IN THE SUPREME COURT OF FLORIDA

J. B. PARKER,

Appellant,

vs. **Case No. SC08-1385**
(L. C. Case No. 97-214-CF)

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

On Direct Appeal From A June 19, 2008, Final Order Denying Parker's Corrected Amended Initial Motion for Post Conviction Relief from Judgments and Sentences, Including A Death Sentence, Filed Per The Provisions of Florida Rule of Criminal Procedure 3.851.

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THE STATE'S STATEMENT OF THE CASE AND OF THE FACTS[1]

The state does not take issue with Parker's statement of the case and of the facts as set forth on pages 9-35 of the Initial Brief of Appellant.[2] Parker will continue to rely on those facts.

THE STATE'S SUMMARY OF THE ARGUMENT

The state's summary of the argument is thin and not in compliance with Florida Rules of Appellate Procedure 9.210(b) and (c) which require more than "a mere *repetition of the headings* under which the argument is arranged." (emphasis added). This is all the state does in its summary. (AB 19-20.) The summary should instead, "succinctly, accurately, and clearly [condense] the argument actually made in the body of the brief." Fla. R. App. P. 9.210(b)(4). This is what Parker did on pages 36-40 of the initial brief. Parker will therefore address each point made by the state in the Argument section of this reply brief.

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[1] The Initial Brief of Appellant will be referred to as "IB" followed by a page number(s). The Answer Brief of Appellee will be referred to as "AB" followed by a page number(s).

[2] In its statement of facts, the state quotes extensively from this Court's recitation of facts on the direct appeal from Parker's original conviction and sentence. (AB 1-4.) That statement, however, is replete with facts taken from Parker's May 5 statement which was held in collateral review proceedings to be inadmissible and thus was not admitted at the re-sentencing proceeding and forms no part of the record evidence considered by the jury at that proceeding. On this appeal, this Court should disregard any facts taken from the May 5 statement.

REPLY TO THE STATE'S ARGUMENT

Issue I. Did the Trial Court Err in Not Finding that Retrial Counsel Was Ineffective for Stipulating to Evidence Used as the Basis for Resolving the Motion to Suppress Parker's May 7, 1982, Incriminating Statement to Detective Powers, and that Prejudice Resulted?

The State Fails to Identify the Standard of Appellate Review

The appropriate standard of appellate review is *de novo* except that the trial court's factual findings are entitled to deference so long as there is competent evidence in the records to support them. *State v. Lewis*, 838 So. 2d 1102, 1112 (Fla. 2002); *see also* IB at 41.

Merits

To address the state's argument, the facts leading up to the May 7 statement, discussed in some detail at IB 41-52, need to be kept clearly in mind. Parker made two incriminating custodial statements: the first a tape recorded statement to Sheriff Holt at the Martin County Jail on May 5, 1982; the second a May 7 statement to Detective Powers at one of the crime scenes that was not memorialized by Powers until well after May 7. The Eleventh Circuit Court of Appeals held that the May 5 statement was obtained in violation of Parker's Fifth Amendment rights because Parker had invoked those rights during the May 5 custodial interview, and, in violation of those rights, Sheriff Holt nevertheless continued the interview. *Parker v. Singletary*, 974 F.2d 1562, 1570-74 (11th Cir.

1992) ("*Parker IV*"). Parker's May 5 invocation of his Fifth Amendment rights created a roadblock of constitutional proportions for the state in terms of obtaining incriminating evidence from Parker because, under *Edwards v. Arizona*, 451 U.S. 477 (1981), the police were prohibited from initiating any further contact without counsel present. As Parker demonstrated in his opening brief, Lamos' agreement to proceed on a written record in connection with Parker's efforts to suppress his May 7 statement for lack of initiation by Parker was constitutionally ineffective because, in doing so, knowing that the written record contained *no* non-hearsay evidence that would enable the state to meet its burden of proving that Parker initiated the contact with law enforcement that led to the May 7 statement, Lamos inexplicably failed to preserve Parker's right to object to that admitted hearsay. In Parker's initial brief (IB 47-48), he cited a line of cases establishing that, to be effective, especially in capital litigation, trial counsel is expected to understand and know how to apply the rules of evidence. Lamos failed to meet this basic requirement and to satisfy his solemn duty to endeavor to exclude damning, otherwise inadmissible evidence against his client, and to ensure that his actions did not permit the introduction of inadmissible evidence to fill gaps in the state's case, thereby assisting in the conviction of his own client.

The Ineffectiveness and the Resulting Prejudice

Lamos, by his failure to appreciate the central importance of challenging the incompetence of the Powers testimony and to take the appropriate steps to preserve his client's right to object to that testimony, came to the state's rescue and rendered inadmissible hearsay admissible. Lamos' inability to comprehend the Florida Evidence Code when he failed to preserve Parker's hearsay objections when stipulating to the use of affidavits and prior court and deposition testimony as a means of allowing the trial court to resolve the issue of the admissibility of Parker's May 7 statement and, more importantly, to establish that Parker initiated further communication with law enforcement after having expressed his desire on May 5 to deal with law enforcement only through counsel, demonstrates his failure to provide effective assistance.

On Parker's direct appeal from the re-sentencing court's judgment, this Court rejected Parker's argument that "Powers' testimony alone cannot be considered competent to establish that Parker initiated the May 7 interview because it is hearsay," ruling instead that, "Parker stipulated to the admissibility of this evidence and [therefore] cannot now assert that the trial court was precluded from considering Powers' testimony in addressing the motion to suppress." *Parker v. State*, 873 So. 2d 270, 280-81 (2004) ("*Parker VI*"). This Court, citing *Laws v. State*, 356 So. 2d 7, 8 (Fla. 4th DCA 1977), for the proposition that "otherwise

inadmissible evidence, received without objection, may properly be considered," expressly found that Lamos' failure to object to the use of hearsay precluded any claim that Powers' testimony was incompetent to establish initiation. Trial counsel is obligated to do all things necessary to preserve a defendant's right to appeal an adverse ruling related to the admissibility of evidence. *Sims v. Florida*, 967 So. 2d 148 (Fla. 2007) (finding that trial counsel was ineffective for failing to preserve objection for appellate review). This flagrant failure to understand the basic tenets of the Florida Evidence Code, and to preserve the right to object to the Powers' hearsay testimony, establishes that trial counsel was ineffective. *See Merkison v. Florida*, 1 So. 3d 279, 281 (Fla. 1st DCA 2009) ("the failure to preserve an issue for appellate review may be sufficient to constitute ineffective assistance of counsel….").

In accordance with Parker's Fifth Amendment rights, under *Edwards*, the state was required to establish that Parker, *after* having expressed his desire to deal with law enforcement only through counsel, initiated further communication with law enforcement. Had Lamos properly preserved Parker's hearsay objection, the state could not possibly have met its burden of proving in an evidentiary hearing that Parker initiated the May 7 contact because the only "evidence" it had to prove *initiation* by Parker was the Powers' hearsay which is not admissible under the Florida Evidence Code. FLA. STAT. ANN. § 90.802 ("except as provided by statute,

hearsay evidence is inadmissible"); *see also* FLA. STAT. ANN § 90.805 ("[h]earsay within hearsay is not excluded under 90.802, *provided each part of the combined statements conforms* with an exception to the hearsay rule as provided in § 90.803 or § 90.804.") (emphasis added).[3] Powers admitted 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." (SOR5/672.) Powers added that the only persons who could have given him this information were persons "superior to me in the chain of command," that is, either Holt or Crowder. However, Holt denied under oath that he spoke with Parker at any time after May 5 (SOR4/532) and thus could not have personal knowledge of initiation by Parker after his May 5 rights invocation. Moreover, after checking later, Powers admitted that "[w]ere Sherriff Crowder to testify in this matter, "he would state that he was not the person who contacted me on May 7, 1982." (SOR5/672.) To make matters worse for the state, Powers could not even say that the mystery person he supposedly spoke with was the same person with whom Parker spoke when he allegedly initiated a further interview with law enforcement. The Powers testimony thus was at best hearsay and, without an identified declarant, potentially hearsay within hearsay, which lacked

[3] The state does not argue that any part of the hearsay in this case was admissible under §§ 90.803 or 90.804.

any indicia of reliability. But for Lamos' inexplicable lack of understanding of the rules of evidence and failure to preserve Parker's right to object, such hearsay could not, consistent with the Sixth Amendment, have been used in opposition to Parker's motion to suppress.

The state's further claim that other evidence in any event was sufficient to establish initiation is likewise flawed. The additional evidence on which the state relies — the testimony of Art Jackson, Robert Makemson and Steven Greene — all refers to Parker's admitted initiation of the May 5 interview, not the circumstances that led to the May 7 interview. During the May 5 interview, however, as the Eleventh Circuit held, Parker validly invoked his Fifth Amendment right to counsel and the state nevertheless, in violation of Parker's Fifth Amendment rights, proceeded with the interview. *See Parker IV*, 974 F. 2d at 1570-74. The pre-rights invocation evidence on which the state seeks to rely to establish the immateriality of Lamos' failure to preserve Parker's hearsay objection simply cannot provide an independent basis for showing the post-rights invocation initiation required by *Edwards*.[4]

The state has only two arguments: First, the state asserts that Parker's claim was and remains procedurally barred; and second, it asserts that Parker suffered no

[4] The state also ignores the undisputed evidence that, on May 6, Parker refused to speak with two other law enforcement members who had approached him for the same purpose as the Powers visit with Parker on May 7. (SOR5/559-61, 590-92.)

prejudice[5] because Powers' testimony would have been admissible because hearsay is admissible in a pretrial suppression hearing, and therefore, any ineffectiveness was harmless. (AB 29-35; AB 20-28.) The state's arguments are meritless.

The Claim Is Not Procedurally Barred

The state candidly concedes that " the trial court did not specifically find that [claim 1.A.I.] was procedurally barred ...." (AB 29.) Irrespective of this admission, the state then cites a series of decisions in support of its proposition that a defendant is prohibited in a post conviction proceeding from re-litigating in the guise of a collateral, post conviction IAC claim, an issue that was argued and disposed of on direct appeal.[6] The state's cases have no application here, however, because Parker is not arguing error in the court's denial of the suppression motion, but instead that Lamos was ineffective in failing to preserve Parker's objection to

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[5] The state fails to accurately set forth the standard for assessing whether prejudice resulted from Lamos' ineffectiveness. (AB 32-33.) If this Court concludes that the May 7 statement would not have been admitted into evidence absent Lamos' ineffectiveness, unless this Court also determined, beyond a reasonable doubt, that the May 7 statement did not contribute to the death recommendation and sentence, reversal would be required. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

[6] The state cites *Muhammad v. State*, 603 So. 2d 488 (Fla. 1992); *Valle v. State*, 705 So. 2d 1331 (Fla. 1997); *Jones v. State*, 855 So. 2d 611 (Fla. 2003); *Gaskin v. State*, 737 So. 2d 509 (Fla. 1999), *overruled in part by, Nelson v. State*, 875 So. 2d 579 (Fla. 2004); and *Marajah v. State*, 684 So. 2d 726 (Fla. 1996). (AB 30-1.)

hearsay evidence contained within the stipulated record. That issue was neither argued nor disposed of on direct appeal.

It is not disputed that the underlying facts regarding the appeal and the IAC claim are essentially the same. It is Lamos' actions leading to the denial of the suppression motion — the precise reasons *why* the otherwise valid motion was denied — that give Parker the right to pursue an ineffective assistance of counsel claim here. The issue of whether the trial court erred in denying the motion to suppress the May 7 statement and the issue of whether Lamos provided ineffective assistance of counsel when representing Parker during the suppression motion proceedings are not the same. It is for this reason that the state's assertion that Parker's claim is procedurally bared is meritless. *See Bruno v. State*, 807 So. 2d 55 (Fla. 2001) (holding that, even though an issue on direct appeal and a claim of ineffective assistance arise from the same underlying facts, "... *the claims themselves are distinct* and — of necessity — have different remedies: A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion, and a claim of ineffectiveness generally can be raised in a rule 3.850 motion, but not on direct appeal.") (emphasis added). *Id.* at 63.

The Powers Hearsay Testimony Would Not Have Been Admissible Absent Lamos' Ineffectiveness

The state's argument that Powers' testimony, even though hearsay, was admissible is wrong for three reasons. First, the state's argument that as a general rule "hearsay is admissible in pretrial motions, including suppression motions" is directly inconsistent with Florida law and the United States Constitution. (AB 31). The Sixth Amendment requires that "[i]n all *criminal prosecutions* [not just criminal trials] the accused shall enjoy the right…to be confronted with the witnesses against him…." (emphasis added). The Florida Evidence Code and statutes that exclude hearsay evidence except in certain circumstances apply to pretrial hearings. *See* FLA. STAT. ANN. § 90.801(c) ("'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 asserted.") (emphasis added). The state cites two cases to support its assertion that hearsay evidence is generally admissible at pretrial hearings: *Lara v. Florida*, 464 So. 2d 1173 (Fla. 1985) and *State v. Cortez*, 705 So. 2d 676 (Fla. 3d DCA 1998). Neither case supports the state's claim.

While the court in *Lara* held that hearsay evidence was admissible in that case, it did not set forth a blanket rule that hearsay evidence is generally admissible at suppression hearings. Instead, the court held that, where probable cause for

issuance of a search warrant could be based on hearsay in affidavits, such hearsay was also competent to establish a consensual search. *Lara*, 464 So.2d at 1177; *see also McDaniel v. State*, No. 2D08-4144, 2009 WL 4723310, at *3 (Fla. 2d DCA Dec. 11, 2009) (citing *Lara* as "holding that hearsay evidence is admissible to establish consent to search at a hearing on a motion to suppress physical evidence *based on the rationale* that an affidavit for a search warrant may be based on hearsay") (emphasis added). Likewise, at issue in *Cortez* were the evidentiary requirements to establish probable cause, not the rules of evidence applicable to suppression motions generally. *Cortez*, 705 So. 2d at 679. In clear contrast to *Lara* and *Cortez*, the hearsay evidence at issue in Parker's case was offered to establish that the state had proved, as required by *Edwards*, that Parker, *after* having invoked his Fifth Amendment rights to deal with law enforcement only through counsel, initiated further communication with law enforcement. The state fails to cite a single case where a Florida court found hearsay evidence, particularly the type of unreliable statements at issue here — where the witness is unable to identify the declarant, to state what Parker allegedly said to the declarant, or to specify when Parker allegedly made any such statement — to be admissible and competent to establish that an incarcerated defendant, after having expressed his desire to deal with the law enforcement only through counsel, initiated further communication with law enforcement.

Significantly, and in direct contrast to the federal rule, the Florida Evidence Code does not grant a trial judge broad discretion to rely on hearsay in deciding preliminary questions such as the admissibility of evidence. Florida Evidence Code § 90.105(1) differs materially from Federal Rule of Evidence 104(a) with respect to whether the rules of evidence are applicable to such preliminary questions. Unlike the federal rule, which explicitly exempts courts from the restrictions embodied in the Federal Rules of Evidence when making such preliminary determinations, Section 90.105(1) omits this exemption. Thus, as this Court recognized in *Romani v. State*, 542 So. 2d 984, 985-86 (1989), the Florida Evidence Code does not permit the court to ignore the generally applicable rules of evidence, including the rules concerning hearsay, at preliminary hearings. *See also State v. Edwards*, 536 So. 2d 288, 293-94 (Fla. 1st DCA 1988) ("Federal Evidence Rule 104(a) … specifically provides that the trial court is 'not bound by the rules of evidence except those with respect to privilege' in determining preliminary questions concerning the admissibility of evidence. The Florida Evidence Code contains no such provision.").

Second, this Court has already correctly identified the Powers testimony regarding Parker's supposed initiation of contact with law enforcement as "*inadmissible,*" quoting *Laws v. State*, 356 So. 2d 7, 8-9 (Fla. 4th DCA 1977) to the effect that "(t)he general rule is that *otherwise inadmissible evidence*, received

without objection, may properly be considered in determining the facts in issue." *Parker VI*, 873 So. 2d at 281 (emphasis added).

Third, even if under certain circumstances hearsay evidence that would not otherwise be admissible at trial may be introduced in a pretrial hearing, Powers' testimony would not have been admissible in this case and to have permitted its introduction, in the absence of Lamos' inexplicable waiver of Parker's right to object, would make a mockery of the evidence code. Powers could not say who contacted him on May 7, other than to speculate that it must have been Holt, and therefore, there was no identifiable "declarant" as a source of the hearsay provided by Powers. Even a hearsay statement requires a "declarant" in order for the reviewing court to have some basis for scrutinizing the reliability of the declarant in order to satisfy the Sixth Amendment right to confront one's accuser. *See, e.g.*, FLA. STAT. ANN. §§ 90.806(1)-(2) (stating that the "credibility of the declarant may be attacked"); *see also Banks v. State*, 790 So. 2d 1094, 1097 (Fla. 2001) (hearsay is generally inadmissible because the declarant does not testify under oath, the trier of fact cannot observe the declarant's demeanor, and the declarant is not subject to cross-examination). In the case at bar, the unreliability of Powers' testimony is egregious because Powers had absolutely no personal knowledge that Parker initiated communication with law enforcement after the invocation of his Fifth Amendment rights. As this Court reaffirmed in *Romani*, the rules governing the

use of hearsay evidence are designed to "assure that a defendant is convicted only on credible evidence." *Romani*, 542 So. 2d at 986.

Without Lamos' inexplicable stipulation that led directly to the admission of the otherwise inadmissible Powers hearsay — the only evidence proffered to establish initiation — the May 7 statement would have been suppressed and the state would have been left with only the obviously false testimony of Georgeanne Williams and the problematic testimony of co-defendant Terry Wayne Johnson as the bases of proving Parker's guilt. (*See* IB 41-52.) Given the critical importance of the May 7 statement to the death sentencing process, which alone was sufficient to establish Parker's guilt of felony murder, *State v. Parker*, 721 So. 2d 1147, 1152 (1998), its admission as a direct consequence of Lamos' ineffectiveness cannot be found, beyond a reasonable doubt, not to have contributed to the jury recommendation and death sentence.

Issue II: Did the Trial Court Err in Not Finding that Retrial Counsel was Ineffective for Failing to Competently Cross Examine and Impeach Georgeanne Williams, and that Prejudice Resulted?

The state is wrong, as explained at IB 52-57. The shooter's identity was strongly contested at Parker's re-sentencing. The only evidence to support the re-sentencing court's determination in support of its imposition of a death sentence that Parker "admitted to actually shooting the victim in the head" (OR36/2928)

was Williams' testimony.[7] Impeaching her credibility was therefore critically important to obtaining a life sentence. Lamos, however, was unprepared to confront Williams' denials with records documenting her prior convictions and failed to introduce all available evidence of her documented convictions. (IB 54-55; PCT20/219-26.) Contrary to the state's claim, Lamos, through an inadequate investigation, did not have those records ready to use at trial. (IB 54-55; R13/1772-92.)

Such critically important evidence was not, as the state suggests, cumulative, and Lamos' inability to confront Williams with the documents establishing her crimes was not a mere technical lapse. Particularly in light of Williams' repeated efforts on the witness stand to deny her criminal past and to claim that it was her sister, not she, who had committed these crimes, Lamos needed to be prepared to introduce all available evidence of Williams' repeated crimes to not only demonstrate the fact of those crimes but also to demonstrate that even in that courtroom she was willing to prevaricate. There is no strategic or other justification for this failure of preparation and execution. Lamos' constitutionally ineffective investigation into Williams' criminal history and his constitutionally ineffective cross-examination of this critically important witness, standing alone,

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[7] This Court made precisely that finding based upon Williams' testimony in upholding Parker's original death sentence. *Parker v. State*, 542 So. 2d 356, 358 (Fla. 1989).

warrant reversal of the denial of Parker's motion for post conviction relief. When considered with Lamos' numerous other lapses, the cumulative effect was a verdict in which this Court can have no confidence.

Issue III: Did the Trial Court Err in Not Finding that Retrial Counsel was Ineffective for Failing to Present Testimony From Richard Barlow that He Believed the Testimony of Michel Bryant, and that Prejudice Resulted?

The trial court found no ineffectiveness or prejudice here "where the State elicited that Barlow believed Bryant,[8] where Barlow testified that Bryant had no motive to lie in implicating Cave as the shooter,[9] 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.) The court made this finding despite the prosecutor's concession, "I have certainly opened the door to [Barlow's] mental processes in evaluating the credibility of Mr. Bryant." (OR29/2100.) Lamos, however, failed to press Barlow as to the reasons *why* he believed that Bryant was telling the truth. In fact, on redirect, he did not address the matter at all. (OR29/2115-20, 2126-30.) Surely, detailed testimony from Barlow, a highly respected prosecutor, vouching for Bryant's credibility (*see*, *e.g.*, PCT21/348) and reiterating Bryant's testimony to the effect that Cave, not Parker,

[8] The prosecutor: " . . . you believed Mr. Bryant . . .?" A. That's correct." (OR29/2085.)

[9] Barlow's only reference as to why he believed Bryant came in this exchange with the prosecutor (not Lamos): The prosecutor: " He had no motive to lie against Mr. Cave? A. "No acceptable, believable, rational motive." (OR29/2124.)

was the shooter, and that Bush, not Parker, stabbed the victim (PCT21/343-47), would have completely undermined the testimony of Williams and Johnson.

Issues IV and V: Did the Trial Court Err in Not Finding that Retrial Counsel was Ineffective for Failing to Obtain and Use Johnson's Cooperation Agreement to Impeach Johnson, and that Prejudice Resulted?

Did the Trial Court Err in Not Finding that the State's Failure to Disclose the Full Terms of the Johnson Cooperation Agreement Violated *Brady*?

Parker's claim of ineffective assistance of counsel with respect to Lamos' cross-examination of Johnson, and his *Brady*[10] claim with respect to the state's failure to disclose the full terms of the 1999 agreement between Johnson and the state, are based on the fact that Lamos failed to discover and use in cross-examination, and the state failed to disclose, Johnson's agreement to testify "*in accord with the sworn testimony that [he] gave to both law enforcement officers and the Grand Jury of Martin County in the year 1982*." (R9/1216) (emphasis added). The state concedes that the disclosure notice it filed prior to the resentencing hearing (R17/2365-68) "differed from the actual agreement." (AB 60.) That is an understatement. It "differed" in that it failed to disclose Johnson's obligation to conform his testimony to his prior testimony in exchange for the state to notify the parole board of his cooperation. This critical fact was obviously not

[10] *Brady v. Maryland*, 373 U.S. 83 (1963).

known to Lamos at the time of the 2000 resentencing hearing.[11] The only evidence of the full terms of the agreement is contained in documents obtained *after* the October 2000 re-sentencing trial. (R9/1215-18.)

Lamos' lack of knowledge of this critical impeachment evidence was due to two factors: Lamos' failure to obtain a copy of the actual agreement, and the state's failure to disclose it. As demonstrated in Parker's opening brief, Lamos' failure to obtain and use the agreement to impeach Johnson constituted ineffective assistance. Parker thus refers the Court to his opening brief with regard to the merits of the ineffectiveness claim (IB 59-68), and addresses here the merits of the *Brady* claim and the prejudice that resulted equally from Lamos' ineffectiveness and the state's *Brady* violation.

The *Brady* Claim Is Not Procedurally Barred

The state's acknowledged failure to disclose the full terms of the witness agreement (*see* AB 55)[12] constitutes an independent ground for relief under *Brady*.

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[11] The exchange between Lamos and the prosecutor during the retrial, reported at pages 65 and 70 of the initial brief, makes it clear that Lamos was unaware of the contents of the Johnson plea agreement itself (R9/1219-24), and that all he knew about the agreement was what was contained in the state's misleading notice. (R17/2365-72; *see* OR28/1961.)

[12] The state, in claiming that it provided Lamos with the agreement, can only cite to the incomplete disclosure of the terms of that agreement and thus cannot mean to say that it disclosed the full terms of that agreement. (AB 51) The state's blanket assertion that there was no other agreement beyond that disclosed in the state's disclosure statement is flatly contradicted by the terms of the actual

Contrary to the state's argument on appeal, and the trial court's rulings, Parker's *Brady* claim is not procedurally barred. The trial court misapprehended Parker's *Brady* claim as requiring Parker to introduce newly discovered evidence of "'recantation,' suppression or false testimony." (R8/1122-23) Parker did not claim to have newly discovered evidence of "recantation," but instead, the full terms of the 1999 cooperation agreement itself (R9/1219-24), which the state failed to disclose when it provided a materially incomplete summary of that agreement and falsely stated in court that the substance of the disclosure notice was the same as the 1999 agreement. (OR 28/1960.) Even the state does not deny that its disclosure prior to the re-sentencing was incomplete, thus there is no basis for the trial court's conclusion that Parker could have raised this claim on direct appeal.

The "bar against successive motions can be overcome if the movant can show that the grounds asserted were not known and could not have been known to the movant at the time of the previous motion." *Rivera v. State*, 995 So. 2d 191, 195 (Fla. 2008) (*Brady* and *Giglio* claims not procedurally barred where the prosecution allegedly withheld a key witness's plea offer, corroborated the witness's misstatements at trial, and prevented impeachment as to the witness's "personal incentive and gain" for testifying against defendant); *see Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989).

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agreement, which are set forth in the state's 2001 correspondence with Johnson's mother, which sets forth the full terms of the agreement. (R/1215-18)

Here, the only evidence of the actual terms of the Johnson witness agreement is set forth in letters which reiterate those terms dated in 2001 (R9/1215-18), months after the 2000 resentencing hearing.[13] It is thus apparent that due to the state's inadequate disclosure, Parker did not have access to the agreement until after the 2000 hearing, and thus the claim is not procedurally barred.

The Merits of Parker's Brady Claim

"The determination of whether a *Brady* violation has occurred is subject to independent appellate review." *Mordenti v. State*, 894 So. 2d 161, 169 (Fla. 2004). A *Brady* violation is established when the defendant shows that "(1) the State possessed evidence favorable to the accused because it was either exculpatory or impeaching; (2) the State willfully or inadvertently suppressed the evidence; and (3) the defendant was prejudiced." *Id.* Parker has established each of these elements. The withheld terms of the witness agreement unquestionably would have aided Parker in impeaching a key witness and thus were favorable. *See Mordenti*, 894 So. 2d at 170 (there is "absolutely no question" that evidence that would have "assisted [defendant] in the impeachment of … the State's critical witness" was favorable). As to the second prong, despite its unsupported

[13] Claims based on evidence discovered after the 2000 hearing would not be procedurally barred because they could not have been addressed on direct appellate review. *See Aguirre-Jarquin v. State*, 9 So. 3d 593, 602 n. 11 (Fla. 2009), *cert. denied*, __S.Ct.__, 2010 WL 596621 (Feb. 22, 2010).

assertions of full disclosure, the state acknowledges that what it really means is that the variation between the state's disclosure and the actual terms of the agreement are not material. (*See* AB 60). The additional terms of that agreement that the state failed to disclose, however, undeniably are favorable, and thus, under *Brady*, were required to be disclosed. *See Young v. State*, 739 So. 2d 553, 558 (Fla. 1999).

Prejudice Regarding Issues IV and V

The third prong of the *Brady* test requires that the defendant be prejudiced.[14] To satisfy this prong, "a defendant must establish that the suppressed evidence was material." *Mordenti*, 894 So. 2d at 170. "Evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* (citation omitted). The United States Supreme Court has defined 'reasonable probability' as "a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)); *United States v. Bagley*, 473 U.S. 667, 682 (1985). "In determining whether prejudice has ensued, this Court must analyze the impeachment value of the undisclosed evidence." *Mordenti*, 894 So.

[14] As noted, the prejudice to Parker described here would also apply were the Court to determine that Lamos was ineffective in his failure to discover and use the full terms of the witness agreement to impeach Johnson, as discussed in Issue IV. *See Mordenti*, 894 So. 2d at 170 (describing the definition of "material" under *Brady* as identical to the definition of "material" under *Strickland*).

2d at 170-71 (confidence in the outcome of defendant's trial was undermined because evidence that would have helped impeach a "pivotal and weighty witness for the State" was withheld); *Cardona v. State*, 826 So. 2d 968, 979, 982 (Fla. 2002) (withheld evidence that would have helped the defendant impeach a "critical witness" undermined the court's confidence in the verdict). Here, Johnson was a crucial witness for the State. (*See* the prosecution's closing argument, OR33/2691) ("Terry Wayne Johnson's testimony obviously was very important to the State in this case.") Johnson was the only witness who provided testimony as to who had the gun at what points during the night (OR28/1916-17, 25), and as to the victim's demeanor during the car ride. (OR28/1920.) At the resentencing trial, in direct contradiction of his own 1989 affidavit, *Compare* OR28/1925 *with* OR32/2511, Johnson provided the most damaging evidence against Parker when he testified that Parker got out of the car and told Cave to hand him the gun in the moments just prior to the shooting.

This Court has previously found that, where undisclosed evidence would undermine the rationale for a court's finding of aggravators, the evidence was material as to sentencing. *See Young*, 739 So. 2d at 560-61. In finding the presence of the cold, calculated, and premeditated ("CCP") and "avoiding arrest" aggravators, the resentencing court expressly relied on Johnson's testimony. *See Parker VI*, 873 So. 2d at 288-89. As this Court noted in affirming the resentencing

court's judgment with respect to these aggravators, that court expressly found that Parker "asked for the gun" and then shot the victim. *Id*. at 289. By tying Parker to the gun moments before the shooting, Johnson's testimony provided a basis for the trial court to conclude that Parker was the shooter. The identity of the shooter is critical to both the judge and the jury in determining whether to impose a death sentence. *See Garcia v. State*, 622 So. 2d 1325, 1331 (Fla. 1993); *Hawkins v. State*, 436 So. 2d 44 (Fla. 1983). Both courts also relied on Johnson's testimony in finding the HAC aggravator. *See Parker VI*, 873 So. 2d at 286-88. In fact, this Court cited Johnson's testimony regarding Parker's request for the gun four separate times, including in finding that the sentence was proportional. *Id.* at 288-89, 292.

Had the complete terms of the state's agreement with Johnson been disclosed, Lamos would have been able to impeach Johnson on his statements regarding Parker's request for the gun by showing that Johnson had a clear motive to disclaim his statement in his 1989 affidavit that Bush, not Parker, had the gun. (R10/1406-07.) The content of the state's disclosure notice, however, allowed Lamos to impeach Johnson solely based on a vague "motive to please" the State. (*See* Lamos' closing, OR33/2769.) Without knowledge of Johnson's agreement, Lamos was unable to provide the jury with any reason why Johnson would contradict his 1989 affidavit, allowing jurors to wrongly infer, based on the

prosecutor's misstatement in court that the agreement with Johnson only required that he testify "truthfully," that Johnson's in-court testimony *was* truthful.[15] Armed with this information, Lamos could have destroyed Johnson's credibility by demonstrating Johnson's strong motive to lie.[16] The import of this evidence in connection with the impeachment of a critical witness and the finding of the statutory aggravators is clearly "'sufficient to undermine confidence'" in Parker's death sentence. *See Mordenti*, 894 So. 2d at 170. (citation omitted).

Issue VI: Did the Trial Court Err in Limiting Anderson's Expert Testimony?

Parker relies upon his argument as set forth at IB 71-3.

CONCLUSION

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[15] The state's misstatement at trial regarding the content of Johnson agreement also constitutes a violation of *Giglio v. United States*, 405 U.S. 150 (1972). "Under *Giglio*, where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Mordenti*, 894 So. 2d at 175. (citation omitted). The combined effect of the *Brady* violation "coupled with misrepresentations by the prosecutor" creates an additional likelihood that absent these violations, the jury would not have recommended a sentence of death. *See id.*

[16] The state suggests that the fact that Lamos used the disclosure notice to impeach Johnson at the resentencing somehow shows that the terms of Johnson's actual agreement are not material. (AB 60.) This Court has rejected this exact argument where the withheld evidence introduces a new source of potential bias. *See Cardona*, 826 So. 2d at 981 ("The trial court concluded that the third prong of *Brady* was not met because Cardona was 'sufficiently impeached.' However, as discussed above, the availability of [withheld evidence] would have provided additional valuable impeachment of [the witness]").

Parker urges the Court to reverse the June 19, 2008 final order of the circuit court (R8/1099-1124) that denied him post conviction relief from his sentences, including a death sentence, vacate and set aside those sentences, grant Parker a new trial and grant him 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 reply brief of appellant has been furnished to this 9th day of March, 2010, by U. S. mail and email delivery:

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CERTIFICATE OF COMPLIANCE WITH FONT SIZE

I certify that this reply brief was prepared using a Times New Roman font, 14 point, not proportionally spaced, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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