IN THE SUPREME COURT OF FLORIDA

JUAN ROBERTO MELENDEZ,

Appellant,

v. Case No. 75,081

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CANDANCE M. SUNDERLAND
Assistant Attorney General
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

OF COUNSEL FOR APPELLEE

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ISSUE II

Since the record itself did not support the defendant's Brady allegations, it was within the trial court's discretion to summarily deny the claim. Appellant has failed to show an abuse of that discretion.

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Appellant's motion was properly denied as he failed to show that counsel's performance during the guilt phase was deficient or that said deficiency prejudiced the outcome of the proceeding.

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These claims are all procedurally barred as they could or should have been or were raised on direct appeal.

ARGUMENT

ISSUE I

WHETHER THE RULE 3.850 COURT'S SUMMARY DENIAL OF MR. MELENDEZ' MOTION TO VACATE WITHOUT AN EVIDENTIARY HEARING WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

Under Florida law, the trial court should grant an evidentiary hearing only where one is warranted. Jones v. State, 446 So.2d 1059 (Fla. 1984). It is the movant's burden to show his entitlement to a hearing; it must be considered whether the movant would be entitled to relief if the allegations are true. Ramsey v. State, 408 So.2d 675 (Fla. 4th DCA 1981) and Johnson v. State, 362 So.2d 465 (Fla. 2nd DCA 1978). However, if the motion and the files in the record of the case conclusively show the defendant is entitled to no relief, then the motion can be denied without a hearing. Accord, *Rule 3.850, Fla. R. Crim.* P.; Porter v. State, 478 So.2d 33 (Fla. 1985); Middleton v. State, 465 So.2d 1218 (Fla. 1985).

Melendez failed to carry his burden to show that an evidentiary hearing was warranted. As the records in the instant case conclusively show that Melendez was not entitled to relief, the trial court correctly denied the motion without an evidentiary hearing.

ISSUE II

WHETHER THE STATE'S INTENTIONAL WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE AND ITS RELIANCE UPON FALSE EVIDENCE DEPRIVED MR. MELENDEZ OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Appellant next presents a claim under Brady v. Maryland, 373 U.S. 83 (1963). To establish a Brady violation a defendant must establish the following:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So.2d 170 (Fla. 1991), quoting, United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989).

Further, it should be noted that the purpose of the Brady rule is not to displace the adversary system as the primary means of uncovering the truth; rather, the paramount goal is to guard against miscarriages of justice. Therefore, unless the prosecutor's omission deprives the defendant of a fair trial, there is no constitutional violation requiring the verdict to be set aside. Consequently, the United States Supreme Court has deemed it appropriate to apply the harmless error rule adopted in Chapman to Brady violations, thereby preventing the automatic reversal of convictions where the discovery violation was

harmless beyond a reasonable doubt. Smith v. State, 500 So.2d 125 (Fla. 1986).

The defendant was afforded a fair trial. No material evidence was withheld from the defendant. The state further asserts however, that even if the evidence alleged by Melendez as having been withheld was withheld, Melendez has still failed to meet his burden of showing that there exists a reasonable probability that the outcome of the proceeding would have been different. Accordingly, error if any, was harmless.

Appellant specifically alleged the following information was not provided to him in violation of Brady. Comparing what defense counsel alleges was available to what was actually presented, will make it clear that all items mentioned in the Rule 3.850 motion either were made known to the jury, would have been inadmissible, or were legally immaterial.

1) Falcon was involved in criminal activity in the past.

Current counsel presented documents to the court below, reflecting witness David Luna Falcon had been convicted of certain crimes in the past, had used drugs in the past, and had been treated for mental illness in the past. It is alleged that the state is guilty of a Brady violation for not disclosing this information to defense counsel so that it could be used for impeachment.

The state agrees it is required to provide Brady material to the defense but the state has no obligation to "scour the countryside (and in this case, go outside the United States),"

delving into the backgrounds of all its witnesses in an attempt to come up with something that may be Brady material. The law is clear that the State does not have a duty to actively assist the defense in investigating a case, Hansbrough v. State, 509 So.2d 1081 (Fla. 1987). Further, as this Court noted in Spaziano:

> We emphasize that the prosecution is not required to "make a complete and detailed accounting to the defense of all police investigatory work on a case." *Spaziano v. State*, 570 So.2d 289 (Fla. 1990), *quoting*, ***Moore v.*** *Illinois*, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706, 713 (1972).

"There is no Brady violation where alleged exculpatory evidence is equally accessible ta the defense and prosecution." Roberts v. State, 568 So.2d 1255 (Fla. 1990), citinq James v. State, 453 So.2d 786, 790 (Fla. 1984).

Even if the state did have a duty to find and furnish this information to the defendant, Melendez has still failed to establish that the failure to furnish this evidence prejudiced the outcome of the proceeding. The United States Supreme Court in United States v. Bagley, 105 S.Ct. 3375 (1985) has held that the evidence must be material; that is, there must be a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. The court defined "reasonable probability'' as a ,probability sufficient to undermine confidence in the outcome, As the court below found:

> The defendant's other assertion is that evidence was withheld which pertained to the impeachment of David Luna Falcon, the main

> state witness. The defense cross-examination of Falcon revealed that he was a drug user, had been convicted of homicide, worked closely with the police, and was paid for information. Any further evidence is either non-material, cumulative or simply speculative. (PCR. 811)[1]

The nature and facts of the witness' prior arrests, drug history, or mental history are generally inadmissible. Accordingly, even if the state did have a general duty to find and disclose such information relevant to all potential witnesses, the evidence in the instant case was not material or relevant as it would have been inadmissible at trial. Cf. Combs supra. (no prejudice where evidence defendant claims should have been obtained was inadmissible).

Further, to the extent this evidence was admissible, it was known by counsel and presented to the jury. Falcon testified he was convicted of crimes twice previously, had used drugs, and had been convicted of murder in the past. The jury was therefore well aware of the criminal past of the witness. In fact, the testimony went beyond what is normally allowed in criminal trial, i.e. "Have you ever been convicted of a crime and, if so how many times?" It is also clear that Mr. Alcott was aware of Falcon's criminal past since he asked Gary Glisson about it. (R 535, 561 - 563) It also appears Mr. Alcott had a printout of Falcon's criminal history. (R 535)

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[1] The record from Melendez' direct appeal is designated as (R.), followed by the appropriate page number. The record from the post-conviction hearing will be designated as (PCR.)

2) Falcon was treated for mental illness in 1976 or 1977.

This did not come out during the trial but it would have been inadmissible unless there was some evidence presented that would cause this fact to be relevant to Falcon's testimony. A review of the transcript reveals nothing to which this evidence would be relevant. It is therefore stale, irrelevant, and also of questionable validity (the reports also indicate Falcon possessed average intelligence, average perception, average memory, is adequately oriented and suggests no evidence of brain damage). To say that there is a reasonable probability that the verdict in the trial would have been "Not Guilty" if the jury had known of Falcon's treatment for mental illness in 1976 would be overreaching beyond all reasonable bounds. There is absolutely no evidence that Falcon was suffering from any mental illness in 1983 and defendant does not allege that he was. Without that connection, his status in 1976 becomes irrelevant.

3) Failure to correct the testimony of Detective Glisson.

In support of this claim, counsel provides an affidavit from Mr. James Reagan. Detective Glisson testified about the "Reagan incident'' during the trial. Defendant is apparently alleging that Det. Glisson lied, the state knew it, and failed to correct the lie. This is utterly baseless for a number of reasons:

1. Det. Glisson was called as a witness for the defense -- not a state witness.

2. Det. Glisson's testimony is consistent with the police report filed about the Reagan incident.

> The fact that Mr. Reagan signs an affidavit five (5) years later saying he was suspicious of the relationship between Det. Glisson and Falcon and claiming he was coerced into signing a waiver of prosecution does not support an allegation that the state was a party to perjury.
>
> 3. These is basically no difference between what Det. Glisson testified about and what is in Mr. Reagan's current affidavit, Det. Glisson never testified that Falcon was on "official business" when he fired some shots at the Reagan car. He only testified that Falcon was at the time working for him as a drug informant. There was therefore nothing for the state to correct.

Essentially, Melendez is claiming that the state knew Det. Glisson was lying and sat back and allowed the lying to continue. A review of Det. Glisson's testimony and the police report of the incident clearly refutes this suggestion. The state did not present Det. Glisson's testimony and, in fact, objected to the admission of the testimony. The defense insisted on putting it on anyway. It is hard to fathom how the state is guilty of misconduct under those circumstances.

4) The failure to disclose "deals" with Falcon

There were no facts alleged in the Rule 3.850 pleadings that even if true would support the allegation. Again, the burden is on the defendant to establish a basis for an alleged Brady violation. The claim presented herein is nothing more than pure guesswork and speculation. Defendant presented absolutely no

factual support for this claim. Accordingly, it was within the trial court's discretion to summarily deny this portion of the claim. See, Kight v. Dugger, 574 So.2d 1066 (Fla. 1990).

5) Improper bolstering of known unreliable testimony

The last allegation in this group states that Det. Glisson and Agent Roper testified so as to bolster Falcon's credibility when they knew he was not reliable. Det. Glisson and Agent Roper testified to their knowledge of the case. Melendez failed to present any support for the suggestion that this testimony was false. Consistent testimony will in general bolster the credibility of witnesses. That is uniquely a jury function to decide. It is not improper for the state to present more than one witness to establish its case and it certainly does not rise to the level of a Brady violation.

Defense counsel also claims Agent Roper disassociated himself from Det. Glisson and Falcon at some point in time but never told defense counsel or explained his reasoning on the witness stand. A short answer to this is that he was never asked. Any response he would have given would not have been admissible at the trial anyway. The answer to why FDLE later got out of the case is certainly not "material" in the legal sense as contemplated by the Bagley decision. The allegation does not even qualify as a Brady violation because it is not exculpatory as to the defendant.

To summarize, David Luna Falcon's prior criminal history was not withheld from defense counsel. The trial transcript

affirmatively shows Mr. Alcott was aware of the prior record and questioned both Falcon and Det. Glisson about it. Falcon's 1976 diagnosis of mental illness, while not introduced at trial, would have been inadmissible and thus immaterial under Bagley. The current pleadings do not allege or show Falcon was suffering from any mental illness in 1983 and without such proof, his status in 1976 is irrelevant.

The motion was therefore insufficient to justify any relief and it was within the trial court's discretion to summarily deny the motion. There is no reasonable probability the result of the trial would have been different if defense counsel had been aware of this information and there is absolutely no evidence the state was a party to perjury. It is easy to allege that a witness lied **and** ultimately the jury decides such factual issues, but where there is no support for the claim that the state knew perjury was occurring and let it continue, it is within the court's discretion to summarily deny the motion for post-conviction relief. Mr. Reagan's affidavit may show a conflict with something that Det. Glisson implied in his testimony, but it certainly doesn't show knowledge on the part of the state that a witness is lying. **The** motion itself is utterly silent as to knowledge on the part of the state that a witness is lying. Without such evidence the motion is insufficient to justify relief.

The last Brady violation alleges possible deals with David Falcon which were not disclosed. Again, the defendant failed to

allege sufficient facts to support this claim. Melendez quoted from affidavits of two (2) witnesses, but those witnesses testified at trial and said nothing about any "deals". There is nothing in the pleadings to support the claim that such hidden "deals" existed. This claim is based solely on innuendo and speculation and is totally insufficient to make out a Brady violation.

Since the record itself did not support the defendant's Brady allegations, it was within the trial court's discretion to summarily deny the claim. Appellant has failed to show an abuse of that discretion.

ISSUE III

WHETHER JUAN MELENDEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

As our courts have consistently pointed out since 1984, claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 89 L.Ed.2d **674 (1984).** A defendant who asserts ineffective assistance of counsel faces a heavy burden. First, he must identify the specific omissions and show that counsel's performance falls outside the wide range of reasonable, professional assistance. Second, the defendant must show that the inadequate performance actually had an adverse effect so severe that there is a reasonable probability that the results of the proceeding would have been different but for the inadequate performance. Blanco v. Wainwright, 507 So.2d **1377,** 1381 (Fla. **1987).**

In Strickland v. Washington, supra., the United States Supreme Court held with regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is one that undermines confidence in the outcome. There is no reasonable probability that, but for counsel's allegedly unprofessional errors, the result of the proceeding would have been different. See, also,

Harris v. Dugger, 874 F.2d 756, 761 (11th Cir.) (if the failure to investigate did not deprive the appellant of beneficial evidence, there may be inadequate assistance, but no prejudice and thus no constitutional deprivation); Lambrix v. State, 534 So.2d 1151, 1154 (Fla. 1988) (counsel's failure to investigate did not prejudice defendant 'where there was no reasanable probability that outcome would have been different) Cave v. State, 529 So.2d 293, 296 (Fla. 1983) (even if counsel's performance was inadequate, there is no reasonable probability that the performance contributed to the conviction). Combs v. State, 525 So.2d 853 (Fla. 1988) (counsel not ineffective for failing to investigate where most of evidence defendant claims should have been discovered would have been inadmissible).

Appellant argues that his attorney was ineffective because he failed to properly cross-examine two of the state's key witnesses: John Berrien and David Luna Falcon. Appellant asserts Berrien made several inconsistent statements during questioning prior to trial; however, few were used to impeach him. Yet defense counsel did impeach Berrien revealing the fact that he was a convicted felon and revealing the fact that he had falsified information included on his Workman's Compensation insurance. That the state reduced charges from first-degree-murder to accessory-after-the-fact was also brought out during questioning by the defendant's attorney. As the court bellow found, the strategic choices of an attorney after thorough investigation of the law and facts are virtually unchallengeable.

Downs v. State, 453 So.2d 1102 (Fla. 1984). The record reflects that the attorney knew about the prior inconsistent statements, and his utilization of these facts is a reasonable tactical decision. (PCR. 811)

As previously stated, the defense attorney in his impeachment of David Luna Falcon brought out the fact that Falcon was a drug user, had been convicted of homicide, and was a paid informant for the police. Further, the defense presented eight witnesses, including a police officer, who refuted various parts of Falcon's testimony. (Included among the eight witnesses is the testimony of the defendant and of James Reagan, whose testimony was given by stipulation.) The additional evidence the defense claims is should have been presented is either cumulative or speculative. With regard to the various deficiencies in cross-examination of witnesses, the law in this area is clear. As stated by the United States Supreme Court in Delaware v. Van Arsdell, 106 S.Ct. 1431 (1986), " . . . the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. Delaware v. Fensterer, 474 U.S. 15 (1985) (per curiam). This Court has also consistently stated that claims of failure to properly cross-examine witnesses are generally matters within the judgment and strategy of trial counsel. Wright v. State, 16 FLW S311 (Fla.1991); Engle v. Dugger, 576 So.2d 696 (Fla. 1991); Medina v. State, 573 So.2d 293 (Fla. 1990); Kight v. Dugger, 574 So.2d 1066 (Fla. 1990).

Collateral counsel also claims that Mr. Alcott's cross-examination of John Berrian was deficient. The trial record reflects Mr. Alcott did impeach John Berrian. The complaint seems to be that he did not do a good enough job. Strickland warns against the use of 20-20 hindsight. The record shows that counsel effectively cross-examined the witness, even if it was not how collateral counsel would have done it.

Mr. Alcott was well aware of Mr. Berrian's prior inconsistent statements. It is purely a tactical decision as to whether, or to what extent, to use prior inconsistent statements for impeachment. Kight, supra. This is not the serious and substantial deficiency contemplated by the Court in Strickland. Further, even if counsel's performance was deficient, Melendez has failed to show that the alleged deficiency actually prejudiced him, i.e., that it undermines confidence in the outcome of the proceedings.

Appellant also alleges counsel failed to present the complete testimony of Dorothy Rivera. This allegation was properly rejected for three (3) seasons:

> (a) Dorothy Rivera is completely biased in favor of Juan Melendez, She was his lover at the time of the murder and attempted to give him an alibi. Her trial testimony will reflect her efforts to discredit David Luna Falcon. Obviously the jury did not believe her. She now comes forward and claims to have additional evidence that will further discredit Falcon which was not presented at trial. Her motives are certainly suspect.

(b) The few additional details Ms. Rivera adds in her affidavit are cumulative to what she said at trial.

Again, even if counsel's performance was deficient, Melendez has failed to make the requisite showing of prejudice under Strickland. The jury obviously did not believe Rivera's testimony at trial when she gave Melendez an alibi and said Falcon was lying. The addition of the few facts counsel now alleges should have been presented does not make her testimony any more credible.

This same analysis would apply to Ruby Colon's testimony. Ruby Colon also testified at the trial. The additional details she now adds in her affidavit are merely cumulative to her trial testimony.

Appellant also questions defense counsel's failure to subpoena the Reagans to testify. As Appellant states, the Reagans testimony was presented to the jury by way of stipulation after the court denied a motion for mistrial because the Reagans had failed to appear. As this Court noted upon its initial review of this issue:

> Appellant next contends that the trial court erred in denying the motion for mistrial when two non-subpoenaed witnesses failed to appear to testify. Defense counsel sought to introduce testimony of Falcon's forcing his way into the Reagan's home, threatening to kill Mr. Reagan, and shooting into the Reagan vehicle several times. Appellant argues that the Reagan testimony would have hurt Flacon's credibility and might have caused the jury to believe he was the perpetrator. We cannot

> fault the trial court for refusing to declare a mistrial when non-subpoenaed witnesses failed to **appear.** Moreover, inasmuch as the prosecutor agreed to a stipulation **as** to what their testimony would be and the stipulation was read to the jury, appellant suffered no prejudice. We affirm on this point. Melendez v. State, 498 So.2d 1258 **(Fla. 1986)**

As this Court previously found Melendez was not prejudiced by the failure to present the live testimony of the Reagans, the prejudice prong of ineffective assistance standard also fails.

The trial court correctly denied the claim of ineffective assistance of counsel as Melendez failed to allege sufficient facts to show deficiency or prejudice under the test set forth in Strickland.

ISSUE IV

WHETHER JUAN MELENDEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A review of the trial record also belies this claim. Mr. Melendez well knew that by not presenting mitigating evidence and asking for the death penalty he was giving up much hope for a life sentence. The record also reflects his reasons for this decision -- a belief he would receive more publicity for his cause, a speedy appeal, and a belief that his case would be given greater scrutiny if he was appealing from a death penalty than if he was appealing from a life sentence. Mr. Melendez was correct.

The old phrase "the proof is in the pudding" is applicable here. If the defendant had received a life sentence he would have appealed to the Second District Court of Appeals and, assuming the conviction was affirmed as it was by this Court, that would have been the end of the matter. Barring a "jailhouse prepared" motion for post conviction relief, Mr. Melendez would be sitting in state prison with a life sentence containing a minimum mandatory of twenty-five (25) years. Conversely, by demanding his attorney present no mitigating evidence and asking for the death penalty, Mr. Melendez was gambling that he would receive a death sentence which would assure him of an automatic review by this Court and competent representation on a post conviction relief motion. Melendez has received exactly what he bargained for; review by this Court and the considerable

resources of the Office of the Capital Collateral Representative. Rather than a pro se motion, he received a very comprehensive, detailed, and thoroughly investigated 'airing' of the entire process. This was an informed and reasoned decision on his part. Melendez did not want a life sentence, he wanted an acquittal. Now, after obtaining the judicial review he wanted, he apparently is willing to settle for a life sentence.

Melendez attempts to capitalize on this plan further by claiming he was somehow denied his right to a penalty phase. This is incorrect. Despite Melendez' desire to receive the death penalty, the trial judge refused to waive the penalty phase. (R.768-775) The state presented evidence, the defendant elected to take the stand and make a statement, arguments were made to the jury, the jury was instructed on the law, and the jury returned their recommendation. Thus, despite Melendez' intent to get the death penalty, there was no waiver of the penalty phase.

Melendez relies on Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988) as authority for his position that he was erroneously deprived of a meaningful sentencing hearing. Osborn is readily distinguishable from the instant case. After Osborn pled guilty and apparently asked for the death penalty, he changed his mind. A motion was filed to withdraw the plea and rescind his request for the death penalty. The motion to withdraw the plea was denied but the motion to rescind the request for the death penalty was granted. Thereafter, an adversarial sentencing trial was held where the court received evidence in aggravation and

mitigation. Osborn was ultimately sentenced to death. The federal district court granted relief. It held, among other things, that trial counsel was ineffective in the penalty phase since he was not prepared. Trial counsel apparently testified that his strategy was to talk the prosecutor out of seeking the death penalty. When this failed he was left unprepared to conduct the sentencing proceeding. The federal court also based its decision partly on the fact that trial counsel had violated his duty of loyalty to his client based upon certain statements he made to the press.

Those facts in Osborn are totally different from the instant case. Osborn involved a penalty phase for a defendant who was fighting against the death penalty and an attorney who was held to be ineffective because he had not prepared. Melendez involved a penalty phase for a defendant who was asking for the death penalty and an attorney who was forced into not presenting evidence due to his client's desires. Our record also reflects that Mr. Alcott and Mr. Melendez both agreed that this was being done against Mr. Alcott's advice, contrary to the Osborn case where that defense attorney apparently abandoned his client.

In Aldredge v. State, 503 So.2d 1257 (Fla. 1987) one of the allegations made by Aldredge in his 3.850 motion was that the judge and jury did not consider nonstatutory mitigating circumstances. This Honorable Court rejected this argument by quoting from the trial record wherein defense counsel told the jury he was presenting no mitigating circumstances because his

client had requested that none be presented due to his desire to receive the death penalty.

Also, in Autsy v. McKaskle, 727 F.2d 358 (5th Cir. 1984), the defendant directed his lawyers to put on no mitigating evidence during the penalty phase and then got on the witness stand and told the jury he wanted the death penalty. The court stated that defense counsel cannot be ineffective in such a situation:

> " . . . It follows that at least the first wing of Autry's claim of ineffective assistance of counsel must fail. . . . by no measure can Autry block his lawyer's efforts and later claim the resulting performance was constitutionally deficient."
>
> * * *
>
> "If Autry knowingly made the choices, Carver was ethically bound to follow his wishes."

Appellant also contends his counsel was ineffective for failing to present mitigating evidence. Collateral counsel alleges that various items of mitigating evidence were available and should have been presented. The short answer to this is that defense counsel cannot be ineffective for following his client's desire that no mitigating evidence be presented. As discussed above, the Court and his attorney advised the defendant of the possible consequences of his decision not to present mitigating evidence. Therefore, the attorney's actions were not deficient in that he was acting as the defendant requested after fully advising the defendant against this course of action. See, Autry, supra.

Appellant also alleges that counsel was ineffective for failing to obtain a mental health expert to evaluate competency or to determine mitigation. This claim fails both prongs of the Strickland test. A mental health examination is not mandatory in every capital case. Bertolotti v. State, 534 So.2d 386 (Fla. 1988) Where, as here, there was nothing to indicate mental health issues, counsel in not ineffective for failing to obtain such an evaluation. Christopher v. State, 416 So.2d 450 (Fla. 1982)

And, even if counsel should have obtained such experts, the reports by the experts subsequently obtained by collateral counsel show that there are no mental health issues of any consequence. Further, as Melendez refused to allow evidence in mitigation to be presented, the only relevant question was Melendez' competence. Neither trial counsel nor the court are required to inquire into a defendant's competency unless there is something in the record to make it appear reasonably necessary. Christopher, supra. There is nothing in the record to indicate that Melendez' competency was questionable and none of the recently obtained experts have asserted that Melendez was incompetent to stand trial, or to make the necessary decisions regarding his representation. Accordingly, as Melendez failed to show deficiency or prejudice, the trial court did not err in denying this claim.

ISSUE V

WHETHER JUAN MELENDEZ' CONVICTION AND DEATH SENTENCE ARE UNCONSTITUTIONALLY DISPROPORTIONATE AND IN DISPARITY WITH THE TREATMENT OF HIS ACCOMPLICE, IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This claim is procedurally barred as it is a claim which could or should have been raised on direct appeal. See Waterhouse v. Dugger, 564 So.2d 1074 (Fla. 1990); Christopher v. State, 416 So.2d 450 (Fla. 1982); see also Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984).

ISSUE VI

MR. MELENDEZ' DEATH SENTENCE MUST BE VACATED BECAUSE THE COURT FAILED TO PROVIDE A FACTUAL BASIS IN SUPPORT OF THE PENALTY.

This claim is procedurally barred as it is a claim which could or should have been raised on direct appeal. In Squires v. State, 546 So.2d (Fla. 1990), this Court rejected a similar claim, stating:

> "This claim is predicated upon the fact that the Court's written sentence with factual findings was not filed until eleven days after Squires was orally sentenced to death. This issue is procedurally barred because it was not raised on direct appeal. Even if the argument had been made, it would not have been successful, See Muehleman v. State, 503 So.2d 310 (Fla.) (death sentence sustained when written order followed jury's recommendation by two-and-one-half months), cert. denied, 484 U.S. 882 (1987). It was not until Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, 109 S.Ct. 1354 (1989), that this Court established its prospective rule that all written orders imposing a death sentence should be filed concurrent with the pronouncement of death."

Accordingly, the trial court did not error in summarily denying the instant claim.

ISSUE VII

WHETHER MR. MELENDEZ' SENTENCE OF DEATH, RESTING ON THE "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE JURY INSTRUCTIONS REGARDING THIS AGGRAVATING CIRCUMSTANCE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

This claim was raised on direct appeal. This Court found that it was procedurally barred, as the instruction was not objected to below. Issues that could have been, should have been, or were raised on direct appeal are not cognizable on Rule 3.850 motions. Waterhouse v. Dugger, 564 So.2d 1074 (Fla. 1990); Christopher v. State, 416 So.2d 450 (Fla. 1982 ; *see* also Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). **Accordingly,** this claim was properly denied.

ISSUE VIII

WHETHER THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. MELENDEZ' CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This claim is procedurally barred as it is a claim which could or should have been and, in fact, was raised on direct appeal. See Waterhouse v. Dugger, 564 So.2d 1074 (Fla. 1990); Christopher v. State, 416 So.2d 450 (Fla. 1982); see also Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984).

ISSUE IX

WHETHER MR. MELENDEZ' SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S.CT. 2633 (1985) AND MA" V. DUGGER, 844 F.2D 1446 (11TH CIR. 1988), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. MELENDEZ RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE.

This claim is procedurally barred as it is a claim which could or should have been raised on direct appeal. *See* Waterhouse v. Dugger, 564 So.2d 1074 (Fla. 1990); Christopher v. State, 416 So.2d 450 (Fla. 1982); see also Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984).

ISSUE X

WHETHER THE SHIFTING OF THE BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT THE SENTENCING DEPRIVED MR. MELENDEZ OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

This claim is procedurally barred a5 it is a claim which could or should have been raised on direct appeal. See Waterhouse v. Dugger, 564 So.2d 1074 (Ela. 1990); Jones v. Duqqer, 533 So.2d 290, 293 (Fla. 1988); Christopher v. State, 416 So.2d 450 (Fla. 1982); see also Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984).

ISSUE XI

WHETHER MR. MELENDEZ' DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF MAYNARD V. CARTWRIGHT, LOWENFIELD V. PHELPS, HITCHCOCK V. DUGGER, AND THE EIGHTH AMENDMENT.

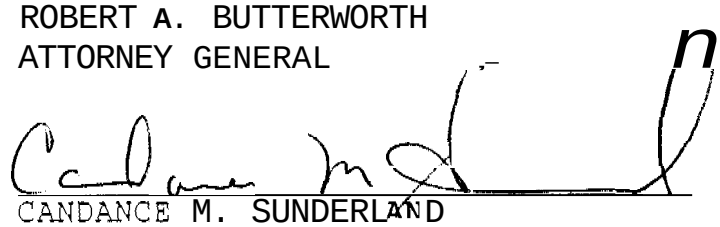
This claim is procedurally barred as it is a claim which could or should have been raised on direct appeal. See Wateshouse v. Duqqer, 564 So.2d 1074 (Fla. 1990); Bertolotti v. State, 534 So.2d 386 (Fla. 1988); Christopher v. State, 416 So.2d 450 (Fla. 1982); see also Palmes v. Wainwriqht, 460 So.2d 362 (Fla. 1984).

CONCLUSION

Based on the foregoing arguments and citations to authority, appellee respectfully urges this Court to affirm the summary denial of Appellant's Motion for Post-conviction relief.

Respectfully submitted,

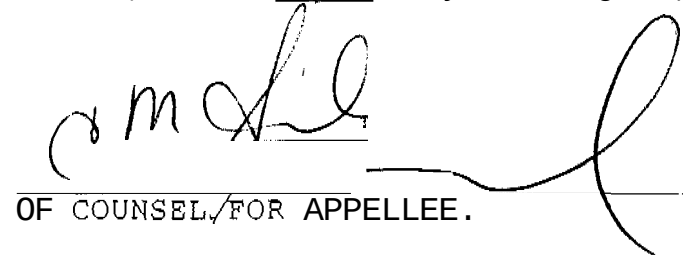
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



CANDANCE M. SUNDERLAND
Assistant Attorney General
Florida Bar ID#: 0445071
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 1 day of August, 1991.



OF COUNSEL FOR APPELLEE.