before Slater was shot. It was based entirely upon the testimony of Johnson who admitted that he was drunk and asleep during the very time that he supposedly saw Parker do that. (R10/1405-06; OR32/2509-11) Without the May 7 statement and with Johnson's inconsistent testimony and reason to lie exposed, there would not have been enough credible evidence to establish that Parker had knowledge of what Cave and Bush planned to do and the heightened *mens rea* to subject Parker to the death penalty. *See Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987). Thus, Parker suffered prejudice as a result of Lamos' failure to impeach Johnson on the basis of the SAO/Johnson cooperation agreement (R9/1216-217) for two key reasons:

First, the state was able to use the misleading notice of disclosure (R17/2365-72) to sugar coat and bolster Johnson's credibility by noting that all Johnson had to do was to testify "truthfully." There is a world of difference between that and conforming Johnson's trial testimony to his previous grand jury testimony in order to get help (parole or clemency) in the future from the prosecutor -- especially when it is clear that Johnson's grand jury testimony regarding Parker's involvement in the robbery/kidnapping and contact with the gun at the murder scene was false. (R10/1406[16]; OR32/2511)

Second, because it is obvious that the trial court and this Court credited Johnson's testimony regarding the extent of Parker's culpability in the homicide especially as it relates to the handling of the murder weapon. The trial court determined that " . . . Parker initiated the murder . . ." by demanding the gun. (OR7/1331) The trial court found specifically after the retrial that

> "(i)mmediately prior to the victim's being shot, Mr. Parker, you did reach over Alphonso Cave and command of him, hand me the gun.

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[16] In Johnson's sworn affidavit of October 5, 1989, he averred that "John took the girl around to 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, then I heard a shot." (R10/1406, emphasis added). He added, "Knowing Cave like I do, I don't think that he is capable of hurting anyone. *I don't think that J. B. is capable of it, either*. I know there's bad blood in J.B.'s family and some of the other people might hurt someone, but I know *J. B. himself had never before been violent, and I don't think J. B. himself was capable of it*." (R10/1406-07, emphasis added). Thus, Johnson's trial testimony that Parker had or handed anyone the gun is false.

> You then took the gun from Mr. Cave and exited the car. You were personally present during the shooting."

(OR36/2925) On direct appeal, this Court found "(t)he evidence established that Parker gave Cave the gun before Parker, Cave and Bush went into the convenience store, that Parker was an active participant in the robbery, and that Parker demanded the gun from Cave when they arrived at the deserted area with Slater." *Parker v. State*, 873 So. 2d 270, 291-2 (Fla. 2004). Johnson was the only state eye witness who provided the jury and trial court with this damaging testimony. Had the jury and the trial court not believed Johnson, it is certainly likely that a death sentence would not have resulted.

Cumulative Ineffectiveness/Prejudice Re: IAC Claims

In reviewing the record and IAC arguments set forth above, the Court is asked to consider them as the sum of their parts. The state will argue that, when considered individually, particular errors made by retrial counsel do not rise to a level sufficient to warrant a retrial. Parker disagrees. When considering them cumulatively, it is clear that retrial counsel's numerous errors and omissions were so serious that the death sentence that resulted is not constitutionally reliable.

Point V: In the alternative to Point IV on appeal, if this Court finds that the prosecutor secreted the actual cooperation agreement from Lamos, and/or misrepresented the terms of that cooperation agreement,

then the trial court erred in not granting Parker a new penalty phase trial based upon a *Brady* violation.

Standard of Review

The standard of appellate review regarding a *Brady* claim requires the appellate court to show deference to the trial court's findings of fact and not to disturb them so long as there is competent evidence to support those findings. The appellate court, when considering the application of the law to those facts, reviews the *Brady* claim de novo. *Sochor v. State*, 883 So. 2d 766, 785 (Fla. 2004).

Merits

The Brady Violation

The state violated the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963) in this case once before when it withheld from defense counsel the fact that it had insisted in Alphonso Cave's resentencing that he, not Parker, was the actual shooter. *Parker v. State*, 721 So. 2d at 1149. Parker raised another *Brady* violation in Claim III of his corrected initial post conviction motion by asserting that the prosecution also withheld the 1999 cooperation agreement (R9/1219-24) from Lamos. (R3/286-88) The trial court rejected the claim, holding in part that Parker presented no newly discovered evidence of the suppression of the cooperation agreement, thus the claim was not proven and was procedurally barred. (R8/1122-23) This was error.

It is obvious from the retrial record that Lamos was utterly confused when cross examining Terry Wayne Johnson about the actual terms of the cooperation agreement. Lamos clearly thought that the disclosure notice (R17/2365-72) and the cooperation agreement (R9/1219-24) itself said the very same thing. Thus, as noted above, Lamos asked Johnson: "Mr. Johnson, is that the disclosure agreement that the State of Florida made to you that it would advise the Parole Commission of the fact that you did not testify, that it -- if you did not testify it would make the Parole Commission aware of that fact?" (OR28/1961) Mr. Mirman then purported to come to Lamos' aide, advising him: "That's not the document that he (referring to Johnson) received, that's a document I sent to you (Lamos). *The gist of it is the same*. See what I mean? That's the disclosure to the Defense, not to the witness." (OR28/1961-62, emphasis added.) But, as noted above, the gist of the two documents was not the same. The prosecutor clearly misled Lamos and the trial judge in this regard. The two documents were markedly different for the reasons set forth in Point IV on appeal above.

The Prejudice

If the state failed to provide Lamos with a copy of the cooperation agreement itself, it violated *Brady*. Regardless of whether it did or did not provide the agreement, the prosecutor misled Lamos, the jury and the Court regarding the

difference in the two documents, which is tantamount to a *Brady* violation. A new penalty phase trial is therefore required.

Point VI: The trial court erred in sustaining the state's objection to Parker's attempt to present expert testimony of attorney ineffectiveness and the error was not harmless.

Standard of Review

The trial court's rulings on the admissibility of evidence are entitled to deference absent an abuse of discretion. *Tengbergen v. State*, 9 So. 3d 729 (Fla. 3d DCA 2009).

Merits

It is hard to imagine a less reliable death sentence than the one imposed upon J. B. Parker at his retrial in 2000 due in large measure to the failure of defense counsel to properly impeach Williams and Johnson and to do what was necessary to prevent the introduction of the May 7, 1982, statement from the defendant. Attorney Kevin Anderson was prepared to testify accordingly at the post conviction hearing. However, the trial court sustained the prosecutor's objection based upon the argument that expert testimony as to lawyer ineffectiveness was not permitted and upon *Casey v. State*, 969 So. 2d 1055 (Fla. 4th DCA 2007). (PCT23/500-02) The trial court misapplied *Casey* and erred.

Casey does not hold that an attorney in a criminal case cannot give an expert opinion as to whether defense counsel effectively represented the client. *See Casey*, supra, 969 So. 2d at 1059. All *Casey* prohibits is a lawyer expert testifying as to whether trial counsel's strategic or tactical decisions were reasonable since that is a strictly a question of law to be decided by the judge. *Id*. At 1060. In the case at bar, Barone did not ask Anderson to testify about the reasonableness of Lamos' tactics and strategies. Instead, she sought Anderson's opinion "as to Mr. Lamos' conduct in this 2000 resentencing trial" (PCT23/500) in general and regarding a host of specific things (*see* PCT23/505-13, 516-17, 526-28, 531, 534-45, 550-60) that Lamos did not do but which he should have done, such as suppressing the May 7 statement and effectively impeaching Georgeann Williams and Terry Wayne Johnson.[17]

What Barone was really trying to do was elicit from Anderson a bottom line opinion as to Lamos' effectiveness. That is what the state did not want the trial judge to hear. Section 90.703, Florida Statutes (2008) provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact." Furthermore, the issue of whether an attorney <u>*in this very case*</u> could testify to the constitutional effectiveness of defense counsel was raised, argued and put to rest

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[17] Admittedly, Barone tried to convince the trial judge that Anderson could testify to Lamos' tactical decisions as well. She was wrong about that.

during proceedings regarding the first post conviction motion that Parker filed when he tried to prevent the state from offering *this very same evidence*. In *Parker v. Dugger*, 542 So. 2d 356 (Fla. 1989), Parker appealed from a trial court order that denied him post conviction relief. He raised the argument that "the trial court improperly admitted expert testimony at the evidentiary hearing concerning trial counsel's effectiveness." *Parker*, supra, 542 So. 2d at 357. This Court held "we find no merit in Parker's fourth claim that the trial court improperly admitted expert testimony concerning the effectiveness of his trial counsel." *Ibid*.

Thus, whether it is the doctrine of law of the case or res judicata, it would be inconsistent, one-sided justice if the prosecution could submit expert testimony on the issue of attorney effectiveness but the defendant could not. *Florida Dept. of Transp. v. Juliano*, 801 So. 2d 101 (Fla. 2001). It was therefore error for the trial court to exclude this testimony. The error was not harmless because Anderson's testimony could very well have tipped the balance and resulted in a finding that IAC had been established.

CONCLUSION

For the reasons set forth above, the Court is requested to:

1. Reverse the final order of the trial court rendered on June 19, 2008 that denied Parker's corrected original motion for post conviction relief based in part upon a finding that Parker was not denied effective assistance of counsel during the retrial of the penalty phase.

2. If the Court finds that the prosecutor did not provide Lamos with a copy of the cooperation agreement between Johnson and the state, grant Parker a new trial for that reason.

3. Vacate the 2000 death sentence and remand the cause to the trial court.

4. Require the trial court to enter an order granting the post conviction motion based upon the aforementioned claims of ineffective assistance of counsel and /or the *Brady* violation, and Point VI on appeal.

5. Order a new penalty phase trial for the defendant.

6. Grant the defendant such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

_____

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Initial Brief of Appellant has been furnished this 29th day of September, 2009, by United States mail delivery, postage prepaid, and by electronic mailing. to:

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CERTIFICATE OF COMPLIANCE

I certify that this Initial Brief of Appellant was prepared using a 14 point Times New Roman font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

_____
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