IN THE SUPREME COURT OF FLORIDA
CASE NO. 75,081

JUAN ROBERTO MELENDEZ,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Melendez's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

Citations in this brief shall be as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "R.___" followed by the appropriate page number. The exhibits attached to the Rule 3.850 motion shall be referred to as "(Ex. ___)," with the appropriate exhibit number indicated. The Appendix to the Supplement to Motion to Vacate Judgment and Sentence shall be referred to as "(App. ___)," with the appropriate appendix number indicated. The record on appeal of the denial of the Rule 3.850 motion shall be referred to as "(PC-R. ___)," with the appropriate page number indicated. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Melendez has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Melendez through counsel accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

Mr. Melendez was named as a co-defendant with John Arthur Berrien in an indictment in Polk County, Florida, charged with one count each of first degree murder and robbery. Mr. Melendez entered pleas of not guilty.

Trial commenced on September 17, 1984. On September 20, 1984, the jury found Mr. Melendez guilty of first degree murder and robbery. The penalty phase was conducted on September 21, 1984. The sentencing jury returned an advisory sentence of death by a vote of 9-3. Immediately thereafter, the Court imposed a sentence of death. Written findings supporting the death sentence were entered on October 3, 1984. Mr. Melendez unsuccessfully took a direct appeal from the conviction and the death sentence. Melendez v. State, 498 So. 2d 1258 (Fla. 1986).

On January 16, 1989, Mr. Melendez filed a Rule 3.850 motion in the circuit court, and on April 21, 1989, he filed a supplement to the Rule 3.850 motion. The State filed its Response on May 15, 1989. On July 17, 1989, the circuit court denied relief without permitting an evidentiary hearing. Notice of appeal was timely filed, and this appeal follows. The facts related to Mr. Melendez's claims for relief are extensive and will be discussed in the Argument section of this brief.

SUMMARY OF ARGUMENT

1. The trial court erred in summarily denying Mr. Melendez's Rule 3.850 motion without conducting an evidentiary hearing. Mr. Melendez's Rule 3.850 motion presented claims which have been recognized as claims requiring evidentiary resolution -- such as claims involving ineffective assistance of trial counsel and violations of Brady v. Maryland -- and provided specific factual proffers in support of those claims. The allegations contained in the Rule 3.850 motion, if proven, establish Mr. Melendez's entitlement to relief. Under this Court's case law, an evidentiary hearing was required on the Rule

3.850 motion because the files and records do not conclusively refute Mr. Melendez's allegations.

2. The State's case at trial hinged upon the testimony of David Luna Falcon, who testified that Mr. Melendez had admitted committing the offense. At trial, Falcon testified that he had previously been an undercover agent in Puerto Rico and that he was in Puerto Rico at the time of the offense. Falcon also testified that he was paid for information by the F.D.L.E. and police, but he could not remember how much, In reality, Falcon was not an undercover agent but had recently been released from prison for a Puerto Rico murder after testifying against co-defendants in a New Jersey multiple murder, and was in New York, not Puerto Rico, at the time of the offense. In reality, the F.D.L.E. had disassociated itself from Falcon .. not paid him for information as he testified .. and police had paid him $5000 for his testimony in Mr. Melendez's case .. not a sum so insignificant that he would not be able to remember it. The State knew or should have known the information about Falcon's background and motives, but did not disclose this information to the defense. Rather, the State affirmatively used Falcon's falsehoods to enhance his credibility and to urge that he was believable, and never once corrected those falsehoods. Falcon's credibility was crucial to the State's case. Had the information about his background and motives been revealed, there is more than a reasonable probability that the outcome of trial would have been different; had Falcon's falsehoods been corrected, there is every reasonable likelihood that this relevation would have affected the verdict. An evidentiary hearing and relief are required.

3. Mr. Melendez was deprived of the effective assistance of counsel at the guilt phase of trial. Substantial evidence was available to impeach the testimony of the State's two key witnesses, without whom the State would have had no case against Mr. Melendez. This evidence was not presented to the jury

because of counsel's neglect. Witness John Berrien testified that he had driven Mr. Malendez and George Berrien to the victim's shop in early September, 1983. However, Berrien had given three prior statements to police which were sharply inconsistent with his trial testimony. The jury never heard about these statements. In deposition, Berrien had testified that most of what he told the police was false. The jury never heard about the deposition. Trial counsel was similarly deficient in investigating and preparing for the testimony of David Luna Falcon. Before trial, Falcon had forcibly entered the home of the Reagan family, brandishing a gun, and had shot up the Reagan's car and yard, but he was never charged in this incident. Trial counsel failed to take a simple step of issuing subpoenas for the Reagans, and thus the jury did not hear their vivid description of this incident and did not learn about the lengths to which a police detective went to protect Falcon and insure he was not charged in the incident. Other witnesses who were present at trial could have testified that Falcon was going to be paid $5000 for his testimony, that Falcon and the police detective were like "partners," and that Falcon had tried to get away so he would not have to testify, but that police were making him testify. This testimony was not presented only because of trial counsel's neglect. Trial counsel also failed to investigate Falcon's background, and thus the jury did not learn that Falcon was not truly an undercover agent, but a drug addicted, mentally ill criminal who would simply do anything to protect himself and serve his own ends. Impeachment of Berrien and Falcon would have created substantial doubts about their credibility. In light of the weakness of the State's case, the evidence which trial counsel failed to uncover and neglected to present creates more than a reasonable probability of a different outcome. An evidentiary hearing and relief are required.

4. Mr. Melendez was denied the effective assistance of counsel at the penalty phase of trial. Defense counsel failed to advise Mr. Melendez of the

consequences of not presenting mitigating evidence at the penalty phase. The record discussion of this "waiver" indicates that Mr. Melendez was confused about the process and about the possible results of his actions and that his decision was not knowingly and voluntarily made. Trial counsel also failed to investigate and prepare mitigating evidence, although much compelling mitigation was available, and thus could not competently advise Mr. Melendez regarding the penalty phase. Trial counsel was also deficient in other areas, including argument regarding the disparate treatment received by George Berrien and in failing to consult with a mental health expert. Had counsel performed properly, there is every reasonable probability of a different outcome. An evidentiary hearing and relief are proper.

5. Mr. Melendez's conviction and death sentence are unconstitutionally disproportionate and in disparity with the treatment received by his alleged accomplice. George Berrien, who the State argued at trial was "equally guilty" of the offense, was never even charged. Mr. Melendez's conviction and death sentence should be vacated.

6. The trial court failed to provide a factual basis in support of the death sentence. Immediately after the jury recommendation, the court sentenced Mr. Melendez to death without making any factual findings. A written order was not entered until almost three weeks later and did not make specific factual findings. Mr. Melendez's death sentence must be vacated.

7. The jury instructions regarding and trial court's assessment of the heinous, atrocious or cruel aggravating factor were inadequate under Maynard v. Cartwright.

8. The jury instructions regarding and trial court's assessment of the cold, calculated and premeditated aggravating factor were inadequate under Maynard v. Cartwright.

9. The jury's sense of responsibility for its sentencing decision was

improperly diminished under Caldwell v. Mississippi.

10. The jury was erroneously instructed that under Florida law Mr. Melendez bore the burden of proving a life sentence was warranted.

11. Mr. Melendez's death sentence rests upon an unconstitutional automatic aggravating circumstance.

ARGUMENT

INTRODUCTION

A number of the issues presented in Mr. Melendez's appeal involve interrelated facts. This introduction is presented in order to avoid repetition and provide an overview which is essential to an understanding of the case.

Juan Melendez is innocent of the offenses for which he was convicted and sentenced to death. During Mr. Melendez's direct appeal, Justice Barkett expressed the concern that this may be a case where "a review of the evidence in the record leaves one with the fear that an execution would perhaps be terminating the life of an innocent person." Melendez v. State, 498 So. 2d 1258, 1262 (Fla. 1986)(Barkett, J., concurring specially). The State's case at trial was extremely weak, and Mr. Melendez's conviction and death sentence rest solely on the testimony of two felons. Absolutely no physical evidence connected Mr. Melendez to the murder of Delbert Baker. In light of the weakness of the State's case at trial and the additional evidence presented in the Rule 3.850 motion, Mr. Melendez's conviction and death sentence represent a manifest miscarriage of justice and cannot be allowed to stand.[1]

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[1]On direct appeal, appellate counsel presented no argument regarding the sufficiency of the evidence to support Mr. Melendez's conviction and death sentence. (See Melendez v. State, No. 66-244, Initial Brief of Appellant). Despite this lack of argument, this Court was obviously troubled about the sufficiency of the evidence and examined the issue on its own. See Melendez v. State, 498 So. 2d 1258, 1260-61 (Fla. 1986); id. at 1262-63 (Barkett, J., concurring specially). Because of appellate counsel's failure to provide any advocacy on this and other significant issues, counsel for Mr. Melendez are currently preparing a petition for a writ of habeas corpus for this Court's review. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985).

The State's theory at trial was that Mr. Melendez, John Berrien. and George Berrien rode in John Berrien's car to the victim's hairdressing salon in the late afternoon of September 13, 1983. John Berrien dropped off Mr. Melendez and George Berrien and returned for them about two hours later. The State contended at trial that Mr. Melendez and George Berrien robbed and killed the victim, and then were driven home by John Berrien. According to the State's theory, George Berrien slit the victim's throat and Mr. Melendez shot the victim in the head. The next day, according to the State, John Berrien drove George Berrien and Mr. Melendez to the train station, where George Berrien boarded a train for Wilmington, Delaware. At the train station, Mr. Melendez purportedly handed George Berrien some jewelry and a gun which George Berrien was supposed to sell in Delaware.

This theory rested solely on the testimony of John Berrien and David Luna Falcon. The only physical evidence which tended to support the State's theory was an Amtrak record indicating that George Berrien had taken a train to Wilmington, Delaware, on September 14, 1983. No physical evidence connected Mr. Melendez to the victim's death or supported the State's theory regarding his participation in the offense.

On the basis of the State's highly suspect case, Mr. Melendez was convicted and sentenced to death. John Berrien pled nolo contendere to being an accessory after the fact and received two years' probation. George Berrien was never charged with any offense, although he testified at trial as a defense witness and thus was certainly available to the authorities, and although the State argued at trial that he was "equally guilty" and "equally involved . . . in committing the murder" (R. 786-87).

As stated, John Berrien and David Luna Falcon provided the only evidence tending to support the State's theory that Mr. Melendez participated in the offense. However, an examination of the trial testimony of John Berrien and

Falcon, and of information which was never presented at trial because of State misconduct and/or trial counsel's ineffectiveness demonstrates that Berrien's and Falcon's testimony lacked any credibility or reliability whatsoever.

A. John Berrien

1. Trial Testimony

At trial, John Berrien testified that he knew Juan Melendez because Mr. Melendez had once stayed at the home of John Berrien's father-in-law (R. 301), and that he was friends with Mr. Melendez (R. 303). One day, according to this testimony, Mr. Melendez asked John Berrien to take Mr. Melendez to the victim's shop in Auburndale so that Mr. Melendez could get his hair done and pick up some money (R. 305). This request was made at about 3:45 p.m. (R. 306), and at about 4:00 p.m., John Berrien left to take Mr. Melendez and George Berrien to Auburndale (R. 308). Mr. Melendez promised to pay John Berrien $7 for the transportation (R. 308). John Berrien did not remember what day this occurred (R. 307-08, 309), but thought it was around the time of his marriage, which was on September 2, 1983 (R. 309). He later testified that he thought he took Mr. Melendez and George Berrien to Auburndale before his marriage (R. 474). John Berrien did not see anyone with a gun (R. 310), but saw a bulge in the back of Mr. Melendez's pants (R. 311). It took 20 minutes to get to the victim's shop, where Mr. Melendez and George Berrien got out of the car (R. 312). Mr. Melendez said their business would take 1 1/2 to 2 hours (R. 312). John Berrien drove away and did not see Mr. Melendez or George Berrien go into the victim's shop (R. 313). John Berrien was gone about two hours, then drove back to the area and heard Mr. Melendez calling him from the side of the road (R. 314). Mr. Melendez had a towel in his hands, but John Berrien could not tell if anything was in the towel (R. 315-16). George Berrien was not carrying anything (R. 316). On the way home, Mr. Melendez and George Berrien spoke in Spanish to one another and were laughing (R. 316-17). Mr. Melendez said he would have to pay

John Berrien later (R. 318). It was about 6:00 p.m. when the trio left Auburndale (R. 318). John Berrien took Mr. Melendez home, and George Berrien went to John's house (R. 318). George did not mention that anything had happened (R. 319). At some point, George asked John to take him to the train station for a trip to Wilmington, Delaware, but John did not remember what day this was (R. 320). On the way to the train station, they picked up Mr. Melendez (R. 320). At the train station, Mr. Melendez gave George some rings, a watch, and a gun, which George was supposed to sell in Wilmington (R. 321). John heard about the victim's death on TV, but did not remember when he heard this news, except that it was not at the time he went to the train station (R. 322). John never asked Mr. Melendez about the murder (R. 323).

On cross-examination, John Berrien testified that Mr. Melendez had a towel hanging around his neck when he was dropped off in Auburndale, and that Mr. Melendez was holding the towel in one hand when he got back in the car (R. 329). When he picked up Mr. Melendez and George, John saw a Cadillac (which belonged to the victim), parked on the side of the victim's shop and a blue Camaro parked in the back of the shop (R. 330). When he had dropped the pair off, John saw a yellow car parked on the side of the shop (R. 331). John did not see any other people (R. 331). When he picked up the pair, Mr. Melendez walked to the car, and about 3 minutes later, George walked to the car (R. 332). John dropped them off about 4:15 or 4:20 p.m., and came back for them at 5:30 or 5:45 p.m. (R. 332-33). Mr. Melendez and George were not excited, scared or bloody when they got back in the car (R. 334).[2]

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[2] Other evidence contradicted John Berrien's testimony. Franklin Brown, a State witness who worked at the victim's shop and knew John and George (R. 278-79), testified that he worked on the day of the victim's death until 5:10 or 5:15 p.m. (R. 281), and did not see John or George that day (R. 283). Dorothy Rivera, Mr. Melendez's girlfriend, testified that she was with Mr. Melendez on September 13, 1983, from 5:00 p.m. until the next morning (R. 486-87). Ms. Rivera remembered that date because it was her first wedding anniversary and her husband was in Pennsylvania (R. 484). Mr. Melendez had been at Ms. Rivera's (continued...)

2. What the Jury Did Not Hear

Clearly, John Berrien's credibility and the reliability of his story were significant issues at Mr. Melendez's trial. However, the jury never heard the information essential to assessing his credibility and reliability. John Berrien had made at least three prior statements to the police, all of which contained information substantially inconsistent with his trial testimony. The jury never heard about these statements. John Berrien had also been deposed less than a week before trial and had stated that everything he had told the police was false except for the account about going to the train station. The jury never heard about this deposition. A police report verified that one of John Berrien's early accounts was false. The jury never heard about this police report.

In one statement, John Berrien claimed to have taken "Pizon" (Berrien knew Mr. Melendez as "Fison," R. 301), to Auburndale. He "[didn't] know what day that was," except that it was "the first part of September, 1983" (Ex. 1). "Pizon" was "[n]ot a friend of mine." On the way, "[w]e stopped by Big Dave's house and picked up David." He dropped "Pizon" off "at the fish market . . .

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[2](...continued)
sister's house when Ms. Rivera arrived there at 3:00 p.m. (R. 499). Marie Graham, Ms. Rivera's sister, testified that Mr. Melendez was with her sister on September 13, 1983 (R. 502). Terry Barber, who knew the victim and was interviewed by police at the time of the victim's murder (R. 569), testified that he went to the victim's shop between 5:00 and 6:30 p.m. on September 13, 1983 (R. 571). He saw the victim at about 5:45 or 5:50 p.m. (R. 572). Two other people who Barber thought were Vernon James and Bobo were in a back room of the shop (R. 574-75). Barber left the shop about 6:15 p.m. (R. 577). Barber testified that he had never seen Mr. Melendez before (R. 579). Roger Mims, a jail inmate and cellmate of Vernon James (R. 633), testified that James had admitted participating in the victim's murder (R. 634-35), and had said that Mr. Melendez had nothing to do with the murder (R. 635). John Knapp, a police investigator, testified that Vernon James and Bobo were suspects in the victim's death (R. 648). George Berrien testified that he had nothing to do with the victim's death (R. 655), and had never ridden in a car with Mr. Melendez to Auburndale (R. 657). George did travel to Delware (R. 657), but got a ride to the train station from a white guy in a brown truck (R. 658). George does not speak Spanish (R. 660).

about 5:30." Berrien and Dave left, went to a beer joint, had a few beers, shot pool, and returned a couple of hours later. Berrien dropped Dave off and took "Pizon" home. A week later, Berrien questioned "Pizon" about why he went to the beauty shop and asked whether he had heard about the victim being killed. According to this statement, when Berrien dropped "Pizon" off at the fish market, Berrien saw "Pizon" with a pistol, but not with a towel. When Berrien picked up "Pizon," "Pizon" "acted a little nervous . . . Quiet like, you know, like he was thinking about something, something was on his mind." Berrien heard about the victim's murder the next day and evening "through a little bit of news and through what my cousin. Pete, say and my cousin Stella say" (Ex 1).[3]

In a police report following up this statement, Detective Gary Glisson reported:

> Writer and Sgt. Knapp interviewed David Files in reference to this case on *03-09-84*, approximately 4:00 PM. After questioning David Files, writer noted that he knew nothing about what occurred on Sept. 13, 1983, and was unable to support Berrien's statement about him being with Berrien on that date.

(Ex. 4).

Another interview, conducted on March 15, *1984*, demonstrates further inconsistencies in Berrien's account and also indicates the kind of pressure being put on Berrien by law enforcement. For example, these exchanges occurred between Berrien and an officer:

> S [Officer]: All right, now the question is, last September the 13th.
>
> JB [John Berrien]: Would that hurt me if I knew that I know that he do take things (inaudible)
>
> S: Only, it won't hurt you if you help the police, it won't hurt you.
>
> . . .

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[3] Berrien's cousin, Stella Dunlap, and her husband, Pete Dunlap, worked at the victim's shop (R. 304). Stella was at the shop the morning after the victim's death (R. 271), and knew how the victim had died (R. 275).

S: John, if you got something up here that you hadn't put down here yet now's the time to do it.

JB: Uh hm.

S: You ain't never gonna get a better chance.

JB: Well...

. . .

S: Yeah, I think so. Well the information I got is strong stuff and I'm trying to be straight with you...

JB: Yes. I understand.

S: Cause I ain't gonna sit here and let you hang yourself and then turn right around and say "John I know you lied because I got information that said it and we can just about back it up and prove it." We not enounh to throw you in jail right now and make a case. But we don't play games that way. We try and get the truth out and if you happened to have had a lot to do with that thing then we want to know how much and there's a good chance and in turn for helping YOU can get off light. Do you know where I'm coming from?

JB: Um hm.

S: You got a crossroads John and you got to go right or you're gonna go left. That left leads to a bad place. The right probably will get You home free. See what I mean?

JB: Uh hm.

. .

S: Cause what comes out of here today is gonna have a big bearing on the rest of your life and I don't want to be a party to putting you between a rock and a hard place if it ain't necessary.

JB: Uh hm.

. .

S: Now You know we're gonna protect vou, you hadn't even been here as far as I'm concerned.

. . .

S: Now be careful John. I mean I want you to get it straight.

(Ex. 2)(emphasis added),

According to this interview, Berrien did not know the name of the third person who went to Auburndale, but this person "looked almost like a Jamaican." Berrien also said, "Big Dave wasn't in, no he didn't have nothing to do with it." Finally, Berrien claimed that he knew a robbery was planned: "they was going to rob the man. I told them I didn't want nothing to do with that" (Ex. 2).

In a third statement, Berrien said that "Faizon" had a "Jamaican friend" with him named "Taboo" (Ex. 3). "Faizon" wanted to "go pick up some money from Mr. Del [the victim]." This time, Berrien said he dropped the pair off "right at the business," rather than at a fish market or on the street. When Berrien picked them up, the Jamaican said "he had to waste him." Faizon "was speaking English most of the time." Berrien "saw the gun" when the two got in the car. Also, "when they got in the car, they showed me some jewelry, which consisted of about three rings, uh gold uh chain, necklace, chain uh, , , . bracelet. All this I seen. Oh, and a watch." The pair had a "big yellow towel" and "there was definitely something inside the towel," About 45 or 50 minutes after he dropped them off, Berrien saw a blue Camaro pull up *to* the shop and blow its horn. There were two people in the Camaro.

Berrien's accounts are filled with inconsistencies and, of course, at trial he told a different story than he had in any of the statements he had given previously. By the time of trial, the companion was his cousin George Berrien. Defense counsel's cross-examination of this witness, however, made no mention of these prior inconsistent statements. The only "lie" brought to the jury's attention had to do with a worker's comp problem:

Q: You had your eye shot out?

A: Yes.

Q: Did you lie to your boss and the Workman's Comp people about how it happened?

A: At first, yes.

Q: Did you lie to your attorney about how it happened? Did you lie to your attorney about how it happened?

A: No.

(R. 325-26).

Defense counsel then questioned Berrien about his plea agreement and never challenged Berrien's credibility as to the statements he had given the police. However, in his deposition, Berrien clearly stated that he had been lying to the police:

DIRECT EXAMINATION

BY Mr. ALCOTT:

Q. My name is Roger Alcott; you know me, I've talked to you lots of times. This is Juan Melendez, and this is Hardy Pickard. Is what You told the police officers in the statements you gave them, is any of that, or is it all true?

A. That's mostly false.

Q. OK. What is true?

A. Only thing about that that's true. that on the day that George Berrien was going to Wilmington, I saw Faison give him two rings and a watch and a gun to sell for him up there.

Q. OK. Everything else is false?

A. Yeah, I never did--1 didn't know anything about the man's work.

Q. OK. Did you believe that Juan Melendez or George Berrien had anything to do with the murder of Mr. Dell?

A. No, I do not.

Q. OK.

MR. ALCOTT: I have no further questions of the witness.

(Ex. 5)(emphasis added).

B. David Luna Falcon

1. Trial Testimony

David Luna Falcon was the other significant witness against Mr. Melendez. He testified that he had known Mr. Melendez since December 24, 1983, when Falcon came to the United States from Puerto Rico (R. 434-35). Falcon explained what he had been doing in Puerto Rico:

> Q. All right, Mr. Falcon, back in September of '83 when Mr. Baker was killed, where were you at that time?
>
> A. I was in Puerto Rico working for the Justice Department as a --
>
> MR. ALCOTT: Objection, Your Honor, not responsive to the question.
>
> THE COURT: Objection overruled.
>
> Q. Go ahead.
>
> A. I was in Puerto Rico
>
> Q. Doing what?
>
> A. Working for the Justice Department in an undercover ooeration.
>
> Q. In Puerto Rico?
>
> A. Yes sir.
>
> Q. When did you come to the United States?
>
> A. The 24th of December
>
> Q. Of last year?
>
> A. Of last year, sir.

(R. 435-36)(emphasis added). Later, Falcon testified that the "666" tattoo on his shoulder was a cover-up he used when working for the Justice Department in Puerto Rico (R. 463).

According to Falcon, in January, 1984, he was at a bar drinking beer, and Mr. Melendez was also at the bar drinking beer (R. 438-39). When he first met Mr. Melendez, Falcon had told him that Falcon was wanted for murder, and was an escaped fugitive, although, Falcon testified, those things not true (R. 439). Then, according to Falcon, at the bar, Mr. Melendez said that he had killed

someone two months ago (R. *440).* Mr. Melendez supposedly told Falcon that another black guy had set up an appointment with the victim, and that they went to the victim's to steal money and jewelry (R. *442).* According to this story, the other black guy cut the victim's throat, the victim fell to the floor, bleeding and throwing blood at his assailants. asked to go to the hospital, and Mr. Melendez shot the victim in the head (R. *443).* Falcon also testified that one of the perpetrators went to Delaware to sell the jewelry (R. *444).* Three weeks later, Falcon reported this information to Agent Roper of the F.D.L.E. (R. *447).* after finding out who the other people involved in the offense were (R. *448-49).*

On cross-examination, Falcon testified that he had previously been convicted of murder (R. *452).* Before going to Agent Roper, Falcon investigated on his own (R. *454).* Falcon admitted he had been at Ruby Colon's home before talking to Agent Roper and that she lived very near where he met Agent Roper, but he denied telling her that he was going to make up some lies to get Mr. Melendez or that he was going to get Mr. Melendez killed (R. *454-55).* Falcon also testified that he had worked closely with Detective Glisson and that he, his brother Gilbert, and Glisson had been to the jail to talk to John Berrien (R. *455-56).* Falcon admitted that Mr. Melendez did not tell him about someone going to Delaware (R. *456).* Falcon denied involvement in a shooting which occurred at the home of James and Rita Reagan (R. 457). Falcon testified that Agent Roper paid him for information and that Detective Glisson paid him, but he did not remember how much (R. 459). Falcon stated that he never carried a gun (R. *462).*[4]

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[4]Other testimony contradicted Falcon's account. Mr. Melendez testified that he never had a conversation with Falcon at *a* bar (R. *672).* Five witnesses testified that Falcon always carried a gun (R. *488,* 503, *506, 509, 587).* Dorothy Rivera testified that before and after Mr. Melendez's arrest, Falcon said that he was going to testify in order to get Mr. Melendez and that Mr. Melendez had not told Falcon he killed somebody (R. 489-90). Angelo Graham (continued...)

2. What the Jury Did Not Hear

Falcon's testimony was obviously crucial to the State's case, and thus his credibility was a central issue at trial. Substantial information was available to attach Falcon's credibility, but the jury never heard about it.

Falcon testified that in September, 1983, he was in Puerto Rico working for the Justice Department. That testimony was not true, but it clothed Falcon in respectability and gave his testimony credibility. The truth is that Falcon was in New York in September, 1983, that he was not an "undercover agent" but had provided testimony against co-defendants in a New Jersey multiple murder, and had a lengthy history of drug addiction and mental illness (App. 5).

Falcon joined the Army in 1971 (App. 5). After the Army, he moved to New Jersey, but he fled to Puerto Rico because he had been involved with a group of people who had "slaughtered some persons during an assault and robbery" in New Jersey (App. 5, History of David Luna Falcon, p.2). Falcon later returned to New Jersey and was apprehended by police. but he made bail and returned to Puerto Rico. where he requested psychiatric treatment, which went an for several years (App. 5).

On May 29, 1980, Falcon was convicted of a murder which was committed in Puerto Rico (App. 5). He received a 42-year prison sentence and was required to

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[4](..continued)
testified that Falcon had said he did not like Mr. Melendez, wanted to kill him, and was going to get rid of him (R. 506-07). Ruby Colon testified that Falcon had said that he was going to get Mr, Melendez killed and that if they did not kill him, Falcon would do it himself (R. 510). The same night Falcon made these statements, Falcon called a man and met the man at a stadium near Ruby Colon's house (R. 510). Because defense counsel had not subpoenaed Rita and James Reagan, who therefore did not appear at trial, a stipulation was announced that Mr. Reagan would testify that on May 29, 1984, Falcon had entered his home and shot into his car (R. 557-58). The State announced that it agreed Reagan would say that, but that it was not agreeing that Falcon actually did the Reagan shooting (R. 558). Detective Glisson testified that he saw evidence of a shooting and forced entry at the Reagan home (R. 560-62), and that Falcon was working for him at the time, but that he stopped investigating the incident the day after it occurred because the Reagans signed a waiver of prosecution (R. 563-64).

serve a minimum of 24 years (App. 5). On March **8, 1982,** Falcon escaped from prison (App. **5).** However, apparently after Falcon had been apprehended in the United States, on August **30,** 1982, the court ordered his sentence reduced (Id.). At that time, Falcon was imprisoned in the New **York** Metropolitan Institute **(Id.).** On February **9, 1983,** Falcon was imprisoned at Bastrop Federal Prison in Texas.

On May 16, **1983,** Falcon appeared as a government witness in the New Jersey murder case **(App. 5).** On June **9,** 1983, an Order of Release was entered in the Department of Correction's records (Id.). On June **22, 1983,** a letter to the Regional Director of the United States Bureau of Prisons indicated that Falcon was released on parole on June 10, **1983** (Id.). **On** September **13, 1983,** the Director of Special Investigation for the Department of Justice wrote to the Department of Corrections informing them that Falcon was in New York **(Id).** Falcon had apparently made **a** deal to shorten his sentence by supplying information and testifying in the New Jersey murder case.'

Agent Roper of the F.D.L.E., who testified at trial and who is the person Falcon contacted about his story, says that he did not know Falcon prior to Falcon's phone call to Roper and had never worked with Falcon on any other cases (App. **8).** Before trial, Agent Roper and the F.D.L.E. disassociated themselves

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'Records show that Falcon had been doing heroin and smoking marijuana since he was 18 years of age. His drug use of heroin and cocaine continued through **his army** days. On July **6, 1976,** Falcon had been readmitted to the VA hospital for a psychiatric condition. On January **9,** 1977, he was readmitted for "undifferentiated schizophrenia and drug addiction." At that time, he was treated with Thorazine, Dalmane, Valium, and Congention. This treatment was during the same period of time as the murder in Puerto Rico. Just prior to his **1976** admission into the VA psychiatric ward he had participated in the massacre in New Jersey (App. *5).*

Falcon was diagnosed as schizophrenic in **1976** and 1977. He was found using narcotics in prison in January, **1981,** and in August, 1981, was referred to psychiatric and drug addiction treatment at the State Penitentiary in Puerto Rico. On February **9,** 1983, he was again diagnosed as an addict and treatment again recommended, and on September 13, **1983,** a federal court judge ordered psychiatric treatment for Falcon.

from the investigation because they did not approve of "what was going on," "the way [Auburndale Police Department] were handling things," or "the way they were using Falcon" (App. 8). Agent Roper also stated that he was very surprised that Mr. Melendez was ever convicted and that the conviction was due solely to Falcon's testimony (App. 8).

Still more information was available regarding Falcon. On May 29, 1984, Falcon and another man terrorized a family by threatening to kill them. Falcon pointed a gun at the children and subsequently shot three holes into the family car. The family, James and Rita Reagan, identified Falcon (R. 530-31), but defense counsel failed to subpoena the Reagans (R. 419). who consequently did not appear at trial

The Reagans never returned to testify against Falcon because they feared for their lives:

Before me, personally appeared JAMES REAGAN, who after being duly sworn, deposes and says:

> 1. I am a resident of Cape May, New Jersey. I do not know or ever had heard anything about Juan Melendez or his trial, until Mr. Rivera, an attorney from Florida, called me last week on the phone to ask me some questions.
>
> 2. I do know David Luna Falcon and Gary Glisson. who at the time was a law enforcement officer and who I am told, was fired in disgrace from the Auburndale Police Department.
>
> 3. David Luna Falcon was a low-life drug dealer who played both sides of the fence. That is, he would turn other people in, in exchange for his own immunity and free rein to continue his criminal activities. A friend of mine found Luna Falcon's wallet and in it, Luna Falcon had a list with the phone numbers of several police departments. Someone must have mistakenly told Luna Falcon that I had found his wallet and that I was telling people that he was making deals, I really do not know what happened, but one day, Luna Falcon and his uncle burst into my house with guns to kill me. I have never met Luna Falcon before. He kicked my door in and pointed his gun at my son, who was six years old, and at my wife Rita. My dog attacked Luna Falcon's uncle and chased him out the door. I went to get a weapon from the closet to defend myself. My wife and son ran out of the back door and went to the neighbors, In the meantime Luna Falcon had followed me and was standing at the bedroom door. I could see he had a chrome plated gun, maybe a .44. Luna Falcon was crazed, screaming he would kill me. He saw I was going for a weapon and ran

out the front door. I did not chase him outside. I was very scared. When Luna Falcon got outside he was still hollering and threatening to kill me. He pointed his gun at my truck and shot it three times. The truck survived and is here with me in New Jersey. It still has the bullet holes. I promised Mr. Rivera to take photographs of the holes.

4. My family and I were terrorized. You just can not imagine what it is like to have people with guns kick down your door and come after you. When the police came, we thought they would give us some protection or reassurance. That is when we came across Gary Glisson. By the way he handled the whole situation I could tell he was protecting Luna Falcon. He clearly told me that I should not press charges and get out of town. He said if I pressed charges Luna Falcon would kill me and that the police could not protect me or my family from Luna Falcon. Glisson did not want Luna Falcon arrested or anything. I immediately suspected that Glisson had something going on with Luna Falcon, I knew from my friends that Luna Falcon was a convicted felon who sold cocaine and marijuana all over town. Seeing how Glisson was protecting him made me very suspicious of something going on between Glisson and Luna Falcon.

5. Abandoned by the police, we really felt scared. I can not believe Glisson did not offer to arrest Luna Falcon or offer to provide us with protection. We took some things and hid in a motel in Winter Haven for two or three days while I made arrangements to get out of town. We never slept again in our house. We went back in once to pack our things and left for New Jersey. My son had to change schools in mid-term and we had a lot of problems, but I figured anything would be better than having to put my family in danger.

6. Glisson made me sign some form saying I was not going to press charges. He gave me no choice. As Glisson put it, I had to sign or Luna Falcon would kill us. To this day we can feel the fear.

(App. 7).

Mr. Reagan said it was common knowledge that Falcon was working "both sides of the street." (App. 7). Dorothy Rivera had this to say concerning her knowledge of Falcon:

Before me, personally appeared **DOROTHY RIVERA,** who after duly sworn, deposes and says:

1. I am a resident of Lakeland, in Polk County, Florida. I testified during Juan Melendez' trial, but was not asked about many of the things that I know about David Luna Falcon, Gary Glisson, and Gilbert Luna Falcon.

2. Juan Melendez is innocent. He did not kill Delbert Baker. David Luna Falcon admitted to me that he was lying and that Juan Melendez never told him that he had killed Delbert Baker. Luna Falcon even tried to get away so he would not have to testify against Juan Melendez. He told me the police made him testify anyway, but that he did not want to lie, that when he called the police and turned in Juan

Melendez he was lying.

3. I was at my mother's house when Luna Falcon called the police to implicate Juan Melendez in the murder. He was carrying on saying "I am going to get that mother fucker and make sure he rots in jail." Luna Falcon made the phone call and later went to meet the agent by the stadium. This was one or two weeks before the police arrested John Berrien.

4. Luna Falcon began getting a lot of phone calls from Gary Glisson. Glisson would also call the house for Gilbert Luna Falcon all the time. They talked a lot on the phone and acted more like they were partners or friends than like the police talking with an informant. David and Gilbert Luna Falcon had something going on with Glisson. The way those three talked all the time, I suspected they were selling drugs or doing something illegal. Gilbert Luna Falcon even tried to get Juan Melendez to sell drugs for him but Juan refused. Gilbert Luna Falcon disappeared the day after Juan Melendez' trial. I think he was put in prison.

5. I saw David Luna Falcon at the courthouse before he testified. He repeated to me that when he implicated Juan Melendez he was "just talking". He looked very scared and said the police were making him testify. After he testified, Luna Falcon told me he was getting $5,000.00 for testifying and then he was leaving town. Luna Falcon's father also told me and my mother that Luna Falcon had received $5,000.00 after the trial. I saw Luna Falcon one more time. about two years ago when he came to my mother's house with his lover, another man with whom he was having a homosexual relationship. Luna Falcon died about a year ago in Puerto Rico from AIDS. His father. who still lives in Lakeland, kept me informed of Luna Falcon's illness and death. I would not be surprised at all if I found out that Luna Falcon told his father that he had lied to frame Juan Melendez.

6. I spoke with Mr. Roger Alcott, Juan Melendez' trial attorney, before the trial and told him all of the things I knew about the Luna Falcon brothers and Gary Glisson. I was very surprised that he did not ask me about these things during the trial. If he would have asked, I would have told the court all I know about the case. I risked my marriage when I testified during the first trial. I am still married and these events bring a lot of problems to me and my husband, but I have to say what I know because Juan Melendez is an innocent person. I was with him the night he supposedly killed Mr. Baker. In God's name, someone has to correct this injustice.

(App. 18).

Dorothy's mother, Ruby Colon, confirmed her daughter's observations and had additional information to supply:

Before me, personally appeared RUBY COLON, who after being duly sworn, deposes and says:

1. I am a resident of Lakeland. in Polk County, Florida. I know that David Luna Falcon framed Juan Melendez for the murder of Delbert Baker. Luna Falcon was really mad at Juan Melendez because he

refused to sell drugs and help the Luna Falcon brothers in some robberies. They did not know that I knew what they were up to, but I did. I used to pretend I was not paying attention to what they were saying but I overheard them talking many times. I even told David Luna Falcon to stop lying about Juan Melendez, that he was not supposed to frame that boy because he did not like him.

2. Gary Glisson called my house all the time to talk to David and to Gilbert Luna Falcon. The way they talked it was like they were partners. David Luna Falcon was the leader of the bunch. They spoke all the time and were always planning things they hid from others. Sometimes the Luna Falcon brothers would take my phone into the bathroom so people could not hear them talk to Gary Glisson.

3. David Luna Falcon told me he got $5,000.00 for testifying against Juan Melendez. His father also told me about the $5,000.00.

4. The day of the murder Juan Melendez had been in my house all day. George Berrien was not with him. I know for a fact that Juan Melendez did not kill Delbert Baker,

5. One time David Luna Falcon showed up at my house with his homosexual lover. The laver was a man from Miami. I think Luna Falcon got AIDS from this man and died in Puerto Rico about a year ago.

6. Juan Melendez was a very helpful and smart man. He would come to my house and help me with the yard and with other chores. He got along really good with my husband, who is also from Puerto Rico. My husband just loved Juan Melendez.

7. I would have been willing to testify during Juan Melendez' trial about what I know of the Luna Falcon brothers and Gary Glisson and about everything I know about Juan Melendez and how he was framed by David Luna Falcon. Mr. Alcott, Juan Melendez' trial attorney did not ask me about this when I was in the witness stand.

(App. 17).

Falcon was not an "undercover agent," as he testified, but a criminal who cooperated in the New Jersey case in order to secure his release from prison; Falcon was not in Puerto Rico in September, 1983, working for the Justice Department, but was in New York, having just been released from prison in June, 1983; Falcon received $5000 for his testimony against Mr. Melendez, rather than an amount apparently so insignficant he could not remember it; Falcon was a drug dealer who successfully worked with police in order to avoid prosecution for shooting at the Reagan family. All of this information seriously undermines

Falcon's credibility. Mr. Melendez's jury heard none of it

Rather, the jury heard Falcon portrayed as an "undercover agent" and John Berrien portrayed as a repentant co-defendant and then heard the prosecutor urge that these two witnesses were believable. The prosecutor argued that the issue in the case was not whether a crime had been committed but "who committed the crime" (R. 691). To decide who committed the crime, the prosecutor urged the jury "to believe what John Berrien testified to" (R. 695), and then went through the conflicts between John Berrien's testimony and other testimony (R. 695-99). Of course, having not heard John Berrien's prior inconsistent statements, the jury was unable to assess the conflicts between John Berrien's testimony and his own prior statements.

Regarding Falcon, the prosecutor told the jurors they would "have to decide if Mr. Falcon is a person worthy of belief or not" (R. 699), and then pointed out that Falcon was in Puerto Rico in September, 1983, and that Falcon had worked for the Justice Department (R. 700). Later, the prosecutor asked, "Why would [Falcon] lie?" (R. 704). Falcon would not lie, according to the prosecutor, because he "ha[d] nothing to gain in this case" (R. 705). Falcon had "nothing to gain" because "he had already given his testimony in the case, two months before the [Reagan] shooting even happened" and because:

> Oh, he got a little money from the Auburndale Police Department for helping them out on some drug cases, but he was not charged in this case. He did not agree to testify in return for some deal. He had absolutely nothing to gain at all by getting on the witness stand He even went to the police with the information he got, they didn't come looking for him and say, hey, David, what do you know about the crime. He went out and developed infomation himself as to who committed the crime and went to the police.
>
> Now, probably the reason he did that is because he worked for the police in the past. He had been an informant for -- he called it the Justice Department in the past and had given information to law enforcement in the past, so that's why he did it in this case, but the man stands to gain nothing by his testimony. There is no reason for him to get on the witness stand and lie.

(R. 705-06). Finally, at the close of the State's rebuttal argument, after

responding to the defense evidence, the prosecutor argued, "somebody's lying. That's going to be up to you to decide who's lying and who's telling the truth" (R. 737), and concluded:

> The evidence presented from the witnesses, the State feels, proves beyond a reasonable doubt that Juan Melendez was involved in the murder. Now, Mr. Alcott can throw all sorts of other names at you and say maybe this guy did it, maybe that guy did it, but that doesn't change the fact that John Berrien, who has already entered a plea to his involvement in the offense, says Juan Melendez was taken there that night by him, and David Falcon testifies that Juan Melendez admitted to me he committed the crime and told me the facts of the offense which match what happened, and based on that evidence the State feels it has proven its case beyond a reasonable doubt and Mr. Melendez should be found guilty of the crime for one reason and one reason only, and that is because he is guilty of the crime and he did -- and he was involved in the commission of the murder and the robbery of Delbert Baker. Thank you.

(R. 737-38)(emphasis added)

The credibility of John Berrien and David Luna Falcon was the issue in Mr. Melendez's trial. Without them. there was absolutely no case. With them, there was a weak case pitted against the defense case. Credibility was the key to deciding between the State's theory and the defense theory.

ARGUMENT I

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

The lower court summarily denied Mr. Melendez's claims without conducting any type of hearing, without adequately discussing whether the motion failed to state valid claims for Rule 3.850 relief (it does), and without adequately explaining why the files and records conclusively showed that Mr. Melendez is entitled to no relief (they do not). Indeed, the record supports Mr. Melendez's claims. In denying claims involving ineffective assistance of counsel, the lower court erroneously concluded that counsel's actions were "tactical" and "strategic," but no evidentiary hearing was ever conducted wherein to test those very questions. Mr. Melendez's motion in part challenged his trial counsel's

cross-examination of the State's two key witnesses. While counsel attempted to impeach those witnesses, there was a substantial amount of information that was never brought out that would have shown without question that these two witnesses lacked all credibility and that their accounts were not believable. That information was never used by trial counsel. Much of it may have been unknown by counsel, having been undisclosed as required under Brady v. Maryland. Some of it may simply have been undisclosed by counsel's own failure to investigate. A hearing was never conducted to see whether counsel had this information and whether there was, in fact, any tactical reason for his failure to use it. This is precisely the reason an evidentiary hearing must be conducted in cases such as this -- to ask the attorney about those matters that are not clear from the record. The lower court's summary conclusion that these omissions were "tactical" is made in a vacuum since there was no record upon which to base this conclusion.

The lower court's summary denial of Mr. Melendez's Rule 3.850 motion was incorrect. Many of the issues presented in the Rule 3.850 motion were of the type plainly requiring evidentiary resolution of facts that are not "of record." Questions relating to the State's failures to disclose exculpatory information, questions concerning Mr. Melendez's capacity and understanding of the penalty phase and whether counsel was ineffective in failing to advise him properly, questions of counsel's conduct in litigating many penalty phase issues, and questions of trial counsel's deficient performance at both the guilt and penalty phases of trial were all presented by the motion to vacate and all involved matters that must be dealt with in an evidentiary hearing.

Mr. Melendez also raised claims involving violations of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. As previously discussed, valuable impeachment information about the two key witnesses, John Berrien and David Luna Falcon, was available in the record and was clearly discoverable. Yet it is not

clear from the record that defense counsel was provided this information. This is precisely why an evidentiary hearing is required on this claim as well.

As this Honorable Court's precedents and Rule 3.850 itself make clear, a Rule 3.850 movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Grim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci. 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Mr. Melendez's motion alleged facts which, if proven, would entitle him to relief. The files and records did not "conclusively show that [he] is entitled to no relief," and the trial court's summary denial of his motion, without an evidentiary hearing. was therefore erroneous.

Mr. Melendez's verified Rule 3,850 motion alleged (supported by factual proffers) the extensive non-record facts concerning claims which have traditionally been raised in Florida post-conviction proceedings and tested through evidentiary hearings. Mr. Melendez is entitled to an evidentiary hearing with respect to these claims: there are no files and records which conclusively show that he will necessarily lose. Here, the lower court attached portions of the record with regard to counsel's voir dire, portions of the transcript of the penalty phase, and a copy of the court's "Findings in Support of Death Penalty." None of these attachments "conclusively show that the prisoner is entitled to no relief . . ." Fla. Crim. P. 3.850; Lemon. An evidentiary hearing is proper. The lower court attached no portion of the record which supports its ruling. Clearly nothing was attached to refute the claims of ineffective assistance of counsel or addressing the Brady claim violation. This case involves matters that are not "of record," and the circuit

court erred in denying an evidentiary hearing and in summarily denying the motion to vacate. Facts not "of record" are at issue in this case; such facts cannot be resolved now by this Court, as there is no record to review. The lower court erred in declining to allow factual, evidentiary resolution.

In O'Callaghan, this Court recognized that a hearing was required because facts necessary to the disposition of an ineffective assistance of counsel claim were not "of record." See also Vaught v. State, 442 So. 2d 217, 219 (Fla. 1983). This Court has not hesitated to remand Rule 3.850 cases for required evidentiary hearings. See, e.g., Zeigler v. State, 452 So. 2d 537 (Fla. 1984); Vaught; Lemon; Squires; Gorham; Smith v. State, 382 So. 2d 673 (Fla. 1980); McCrae v. State, 437 So. 2d 1388 (Fla. 1983); LeDuc v. State, 415 So. 2d 721 (Fla. 1982); Demas v. State, 416 So. 2d 808 (Fla. 1982); Arango v. State, 437 So. 2d 1099 (Fla. 1983). These cases control: Mr. Melendez was (and is) entitled to an evidentiary hearing, and the trial court's summary denial of the Rule 3.850 motion was erroneous.

ARGUMENT II

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.

As is clear from the discussion in the Introduction, a great deal of crucial information, essential to a full assessment of the issues involved in Mr. Melendez's trial, was not presented to the jury. Much of this information was or should have been known to the State, but was never disclosed. Some of the testimony presented by the State at trial was simply false, and these falsehoods were never corrected. The State's actions violated due process, and deprived Mr. Melendez of his fifth, sixth, eighth, and fourteenth amendment rights.

David Luna Falcon, one of the State's two key witnesses, testified that prior to coming to the United States, he had been in Puerto Rico in September, 1983, working as an undercover agent for the Justice Department. Although this testimony enhanced Falcon's credibility and was relied upon by the prosecutor in urging the jury to believe Falcon, the testimony was false. In fact, Falcon was not an undercover agent but had recently been released from prison on a sentence for a Puerto Rico murder after testifying against co-defendants in a New Jersey multiple murder. In fact, Falcon was not in Puerto Rico in September, 1983, but was in New York. In fact, Falcon was simply a drug-addicted, mentally ill criminal.

Falcon also testified that he was paid for information by Agent Roper and that Detective Glisson paid him but he did not remember how much. In fact, the only contact Agent Roper had with Falcon was when Falcon initially reported his information, some time after which Agent Roper and the F.D.L.E.disassociated themselves from Falcon and the murder investigation. In fact, Falcon and his father told others that Falcon was being paid $5000 for testifying against Mr. Melendez.

Relying upon Falcon's false statements regarding his background and his motivation for testifying, the prosecutor was able to argue that Falcon had "nothing to gain" and that he sought out information in this case "because he worked for the police in the past. He had been an informant for . . . the Justice Department in the past and had given information to law enforcement in the past" (R. 706). The qualitative difference between this portrayal of Falcon's past and motives and the picture created by the truth about Falcon's past and motives was essential to assessing Falcon's credibility and reliability. The State knew or should have known the information about Falcon's past and motives, but did not disclose that information to the defense. Rather, the State affirmatively used Falcon's falsehoods to enhance his credibility and to urge that he was believable, and never once corrected those falsehoods.[6]

The trial court denied this claim without conducting an evidentiary hearing. Such a hearing was and is necessary to resolve this issue. Squires; Gorham. Without holding a hearing, the trial court concluded that since 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," the facts proffered in the Rule 3.850 motion were "either non-material, cumulative or simply speculative" (PC-R. 811). As to the trial court's conclusion that cross-examination revealed Falcon to be a "drug user," all that the record reflects is Falcon's contention that he had used cocaine with Mr. Melendez during their alleged conversation in the bar (R. 450). Falcon also affirmatively denied being a "cocaine user" (R. 451). As to the trial court's conclusion that cross-examination revealed that Falcon "worked closely with the police," that is part of the point of Mr. Melendez's claim: Falcon was

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[6]To the extent that trial counsel should have or could have discovered the truth about Falcon's background and motives, counsel's failure to do so was ineffective assistance. See Argument III.

represented at trial as a respectable undercover agent who helped authorities search for truth, when in fact he was simply a common criminal who had cooperated in a prior case in order to receive a reduced sentence. As to the trial court's conclusion that cross-examination revealed Falcon "was paid for information," the record reflects that Falcon testified that Agent Roper had paid him for information -- which was not true and which, again, made Falcon appear to be a trusted informant -- and that Falcon could not remember how much Detective Glisson had paid him, which was in fact $5000, a substantial sum which surely would have affected the jury's assessment of Falcon's credibility. The record does not refute Mr. Melendez's claim, but supports it, and an evidentiary hearing is required.

This case involves much more than a simple violation of Brady v. Maryland. As long as fifty years ago, the United States Supreme Court established the principle that a prosecutor's knowing use of false evidence violates a criminal defendant's right to due process of law. Mooney v. Bolohan, *294* U.S. 103 (1935). Due process, at a minimum, demands that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

The prosecution not only has the constitutional duty to fully disclose any deals it may make with its witnesses, United States v. Bagley, 105 S. Ct. 3375 (1985); Giglio v. United States, 405 U.S. 150 (1972), but also has a duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. *264* (1959); Mooney v. Holohan, and to correct the presentation of false state-witness testimony when it occurs. Alcorta v. Texas, 355 U.S. 28 (1957). Where, as here, the State uses false or misleading evidence, and suppresses material exculpatory and impeachment evidence, due

process is violated whether the material evidence relates to a substantive issue. Alcorta, the credibility of a State's witness, Napue; Giglio v. United States, 405 U.S. at 154, or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967); such State misconduct also violates due process when evidence is manipulated by the prosecution. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

Not only did the State withhold exculpatory and impeachment evidence here, but it permitted the knowing false testimony of David Luna Falcon to go uncorrected. The State's knowing use of false or misleading evidence is "fundamentally unfair" because it is "a corruption of the truth-seeking function of the trial process." United States v. Agurs, 427 U.S. 97, 103-04 and n.8 (1976). The "deliberate deception of a court and jurors by presentation of known false evidence is incompatible with the rudimentary demands of justice." Giglio, 150 U.S. at 153. Consequently, unlike cases where the denial of due process stems solely from the suppression of evidence favorable to the defense, in cases involving the use of false testimony, "the Court has applied a strict standard . . . not just because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Agurs, 427 U.S. at 104.

Accordingly, in cases involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict. United States v. Bagley, 105 S. Ct. 3375, 3382 (1985), quoting United states v. Agurs, 427 U.S. at 102. The defendant is entitled to a new trial if there is any reasonable likelihood, Bagley, supra, that the falsity affected the verdict. Thus, if there is "any reasonable likelihood" that Falcon's uncorrected false and/or misleading testimony affected the verdicts at guilt-innocence or sentencing, Mr. Melendez is entitled to relief. Obviously, here, there is much more than just a

"likelihood" -- as the facts discussed above establish.

Further, the prosecution's suppression of evidence favorable *to* the accused violates due process. Bradv v. Maryland, 373 U.S. 83 (1967); Agurs v. United States, 427 U.S. 97 (1976); United States v. Bagley, 105 S. Ct. 3375 (1985). Thus, the prosecution must reveal to defense counsel any and all infomation that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. United States v. Bagley.

The State's action of withholding exculpatory evidence violated the fifth, sixth, eighth and fourteenth amendments. The government's withholding of exculpatory, impeachment, or otherwise useful evidence deprives the accused of a fair trial and violates the due process clause of the fourteenth amendment. Bradv. When the withheld evidence goes to the credibility and impeachability of a State's witness. the accused's sixth amendment rig[redacted]to confront and cross-examine witnesses against him is violated as well. Chambers v. Mississippi, 93 S. Ct. 1038, 1045 (1973). Of course, counsel cannot be effective when deceived; thus, suppression of exculpatory or impeaching information violates the sixth amendment right to effective assistance of counsel. United States v. Cronic, 466 U.S. 648 (1984). The unreliability of fact determinations resulting from such State misconduct also violates the eighth amendment requirement that a death sentence be reliably imposed.

These rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were violated in Mr. Melendez's case. "Cross-examination is the principle means by which the believability of a witness and the truth of [his] testimony are tested." Davis v. Alaska, 94 S. Ct. 1105, 1110 (1974). As is obvious, there is "particular need for full cross-examination of the State's star witness," McKinzy v. Wainwright, 719 F.2d 1525, 1528 (11th Cir. 1982), and here that star-witness was a drug-dealing, convicted felon regarding

whom critical information was withheld. Falcon's testimony about his status was false. His testimony went uncorrected by the trial prosecutor.

There can be little doubt that material evidence was withheld in Mr. Melendez's case -- evidence which would have made a difference at trial and sentencing. Material evidence is evidence of a favorable character for the defense which would affect the outcome of the guilt-innocence and/or capital sentencing trial. Smith (Dennis Wayne) v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown. 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87. Napue, Giglio, and Bagley make it clear that exculpatory evidence as well as evidence which can be used to impeach are governed by the same constitutional standard of reversal. Moreover, the materiality of the evidence' at issue must be determined on the basis of the cumulative effect of all the suppressed evidence and all the evidence introduced at trial; in its analysis, that is, the reviewing court may not isolate the various suppressed items from each other or isolate all of them from the evidence that was introduced at trial. See, e.g., United States v. Agurs, 427 U.S. at 112; Chaney v. Brown, 730 F.2d at 1356 ("the cumulative effect of the nondisclosures might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial or resentencing hearing"); Ruiz v. Cady. 635 F.2d 584, 588 (7th Cir. 1980); Anderson v. South Carolina, 542 F. Supp. 725, 734-37 (D.S.C. 1982). aff'd. 709 F.2d 887 (4th Cir. 1983)(withheld evidence may not be considered "in the abstract" or "in isolation," but "must be considered in the context of the trial testimony" and "the closing argument of the prosecutor"); 3 C. Wright, Federal Practice and Procedure sec. 557.2. at 359 (2d ed. 1982). Here. the withheld evidence involved the key State's witness, and the materiality standard is therefore met. Had the truth regarding Falcon's past and his false testimony been made available to defense counsel and to the jury, there exists a reasonable likelihood that Mr. Melendez would not have been

found guilty of first-degree murder and sentenced to die.

Evidence which even tends to impeach a critical State witness is clearly material under Brady., See Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984); Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986). This is so because "[T]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative . . . and it is upon such subtle factors as the possible interest of a witness [that a] defendant's life . . . may depend." Napue v. Illinois, 360 U.S. 264, 269 (1959). The jurors at Mr. Melendez's trial were never allowed to hear the important information regarding the extent of Falcon's lies and regarding his certainly checkered past. This information was critical to any adequate determination of the facts.

In Gorham v. State, 521 So. 2d 1067 (Fla. 1988), as in Mr. Melendez's case, a capital Rule 3.850 petitioner alleged that the State failed to fully disclose "promises of leniency" made to a key State witness. Id. at 1069. This Court remanded for an evidentiary hearing, holding that if the facts alleged were true, the defendant would be entitled to a new trial. Id. at 1069, 1071. At an evidentiary hearing, Mr. Melendez could prove the facts alleged in his Rule 3.850 motion through documentation and live testimony. At an evidentiary hearing, Mr. Melendez could establish the constitutional error on which this Court directed an evidentiary hearing in Gorham. An evidentiary hearing and, thereafter, relief are proper

ARGUMENT III

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.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland v. Washington requires a defendant to plead and

demonstrate: 1) unreasonable attorney performance, and 2) prejudice. In his Rule 3.850 motion, Mr. Melendez pled each. Given a full and fair evidentiary hearing, he can prove each. He is entitled, at a minimum, to an adequate evidentiary hearing on these claims.

At the time of Mr. Melendez's trial, substantial information was available regarding John Berrien and David Luna Falcon which would have impeached their testimony and credibility, and which would therefore have raised significant doubt about whether their testimony was to be believed. This evidence regarding the State's two key witnesses did not reach the jury because trial counsel unreasonably failed to investigate and prepare, This evidence establishes much more than a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different and certainly undermines confidence in the outcome of the proceedings, Strickland v. Washington, 446 U.S. at 694.

As explained in the Introduction, John Berrien provided several prior statements to police which were sharply inconsistent with his trial testimony. Berrien also provided a deposition in which he testified that most of what he had told the police was not true. None of this information was provided to the jury at Mr. Melendez's trial, because of trial counsel's neglect and failure to prepare. Thus, the jury was required to assess Berrien's credibility and the reliability of his story without having heard the information which demonstrated that his story was unbelievable.

For example, at trial Berrien testified that he took Mr. Melendez and George Berrien to Auburndale, but the jury never learned that previously Berrien had stated that either "Big Dave" or "a Jamaican" named "Taboo" was the third person involved. At trial Berrien testified that when he picked up Mr. Melendez and George, they were talking in Spanish and laughing, but the jury never heard that previously Berrien had stated that Mr. Melendez "acted a little nervous. .

. . Quite like, you know, like he was thinking about something" (Ex. 1), and that Mr. Melendez "was speaking English most of the time" (Ex. 3). At trial, Berrien testified that when he dropped Mr. Melendez off, Mr. Melendez had a towel around his neck and a bulge in the back of his pants, but the jury never heard Berrien s previous statements that Mr. Melendez had a pistol but not a towel (Ex. 1) At trial, Berrien testified that he did not see a gun when he picked up Mr. Melendez and George, but the jury never heard Berrien's previous statement that he "saw the gun" when the two got in the car (Ex. 3). At trial, Berrien testified that when he picked up Mr. Melendez and George. he could not tell if anything was in the towel, but the jury never heard Berrien's previous statements that "there was definitely something inside the towel" and "when they got in the car, they showed me some jewelry" (Ex. 3). At trial. Berrien testified that he saw no other people outside the shop on the day he took Melendez and George there, but the jury did not hear his previous statements that he saw two people in a blue Camaro pull up to the shop and blow the horn (Ex. 3). At trial Berrien testified that he dropped the two men off on the side of the road (R. 312), but the jury did not heard his previous statements that he had dropped Mr. Melendez off at a fish market (Ex. 1), or "right at the business" (Ex. 3). The jury never heard that during interrogation police officers had pressured him into cooperating by telling him, "in turn for helping you can get off light," "[t]he right probably will get you home free," and "we're gonna protect you" (Ex. 2). Finally, the jury never heard that less than a week before trial, Berrien testified in a deposition that what he had told the police was "mostly false," except for the incident at the train station (Ex. 5).

Trial counsel was similarly deficient in investigating and preparing for the testimony of David Luna Falcon. Trial counsel failed to take the simple step of issuing subpoenas for James and Rita Reagan, although he obviously realized that Falcon's assault on the Reagan family was evidence the jury should

consider. Defense counsel knew of this incidence and moved to have the Stte produce the bullents from Falcon's gun in an attempt to show that Falcon's gun used in the Reagan shooting was also used to kill Mr. Del. However, counsel failed to request production of the gun until the day of trial (R. 215) and the State said it did not have the gun and could not produce it (R. 215-17). Without the gun for comparison, the defense expert witness could not make a positive identification and the Court would not allow the testimony of bullet similarity before the jury. This was critical evidence that the defense attempted to bring to the jury, but by waiting until the day of trial, counsel's attempt was futile and the impeachment evidence of Falcon lost.

Defense counsel then announced to the Court that the Reagans were not going to appear to testify against Falcon. He indicated to the Court that he had received a telephone call the night before from Rita Reagan (R. 420), stating they now lived out of state and refused to appear at trial. After acknowledging that he had not subpoenaed them because they had promised to appear, defense counsel moved for a mistrial stating that he would then have the opportunity to move by "Florida Statute through the interstate extradiction of material witnesses to have them court ordered to appear in the defense of this case" (R. 420). The Court chastised defense counsel for this failure to subpoena by saying: "you'll know better than that." (R. 420). The motion for mistrial was denied (R. *424).*

Without the Reagan's testimony, the jury learned only that there had been an incident at the Reagan home and a stipulation that the Reagans said that Falcon was the person responsible. The State refused to stipulate that Falcon was actually responsible for the incident. The jury did not hear Mr. Reagan's vivid account of that incident and did not learn the lengths to which Detective Glisson (who was at that time the lead detective on the Baker homicide) went to protect Falcon and insure that he was not charged in the incident. As a

result, Detective Glisson was able to give the impression that Falcon was an agent working for the police on drug investigations (R. 563), that Mr. Reagan was a drug dealer on whom Falcon had supplied information (R. 567), and that the Reagans had voluntarily signed a waiver of prosecution (R. 566).[7] The Reagan's testimony would have countered these representations and would have pravided valuable impeachment evidence against Falcon, demonstrating that he was simply a criminal being protected by the police so that he could provide testimony against Mr. Melendez and that he had a personal interest in providing testimony against Mr. Melendez -- avoiding prosecution far his awn criminal acts.

Trial counsel's neglect and omissions also resulted in the loss of other valuable testimony from witnesses who were readily available because they were present at trial, Dorothy Rivera and Ruby Colon. Both of these witnesses knew a great deal about Falcon and about Falcon's questionable relationship with Glisson, but they were not asked to testify about much of what they knew. Both witnesses, for example, knew that Falcon had said he was going to be paid $5000 for his testimony. Both witnesses knew that Falcon, who spent a lot of time at Ruby Colon's house, received numerous phone calls from Glisson and that Falcon and Glisson talked to each other "like they were partners." Falcon had told Dorothy Rivera that he had tried to get away so he would not have to testify against Mr. Melendez, but that the police were making him testify. Ruby Colon knew that Falcon was angry at Mr. Melendez because Mr. Melendez refused to sell drugs for Falcon or help him with robberies.

[7] Detective Glisson was called as a defense witness. To whatever extent the State was obligated to disclose any exculpatory or impeachment evidence regarding the Reagan shooting ok regarding Detective Glisson's relationship with Falcon and to correct any false or misleading testimony presented by Detective Glisson, the failure to do so violated Brady and Giglio.

Without this testimony, Falcon was able to testify that he could not remember how much Detective Glisson paid him, leaving the impression at least that the amount was insignificant. Indeed, the prosecutor's closing argument made light of Falcon being paid: "Oh, he got a little money from the Auburndale Police Department for helping them out on some drug cases. . . . He had absolutely nothing to gain" (R. 705). Without this testimony, Falcon and Glisson were able to represent their relationship as one between a police officer and trusted informant, rather than as "partners" involved in a questionable relationship possibly involving criminal activity. Without this testimony, the jury heard only that Falcon did not like Mr. Melendez and had vowed to destroy him, but did not hear the reason for the depth of this feeling -- that Mr. Melendez had refused to assist with Falcon's own criminal activities. Most significantly, without this testimony, the jury did not know that Falcon was not willingly testifying but had been forced to testify by the police. This last piece of information would have demonstrated the full significance of the incident at the Reagan home -- the police had something with which to force Falcon to testify and would only let him walk away from those potential charges if he did as he was told. The failure to present the full accounts of Dorothy Rivera and Ruby Colon resulted in a loss of evidence which would have seriously impeached Falcon's credibility, and undermines confidence in the outcome of Mr. Melendez's trial.

Finally, trial counsel's performance was also prejudicially deficient regarding the investigation and presentation of evidence regarding Falcon's background and motivation. As explained in the Introduction and Argument 11, evidence existed to demonstrate that Falcon was not an "undercover agent" in Puerto Rico, that he was not in Puerto Rico in September, 1983, and that his history involved criminality, drug addiction and mental illness, rather than a history of assisting police in the fight against crime. The jury heard none of

this evidence, which is discussed in previous portions of this brief and will not repeated.[8]

A criminal defendant's right to cross-examine witnesses is one of the basic guarantees to a fair trial protected by the confrontation clause:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witnesses' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.

Davis v. Alaska, 415 U.S. 315, 317 (1972). Here, the failure of trial counsel to impeach the key State witnesses through cross-examination effectively denied Mr. Melendez his right of confrontation. Impeachment of these witnesses with the information discussed above would have created substantial doubts about their credibility. In light of the State's very weak case, the evidence discussed above thus creates more than a reasonable probability of a different outcome.

The trial court denied this claim without an evidentiary hearing.[9] Regarding trial counsel's failure to impeach John Berrien with his prior inconsistent statements, the trial court concluded that trial counsel had made a strategic decision not to use the prior inconsistent statements (PC-R. 812). However, such a determination cannot be made without an evidentiary hearing at

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[8]Counsel's performance was also prejudicially deficient regarding the proposed testimony of Vernon James, who had confessed participation in the murder to Roger Mims. When James was called as a witness, the jury was excused, and an attorney was appointed to represent James, who eventually refused to testify on fifth amendment grounds (R. *547-52*). In closing argument, defense counsel frequently mentioned James (R. *663, 665-66, 679*). The prosecutor responded by arguing that James' confession was not to be believed (R. **687**). However, defense counsel had done nothing to explain the absence of James' testimony to the jury and the jury never learned that James had invoked the fifth amendment. This failure substantially prejudiced Mr. Melendez's defense, which rested in part upon James' confession.

[9]The allegations upon which this portion of this claim is based were presented in the Rule **3.850** motion is Claims IX and XVII.

which trial counsel may be questioned regarding the failure to use the inconsistent statements. Regarding the evidence impeaching Falcon, the trial court concluded that it was "either cumulative or speculative" (Id.). However, the evidence presented in the Rule 3.850 motion and discussed herein is qualitatively different from anything which came out at trial. Further, whether evidence is "speculative" or not cannot be determined without an evidentiary hearing at which that evidence can be presented and assessed. Regarding other allegations, the trial court dismissed them as "general speculation" (PC-R. 813). These allegations also require evidentiary resolution. At a minimum, Mr. Melendez's allegations regarding trial counsel's failures to properly impeach Berrien and Falcon require an evidentiary hearing, for the files and records do not conclusively show that he is entitled to no relief. Rule 3.850; Lemon.

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See also Chambers v. Armontrout, 907 F.2d 825, (8th Cir. 1990)(in banc); United States v. Gray, 878 F.2d 702 (3rd Cir. 1989). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982)("[a]t the heart of effective representation is the independent duty to investigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Carawav v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).[10]

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[10] Counsel have been found to be prejudicially ineffective for failing to impeach key State witnesses with available evidence, Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989); for failing to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible, prejudicial testimony, Vela (continued...)

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994 ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); Strickland v. Washington; Kimmelman v. Morrison.

The errors committed by Mr. Melendez's counsel warranted Rule 3.850 relief. Each undermined confidence in the fundamental fairness of the guilt-innocence determination. The allegations were more than sufficient to warrant a Rule 3.850 evidentiary hearing. See O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1987); see also Code v. Montgomery, 725 F.2d 1316 (11th Cir. 1983).

In United States v. Cronic, 466 U.S. 648 (1984), the United States Supreme Court explained that the purpose of the right to counsel was to assure a fair adversarial testing:

> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an

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[10] (...continued)
v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to prevent introduction of evidence of other unrelated crimes, Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976). ok taking actions which result in the introduction of evidence of other unrelated crimes committed by the defendant. United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d at 816-17; for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963; and for failing to interview witnesses who may have provided evidence in support of a partial defense, Chambers v. Armontrout, 907 F.2d at 828-30.

> advocate." Anders v. California, 386 U.S. 738, 743, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted--even if defense counsel may have made demonstrable errors--the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (CA7), cert. denied sub nom. Sielaff v. Williams, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109 (1975).

466 U.S. at 656-57 (footnotes omitted)(emphasis added). See Harding v. Davis, 878 F.2d 1341 (11th Cir. 1989).

Mr. Melendez was deprived of his right to a fair adversarial testing of his guilt or innocence. The State's case was extremely weak and relied entirely upon John Berrien and David Luna Falcon. Significant evidence impeaching both of these witnesses and their accounts never made it to the jury because of trial counsel's unreasonable omissions and errors. Prejudice is apparent: had this evidence been presented, there is more than a reasonable probability that the jury would have discounted Berrien's and Falcon's testimony and acquitted Mr. Melendez. Accordingly, an evidentiary hearing is required. Thereafter, Rule 3.850 relief must be granted and a new trial ordered.

ARGUMENT IV

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.

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality

opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investivate and prepare available mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Trial counsel here did not meet these rudimentary constitutional standards.

In O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), this Court examined allegations that trial counsel ineffectively failed to investigate, develop, and mitigating evidence. 461 So. 2d at 1355. The Court found that such allegations, if proven, were sufficient to warrant Rule 3.850 relief and remanded the case for an evidentiary hearing. The allegations presented herein are similarly sufficient to warrant Rule 3.850 relief and also require an evidentiary hearing. See Mills v. Dugger, 559 So, 2d 578 (Fla. 1990); Heinev v. Dugger, 558 So. 2d 398 (Fla. 1990). Mr. Melendez's court-appointed counsel failed in his duty to investigate and prepare available mitigation. There was a wealth of significant mitigating evidence which was available and which should have been presented. However, counsel failed to adequately investigate. Moreover, having failed to investigate and prepare, counsel then failed to advise Mr. Melendez of the consequences of not presenting evidence during the

penalty phase and allowed Mr. Melendez to forego presentation of evidence of mitigation. Mr. Melendez was thus denied an individualized and reliable capital sentencing decision. His sentence of death is the prejudice resulting from counsel's unreasonable omissions. See Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989).

A. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADVISE MR. MELENDEZ OF THE CONSEQUENCES OF NOT PRESENTING EVIDENCE DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL.

After the jury returned its guilty verdict, the court recessed until the following day at 9:00 a.m. at which time the penalty phase of Mr. Melendez's trial was to begin. When the penalty phase began, but before the jury was brought in, counsel for Mr. Melendez approached the bench and informed the court:

> Mr. Melendez has indicated to me it's his desire that I not go into his background, his education, his family, bring out to the jury those factors or try to minimize his -- the significant criminal history that he may or may not have. He has indicated to me that he in fact would rather receive the death sentence than the life sentence.

(R. 768).

The court then asked Mr. Melendez if he wanted to express his reasons for not wanting his attorney to "go into his background." Mr. Melendez responded: "I want to tell the reason for it, because I know I not did [sic] this crime and I know I can get more publicity and a speedy -- speedy more -- a speedy trial. I'm willing to take that gamble than stay a long time in prison for something I didn't do" (R. 769).

The trial court explained to Mr. Melendez that if he received life in prison, it would mean 25 years in prison without any possibility of parole for 25 years (R. 770). After more questioning, Mr. Melendez again expressed his desire to receive a death penalty so he could "stand a better chance with publicity and get out faster and a speedy trial -- a speedy trial with the death

penalty" (R. 770).

The court never explained to Mr. Melendez that receiving the death penalty would not effect his "speedy trial" rights whatsoever. The judge did ask him if he had talked to his attorney and if the attorney had explained the procedure to be followed in the second phase of the trial. Mr. Melendez answered that he had talked to Mr. Alcott and that his recommendation was that Mr. Melendez not seek the death penalty (R. 774). However, the judge never ascertained on the record what defense counsel had told Mr. Melendez about his rights or about the consequences of not presenting mitigating evidence.

What is not clear in this case is whether Mr. Melendez fully consulted with competent counsel. There is no discussion on the record as to whether Mr. Melendez understood the consequences of his actions. At the very least, counsel should have requested a continuance of the sentencing phase to have time to consult with his client and to make clear that Mr. Melendez understood fully what he requested. Given the statements made by Mr. Melendez, it is not at all clear that he had any true understanding of what the process was or that his decision was knowingly and voluntarily made.

Mr. Melendez stated he wanted the death penalty because it would allow him (in his mind) to receive a "speedy trial" and "more publicity" to prove his innocence (R. 772). This is not a case where an obviously guilty person, remorseful of his crime, genuinely feels that death is the appropriate punishment he deserves and is willing and desirous of that punishment. Quite to the contrary, Mr. Melendez was proclaiming his innocence. His statements indicate confusion as to the consequences of his decision, and a complete misunderstanding of those consequences.

Furthermore, Mr. Melendez was under the misconception that he would serve twelve or fifteen years in prison (R. 770) (again exhibiting his confusion of the law), yet still he sought the death penalty solely for the purpose of

seeking justice. He was not asking for the death penalty because he was concerned that he would have to serve a mandatory minimum of twenty-five years, which for some individuals is worse than death. He was asking for death as a means of gaining "publicity," which he apparently equated with proving his innocence.

Juan Melendez simply did not understand the proceeding that led to his death sentence. Although he expressed his wish to receive a death sentence when conferring with the court, he did not ask the jury to recommend death, but proclaimed his innocence to the jury. Neither did he waive the presence of the jury. Indeed, the trial court specifically stated that Mr. Melendez would not be allowed to waive the jury recommendation:

> Yeah. I would not be willing to do it without the .. I'd like to have the jury's recommendation.

(R. 774). The trial court did, however, allow Mr. Melendez to waive presentation of evidence, which effectively rendered the jury recommendation meaningless.

Significantly, defense counsel did not ask the jury to recommend death. Nor did Mr. Melendez interrupt his counsel's pitiful argument to state his wish for a death sentence in order to "receive a speedy trial." Defense counsel briefly argued that Mr. Melendez's age, his lack of a significant criminal history, and George Berrien's participation in the offense indicated the propriety of a life sentence (R. 788-89).

Nowhere during any of the proceedings did counsel state that the strategy at penalty phase would be to request a death sentence should Mr. Melendez be convicted of capital murder. From the record it appears that Mr. Melendez, at the shock of being found guilty, came to the conclusion that a death sentence would better ensure his hope of obtaining justice. At no time prior to the verdict did Mr. Melendez preclude his attorney from preparing for the penalty

phase. There is no indication from the record that counsel prepared or investigated evidence to present at a penalty phase proceeding.

In Strickland v. Washington, the Supreme Court explained the analysis of an ineffective assistance of counsel claim:

> [T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court **should** be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that **our** system counts on to produce just results.

466 U.S. at **696** (emphasis added). The Supreme Court had also repeatedly held that a capital sentencing proceeding is neither individualized nor **reliable** unless the sentencer has been able to consider mitigating evidence:

> In order to ensure "reliability in the determination that death is the appropriate punishment in **a** specific case," Woodson, 428 U.S., at 305, the [sentencer] must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character. or the circumstances of the crime.
>
> . . . Our reasoning in Lockett and Eddings thus compels a remand for resentencing **so** that we do not "**risk** that the death penalty **will** be imposed in spite of factors which may call for a less severe penalty." Lockett, **438** U.S., at ***605***; Eddings, 455 U.S. at 119 (concurring opinion). When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth **and** Fourteenth Amendments," Lockett, ***438*** U.S., at ***605***.

Penry **v.** Lynaugh, 109 **S**. Ct. ***2934***, 2951-52 (1989)(emphasis added). In Mr. Melendez's case, because of the actions of trial counsel and the court, the adversarial process broke down, and Mr. Melendez's death sentence was not individualized and reliable.

In Hamblen v. State, 527 **So**. 2d ***800*** (Fla. 1988), this Court held that it was proper for Hamblen to waive the assistance of counsel in the penalty phase, finding that Hamblen was "competent to do so," and that there was mitigating evidence in the record in the form of psychologial reports which the trial court carefully considered. 527 **So**, **2d** at 804. However, the Court emphasized:

> The rights, responsibilities and procedures set forth in **our** constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence, A defendant

cannot be executed unless his guilt and the propriety of his sentence have been established according to law,

Id.

In Hamblen, unlike Mr. Melendez's case, the defendant waived the assistance of counsel at the penalty phase. Mr. Melendez never sought to waive the assistance of counsel. In discussing the waiver of counsel in Hamblen, this Court applied the well known requirements of Faretta v. California, 422 U.S. 806 (1975), and pointed out that the trial court conducted a Faretta inquiry.. Here, there is no evidence whatsoever that Mr. Melendez met the Faretta requirements for self-representation, yet the trial court allowed him to make decisions reserved for counsel and ask for the death penalty.

Recently, this Court considered a case presenting a situation similar to that presented in Mr. Melendez's case. Anderson v. State. 574 So. 2d 87 (Fla. 1991). In Anderson, trial counsel informed the trial court that the defendant did not want any mitigation witnesses presented at the penalty phase. 574 So. 2d at 94. Trial counsel explained in great detail the witnesses he had discovered during his preparations for the penalty phase and the kinds of testimony those witnesses could offer. Id. Trial counsel also emphasized that throughout his representation, the defendant had "never wavered in his desire not to have any of these people testify during the course of this second phase proceedings." Id. On the basis of these explanations and the inquiry conducted by the trial court, this Court affirmed the death sentence.

Justice Ehrlich concurred in the majority's decision, noting, however:

> I joined Justice Barkett's dissent in Hamblen v. State, 527 So.2d 800, 804 (Fla. 1988), and if the colloguy initiated by defense counsel Mark Ober had not taken place in this case, I would dissent.
>
> I am apprehensive that the majority opinion may be construed to mean that no inquiry need be made where a death penalty defendant waives his right to present mitigating witnesses. I am of the view that an inquiry must be made by the court to satisfy the trial judge that the waiver is howlingly. intelligently and voluntarily made. While the colloguy that was had here could have been expanded upon to include further inquiry as to the likely consequences of the

> defendant's waiver, I am satisfied that it was sufficient to meet any constitutional requirement, and for this reason, I concur in the Court's opinion.

Anderson, 574 So. 2d at 95 (Ehrlich, J., concurring, in an opinion in which Shaw, C.J., and Kogan, J., concur).

Mr. Melendez's case is quite different from Anderson. Here, trial counsel did not explain what witnesses were available for the penalty phase or what kind of evidence could be offered at the penalty. Trial counsel had conducted no investigation for the penalty phase and thus did not know what was available. Nor was the decision to forego the presentation of evidence at the penalty phase a longstanding decision as it was in Anderson. Here. that decision was made on the spur of the moment, by a defendant who had vigorously proclaimed his innocence and who was thus in a state of shock after having been found guilty. Further, the inquiry conducted by the trial court did not indicate that Mr. Melendez understood his decision and its consequences, but that Mr. Melendez was confused and believed a death sentence would insure a "speedy trial" and "publicity" which would help him establish his innocence.

Mr. Melendez was denied the effective assistance of counsel at the penalty phase of his capital proceedings. Counsel did not advise Mr. Melendez of the consequences of not presenting evidence at the penalty phase. Counsel could not have properly advised Mr. Melendez because counsel had failed to investigate and prepare.

An accused has the "ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal, see Wainwrinht v. Sykes, 433 U.S. 72, 93 n.1, 97 S. Ct. 2497, 2509 n.1, 53 L.Ed.2d *594* (1977)(Burger, C.J., concurring); ABA Standards for Criminal Justice 4-5.2, 21-2.2 (2d ed. 1980)." Jones v. Barnes, 103 S. Ct. 3308 (1983). However, even these decisions should only be made after full consultation with competent counsel. In a

capital penalty phase setting, an attorney may not "blindly follow" a client's direction not to use character witnesses without conducting an independent evaluation of the witnesses. This is because "the lawyer first must evaluate potential avenues and advise the client of those offering possible merit . . . Although Thompson's directions may have limited the scope of [his attorney's] duty to investigate, they cannot excuse [the attorney's] failure to conduct any investigation of Thompson's background for possible mitigating evidence." Thompson v. Wainwright, 787 F. 2d 1447, 1451 (11th Cir. 1986).

In a case very similar to Mr. Melendez's, the Tenth Circuit reversed a death sentence based on the ineffective assistance of counsel. There a criminal defendant pled guilty to a capital offense and immediately afterwards held a press conference "asserting that he had felt compelled to plead guilty and to ask for the death penalty" in order to get the American Civil Liberties Union to represent him. Osborn v. Shillinger, 861 F.2d 612, 614, 629 (10th Cir. 1988). However, the public defender handling the case continued as counsel of record and was not replaced by the A.C.L.U. Counsel failed to investigate, prepare and present mitigating evidence regarding the defendant. The Tenth Circuit found counsel's performance inadequate:

> Counsel knew Osborn was only pleading guilty in an attempt to get the ACLU interested in his case. Nevertheless, he made every effort to ensure that the court would accept his client's plea. Even assuming that Osborn might have insisted on pleading guilty, a true advocate would have attempted to convince the state to allow Osborn to withdraw his plea before sentencing.

861 F.2d at 629. The Tenth Circuit also noted:

> The Supreme Court has long "recognized that 'the right to counsel is the right to effective assistance of counsel'" under the Sixth Amendment. Striclcland v. Washington, *466* U.S. *668, 686, 104* S.Ct. 2052, 2063, 80 L.Ed.2d *674* (1984); (quoting McMann v. Richardson, 397 U.S. 759, *771* n. *14, 90* S.Ct. *1441, 1449* n. *14, 25* L.Ed.2d 763 (1970)), United States v. Cronic, *466* U.S. *648, 655,* 104 S.Ct. 2039, *2044,* 80 L.Ed.2d 657 *(1984).* An effective attorney "must play the role of an active advocate, rather than a mere friend of the court." Evitts v. Lucev, 469 U.S. 387, *394,* 105 S.Ct. *830,* 835, *83* L.Ed.2d 821 (1985); Cronic, 466 U.S. at 656, *104* S.Ct. at *2045;* Anders v. California, *386* U.S. *738, 743, 87* S.Ct. *1396, 1399,* 18 L.Ed.2d *493*

(1967). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686, 104 S.Ct. at 2064.

861 F.2d at 624 (emphasis added).

> Counsel did not have to prepare for a trial because Osborn had pled guilty. Even though counsel's sole responsibility was to argue the sentencing question, the district court found that he did little in preparation. Osborn, 639 F.Supp. at 616-17. "It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by an objective standard of reasonableness." Blake v. Kemp, 758 F.2d 523, 533 (11th Cir.1985), cert. denied, 474 U.S. 998, 106 S.Ct. 374, 88 L.Ed.2d 367 (1985). Here, counsel failed to uncover mitigating family background witnesses and medical history when both were available.

861 F.2d at 627.

In Mr. Melendez's case, counsel did not investigate, prepare or present a wealth of available mitigation. See Section B, infra. He did not submit the question of whether Mr. Melendez should live or die to a "meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 666 (1984).

Moreover, after trial counsel neglected his duties to investigate and prepare and to advise Mr. Melendez of the consequences of his decision, the trial court allowed Mr. Melendez to forego the presentation of mitigation evidence without conducting an adequate inquiry. The trial court allowed Mr. Melendez to act his own counsel and make decisions reserved for counsel without conducting any Faretta inquiry and thus deprived Mr. Melendez of his right to counsel at the penalty phase.

It is well-established that defense counsel must, with carefully delineated exceptions, have unfettered control of tactics and strategy and be allowed to exercise his or her independent professional judgment, Thus, "the decision on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after

consultation with the client." ABA Standards for Criminal Justice, The Defense Function, *4-5.2*, Controlling Direction of the Case. The ABA Standards also make the common sense point that "[m]any of the rights of an accused, including constitutional rights, are such that only trained experts can comprehend their full significance, and an explanation to any but the most sophisticated client would be futile." Id. Because making decisions such as which witnesses to call "require[s] the skill, training, and experience of the advocate. the power of decision on them must rest with the lawyer." Id.

In Jones v. Barnes, *463* U.S. 745 (1983). an appellate attorney refused to raise two non-frivolous issues which the client insisted on raising. The Supreme Court held that the attorney must be permitted to override the client's decision regarding which issues to pursue. Noting that four fundamental decisions are traditionally committed to the defendant (whether to plead guilty, waive a jury, testify on his or her own behalf, or take an appeal), and that a defendant is entitled to represent himself (thereby retaining total control of his defense), *463* U.S. at 751, the Court stressed that the lawyer's superior skills were paramount in making other decisions:

> Neither Anders [v. California, 386 U.S. 738 (1967),] nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.
>
> This Court, in holding that a state must provide counsel for an indigent appellant on his first appeal as of right, recognized the superior ability of trained counsel in the "examination into the record, research of the law, and marshaling of arguments on [the appellant's] behalf," Douglas v. California, supra, 372 U.S., at 358, 83 S.Ct., at 817. Yet by promulgating a per se rule that the client, not the professional advocate, must be allowed to decide what issues are to be pressed, the Court of Appeals seriously undermines the ability of counsel to present the client's case in accord with counsel's professional evaluation.

Id. This analysis is equally applicable to a trial situation, where the attorney is responsible for decisions involving strategy and tactics

These authorities establish that the trial court erred in Mr. Melendez's case. Unless the client has effectively waived the assistance of counsel, it is not his or her right to control the choice of witnesses.

The trial court's actions interfered with the strategy and tactics of defense counsel, thus depriving Mr. Melendez of the assistance of counsel and creating per se ineffective assistance of counsel. The right to the effective assistance of counsel is violated when the government "interferes . . . with the ability of counsel to make Independent decisions about how to conduct the defense." Strickland v. Washington, 466 U.S. 668, 686 (1984); United States v. Cronic, 466 U.S. 648 (1984); Perry v. Leake, 109 S. Ct. 594, 599-600 (1989). Mr. Melendez's case thus involves a situation where "the likelihood that any lawyer . . . could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Cronic, 466 U.S. at 659-60.

The trial court also in effect allowed Mr. Melendez to represent himself without conducting a Faretta inquiry. When the trial court allowed defense counsel to accede to Mr. Melendez's wishes on decisions reserved for counsel, thus depriving Mr. Melendez of the assistance of counsel, Mr. Melendez was on his own. The court then failed to conduct the constitutionally required Faretta inquiry. If a defendant is allowed to undertake actions resulting in self-representation, regardless of whether the defendant asked to do so or not, the trial court must conduct a Faretta inquiry. Jackson v. James, 839 F.2d 1513 (11th Cir. 1988); Harding v. Davis, 878 F.2d 1341 (11th Cir. 1989).

An evidentiary hearing is necessary to determine whether Mr. Melendez received the effective assistance of counsel before making the ultimate decision to waive the presentation of mitigation at sentencing. If Mr. Melendez does have the right to make such a decision, the decision should not be made without adequate time to fully explore his options, nor should it be made without

adequate assistance of counsel. It is not clear from the record that such assistance was effectively given under the time constraints. See Anderson. The transcript of the penalty phase colloguy, which the lower court attached to its order denying Rule 3.850 relief, does not refute Mr. Melendez's allegations. If anything, that transcript demonstrates that Mr. Melendez was confused regarding the consequences of his decision. The lower court erred in failing to conduct an evidentiary hearing. Such a hearing and relief are proper.

B. TRIAL COUNSEL FAILED TO INVESTIGATE AND PREPARE FOR THE PENALTY PHASE

A wealth of significant evidence was available and should have been presented at Mr. Melendez's penalty phase. However, counsel failed to present this evidence in mitigation and failed to adequately explain to his client the necessity of doing so. The failure to properly investigate and prepare cannot be viewed as tactical. Mr. Melendez's capital conviction and sentence of death are the resulting prejudice, as in Thomas V. Kemp:

> It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trials would have been different if mitigating evidence had been presented to the jury. Strickland v. Washington, 466 U.S. at 694. The key aspect of the penalty trial is that the sentence be individualized, focusing on the particularized characteristics of the individual. Gregg v. Georgia, 428 U.S. 153 (1976). Here the jurors were given no information to aid them in making such an individualized determination.

796 F.2d at 1325. A full and fair evidentiary hearing, O'Callaghan; Heiney, and thereafter, Rule 3.850 relief are proper.

Evidence in mitigation regarding Mr. Melendez could have been and should have been presented to the jury. He proclaimed his innocence and "waived" presentation of mitigation to the jury. However, before this "waiver," trial counsel had failed to even investigate possible mitigation.

The following background information was unexplored by defense counsel, and could have been presented to the advisory jury, and the court, for consideration of whether or not Juan Roberto Melendez should be executed. This information

was readily available from family members who were eager to help but who ever never contacted by trial counsel (See Apps. 11, 13, 15 [Affidavits of Andrea Colon Rodriquez, Maria Conchita Colon, Maria Esther Ortiz]).

Juan Roberto Melendez was born to Andrea Colon and Jose Melendez, on May 24, 1951, in Brooklyn, New York. Juan's parents were never married and Andrea Colon undertook the job of raising her son alone. But life was difficult for Ms. Colon, who was ill-prepared to cope with an environment completely foreign to her native Puerto Rico.

Andrea Colon emigrated to New York from Humacau, Puerto Rico. a rural area southwest of San Juan. Jobs were scarce in Humacau, where most people were very poor. The only means of escape from the desperate poverty and joblessness of the country was to emigrate to the mainland. In the 1940's, Andrea followed a steady stream of relatives and friends to New York City to seek her fortune.

Andrea came to New York with high hopes for a job, a decent salary and a standard of life surpassing her native homeland. but the dream soon became a nightmare. Young Andrea quickly discovered the prosperous America fashioned in the hearts and minds of the poor in Puerto Rico eluded the majority of those who flocked to this country in droves. The language barrier and her limited education and training led to heartbreak and disappointment for Andrea Colon and her fatherless son throughout their years in New York.

The only legacy Jose Melendez gave to his son was the Melendez name. Little is known about Jose Melendez, who died in New York when Juan was very young. Juan never had the benefit of a relationship with his father. The few male role models in Juan's life were his mother's lovers, who were physically abusive to her.

Juan's mother lived with Pepe Poll for approximately five years. During that time, Juan observed his mother's frequent beatings and occasionally tried to defend her. But Poll, the father of Juan's two half brothers and a half

sister, easily defeated Juan and his mother, who frequently ran away from the home she shared with Poll, sometimes in the middle of the night. Juan, along with his mother and the other children, would take refuge in the homes of other relatives and friends.

Life with Poll was so dangerous and chaotic for Juan's mother that she returned to Puerto Rico to her family in 1959. Juan's mother left him in New York with his godmother who was also his grandmother's sister, Francisca Rodriguez, until she could send for him. Andrea's brother, Roberto Colon, took Juan to Puerto Rico within a few months of his mother's arrival. The mother and son reunited in Humacao at the home of his grandfather, Angel Colon Dias.

Life in his family's homeland was idyllic at first for the young Juan, surrounded by his sisters, a brother and other relatives. The separations from his mother and the constant shuffling from one house to another in the frigid New York cold was behind him. Juan and his mother settled in a home they could call their own and for a short while things were better.

The Colon family lived in Maunabo, a fishing village on the southwest coast of Puerto Rico. Juan was enrolled in the local public school, where he earned average grades. School vacations were spent in the mountains and on the beach, within walking distance from their modest home. He also went fishing, crabbing and played ball with the neighborhood boys. Life would have been almost normal for the Colons, if Andrea had not again become the victim of abuse by Juan's step-father, Pablo Morales.

Andrea Colon moved her family to Maunabo because of her relationship with Morales. Although married to another woman in Maunabo, Morales provided a modicum of financial support to Andrea and her family, However, Morales brutalized Juan's mother, often leaving her bruised and welted. Juan observed the frequent beatings and arguments between Morales and his mother. Juan argued with Pablo about the punishment inflicted on his mother, but was unable to stop

Pablo from beating her.

Juan loved and appreciated his mother, who worked long hours as a seamstress to provide for her family. Approaching the threshold between childhood and adulthood, Juan not only felt powerless to protect his mother, but also frustrated by his inability to financially assist his mother. As Juan entered his teenage years, he predictably began to develop his own problems.

Juan enjoyed the company of older boys, some of whom had begun to experiment with drugs. Initially, Juan used drugs to gain the acceptance of his friends, but the desire to please rapidly developed into a dependency on alcohol and narcotics. By age 12, Juan was drinking alcohol, at first on weekends and within a few years on a daily basis. Juan drank whatever he could get, usually Puerto Rican rum and moonshine. Liquor was readily available in his home because his mother drank, although moderately. Juan would steal liquor for himself and his friends, or the group would pool their money to buy alcohol. By age 15, Juan coupled drinking with marijuana use.

When Juan drank, he became severely intoxicated and was soon known as the town drunk by age 17. Juan lost interest in school and eventually dropped out and started working in the sugar cane fields. Juan's varied taste in drugs was also common knowledge in his community. Juan used heroin, and in later years, cocaine. But his drug of choice continued to be alcohol.

Juan's mother became very concerned about his excessive drinking and his inability to control it. She pleaded with him to stop drinking. Juan began to stay away from home to avoid being confronted by his mother about his drinking. Rather than go home drunk, Juan would sleep on the street in any corner he could find,

In 1968, when he was 17, Juan followed some older friends and signed on as a migrant worker and traveled to Delaware and then to Lakeland, Florida. Juan continued his chronic alcohol abuse, controlling the hangovers and tremors with

early morning drinks. Blackouts became a problem for Juan in the late 60s and early 70s. Despite the desperate state of his alcoholism, Juan drank each day until he was drunk.

Drinking precipitated Juan's involvement in a robbery, on January 3, 1975. Juan pled guilty. His live-in girlfriend attributed the cause to drug use. Lorrine Ware told a corrections official March 13, 1975, that "had it not been for Melendez being under the influence of alcohol and marijuana. the offense probably would not have occurred." Ware also said that Juan took pills call "THC".

Juan said about the robbery that he was drunk on alcohol at the time of the offense and did not intend to rob a store, but it happened spontaneously. Juan was abusing alcohol heavily prior to his arrest. Prior to the robbery, Juan's criminal record showed nothing except alcohol-related offenses of minor consequence.

Juan was sentenced to 10 years in prison, where he compiled disciplinary reports for the possession of narcotics and alcohol. It was no secret that Juan made alcohol -- referred to as "buck" in his corrections' records -- from whatever substances were available to him.

Juan returned to Polk County after serving out his sentence and resumed round-the-clock alcohol and narcotics abuse. Up until the time Juan was arrested, he was employed as a migrant worker. He had not been arrested or jailed since his release from prison.

Juan was always very responsible and helpful to his family. Since he was a small child, he helped around the house doing chores and helping care for his younger brother and sisters. Juan was his mother's only support through much of his childhood and during his young adulthood.

After school hours, Juan worked on and built a house for his family. This house was made of wood and Juan wanted even something better for his family. He

worked earnestly and laid the foundation for the concrete house his mother now lives in. Even after Juan permanently moved to the United States he cared very much for his family. He would send money from time to time, to his family in Puerto Rico. Juan was never in trouble with the police when he lived in Puerto Rico (App. 3).

When Juan was in the United States, he remained a nice, kind and helpful person to all his friends. He would help with chores around their houses, just like he helped his family when he was living with them in New York and in Puerto Rico The people who how Juan do not believe that he is the kind of person who can commit a murder.

This information was readily available had defense counsel pursued a proper investigation. Defense counsel, however, did nothing to prepare for the penalty phase. As a result, Mr. Melendez's sentencers were deprived of information which would have made the difference between life and death.

The lower court denied this claim without conducting an evidentiary hearing, holding that "the attorney's actions were not deficient in that he was acting as the defendant requested" (PC-R. 813). This conclusion does not address Mr. Melendez's contention that trial counsel had failed to investigate and prepare before the last-minute decision was made not to present evidence at the penalty phase. Having not investigated and prepared, defense counsel was unable to properly advise Mr. Melendez regarding the penalty phase. An evidentiary hearing is required, at which Mr. Melendez can establish what he has pled and demonstrate his entitlement to relief

C. TRIAL COUNSEL PRESENTED AN UTTERLY INADEQUATE CLOSING ARGUMENT AT THE PENALTY PHASE REGARDING THE NON-STATUTORY MITIGATING CIRCUMSTANCE OF DISPARATE TREATMENT OF GO-DEFENDANT.

Mr. Melendez's co-defendant, George Berrien, was not even prosecuted for his alleged participation in this homicide although in closing argument at sentencing, the prosecutor stated:

> The second mitigating circumstance that you will be asked to consider is whether the defendant was an accomplice in the homicide which was actually committed by another person and his participation was relatively minor. That is not applicable in this case, because Mr. Melendez was equally guilty with Mr. George Berrien or equally involved with Mr. George Berrien in committing the murder.

(R. 786-787)(emphasis added). Defense counsel's sole argument on this subject was:

> . . . but consider what evidence there is as to the role Juan played and the relationship to apparently, as you believe, the role that George Berrien played, and that he was, according to the State's theory an accomplice . . .

(R. 789).

In closing at the guilt/innocence phase, George Berrien's name was also emphasized by the State (See R. 693-94). During the defense case, trial counsel asked Mr. Berrien if he had been arrested or charged for this crime (R. 659), and Mr. Berrien said, "no" (R. 657). That very brief comment went virtually unnoticed, however, and the defense failed to even mention it again. to inform the jury that disparate treatment can be considered in mitigation, or to request that the jury be instructed that it could consider disparate treatment as a nonstatutory mitigating factor. "We have recognized that disparate treatment of an equally culpable accomplice can serve as a basis for a jury recommendation of life." Callier v. State, 523 So. 2d 158, 160 (Fla. 1988).

The sentencing jury was thereby precluded from considering disparity in treatment as a mitigating factor, in a case where the State claimed "Mr. Melendez was equally guilty with Mr. George Berrien" (R. 786). This was in violation of Lockett v. Ohio, 438 U.S. 586 (1978). In addition, there is no indication that the court considered disparate treatment as a nonstatutory mitigating factor, all in violation of the eighth and fourteenth amendments. Eddings v. Ohio, 455 U.S. 104 (1982); Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986). See Callier v. State, 523 So. 2d 158 (Fla. 1988), citing Brookings v. State, 495 So. 2d 135, 143 (Fla. 1986), and McCampbell v. State, 421 So. 2d 1072

(Fla. 1982).

Mr. Melendez's sentence of death is inherently unreliable and fundamentally unfair. Trial counsel's performance was deficient, to Mr. Melendez's substantial perjudice. An evidentiary hearing and relief are proper.

D. AS A RESULT OF DEFENSE COUNSEL'S FAILURES, MR. MELENDEZ WAS DENIED AN INDIVIDUALIZED AND RELIABLE SENTENCING DETERMINATION BECAUSE THERE WERE NO MENTAL HEALTH EXPERTS TO EVALUATE COMPETENCY OR MITIGATION.

A criminal defendant is constitutionally entitled to expert mental health assistance when the state makes his or her mental state relevant to guilt/innocence or sentencing. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). This constitutional entitlement requires a professionally "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985).

Florida law also provides, and thus provided Mr. Melendez, with a state law right to professionally adequate mental health assistance. See, e.g., Mason, supra, 489 So. 2d 734; cf. Fla. R. Crim. P. 3,210, 3,211, 3.216; State v. Hamilton, 448 So. 2d 1007 (Fla. 1984). Once established, the state law interest is protected against arbitrary deprivation by the federal Due Process Clause. Cf. Hicks v. Oklahoma, 447 U.S. 343, 347 (1980); Vitek v. Jones, 445 U.S. 480, 488 (1980); Hewitt v. Helms, 459 U.S. 460, 466-67 (1983); Meachum v. Fano, 427 U.S. 215, 223-27 (1976). In this case, both the state law interest and the federal right were denied

Mr. Melendez's claim is that because of counsel's ineffective assistance in failing to seek professional evaluations, the result of the sentencing determination in this case is not individualized or reliable. Dr. Harry Krop has performed an evaluation on Mr. Melendez, and has diagnosed Mr. Melendez as suffering from chronic chemical dependence. In addition to his alcohol problems, Mr. Melendez is a very good candidate for rehabilitation, and his family background also establishes mitigation. See Section B, supra.

Trial counsel simply failed to prepare for the penalty phase, and Mr. Melendez was thus deprived of significant evidence demonstrating the propriety of a life sentence. An evidentiary hearing and relief are proper.

E. CONCLUSION

Mr. Melendez was deprived of the effective assistance of counsel at the penalty phase of his capital proceedings. Counsel failed to investigate and prepare, As a result, counsel could not properly advise Mr. Melendez regarding the consequences of not presenting evidence in mitigation. Counsel failed to present appropriate argument regarding the one sentencing issue upon which evidence did exist. Mr. Melendez's death sentence is the resulting prejudice. An evidentiary hearing and relief are required

ARGUMENT V

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

The United States Supreme Court recently wrote while overturning a Florida death sentence on what amounted to proportionality grounds:

> "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano v. Florida, 468 U.S 447, 460 (1984). The Constitution prohibits the arbitrary or irrational imposition of the death penalty. Id., at 466-67. We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. See, e.g., Clemons, supra, at (citing cases); Gregg v. Georgia, 428 U.S. 153 (1976).

Parker v. Dugger, 59 U.S.L.W.4082, 4085 (January 22, 1991).

The central concern of the United States and this Court's capital punishment jurisprudence is that any death sentence be proportionate. See Gregg v. Georgia, 428 U.S. 153 (1976); State v. Dixon, 283 So. 2d 1 (Fla. 1973); see also Brookings v. State, 495 So. 2d 135 (Fla. 1986). In this regard, this Court's case law has long established that similarly situated co-defendants

should be treated similarly. "We have recognized that disparate treatment of an equally culpable accomplice can serve as a basis for a jury's recommendation of life." Callier v. State, 523 So. 2d 158 (Fla. 1988). See also Brookings v. State, 495 So. 2d 135 (Fla. 1986); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982). In Downs v. Dugger, 514 So. 2d 1069, 1072 (Fla. 1987), the Court stated:

> This Court previously has recognized as mitigating the fact that an accomplice in the crime in question, who was of equal or greater culpability, received a lesser sentence than the accused.

Accomplices of "equal culpability" should be treated equally. See Eutzy v. State, 458 So. 2d 755, 760 (Fla. 1984) ("[t]he jury may reasonably compare the treatment of those equally guilty of a crime)."

However, such was not the case here, where Juan Melendez was the only one of the two alleged murderers even charged with this crime. According to the testimony of John Berrien, George Berrien was the man who accompanied Juan Melendez to Mr. Del's school of cosmetology on the night in question (R. 305-308). However, George Berrien was never even charged in this crime.

Throughout trial, the State really focused its case on linking George Berrien to Mr. Del and the murder. Most of the testimony, in fact, concerned George Berrien and how he knew about Mr. Del's jewelry (R. 281), had connections with people at Mr. Del's, and ultimately made the "appointment" with Mr. Del and then slashed his throat (R. 443).

But there is no case of "State v. George Berrien." George Berrien was never tried for this murder. Be was never even arrested. When the State's case rests so heavily on the equal or even "greater culpability" of George Berrien, see Eutzy v. State, 458 So. 2d 755 (1984), when the State itself put forth argument expounding on Berrien's guilt, and then the State seeks a conviction and death sentence only against Mr. Melendez, it is clear that George Berrien received the most disparate treatment possible. The State convicted Juan Melendez and did not even charge George Berrien. The State then sought the death

penalty for Juan Melendez and argued at sentencing:

> Mr. Melendez was equally guilty with Mr. George Berrien in committing the murder.

(R. 787)(emphasis added). The State "won" a death sentence for Juan Melendez and "equally guilty" (R. 787) George Berrien walked free. This court's fundamental role is to "[g]uarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case." State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973); Penn v. State, 574 So. 2d 1079 (1991). The Court should now correct the fundamental disparity between the treatment Mr. Melendez and George Berrien received.

Mr. Melendez's conviction and sentence of death violate the eighth and fourteenth amendments and are fundamentally unsound. An evidentiary hearing and Rule 3.850 relief are proper.

ARGUMENT VI

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

Florida law provides that for a death sentence to be constitutionally imposed there must be specific written findings of fact in support of the penalty. Fla. Stat. section 921.141(3); Van Royal v. State. 497 So. 2d 625 (Fla. 1986). The duty imposed by the legislature directing that a death sentence may only be imposed when there are specific written findings in support of the penalty provides for meaningful review of the death sentence and fulfills the eighth amendment requirement that the death sentence is not imposed in an arbitrary and capricious manner. See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976) and Woodson v. North Carolina, 428 U.S. 280 (1976).

This Court has strictly enforced the written findings requirement mandated by the legislature, Van Royal, 497 So. 2d at 628, holding that a death sentence may not stand when "the judge did not recite the findings an which the death

sentences were based into the record." Id. The imposition of such a sentence is contrary to the "mandatory statutory requirement that death sentences be supported by specific findings of fact."

In Mr. Melendez's case, the trial court imposed a death sentence without making any factual findings (R. 802). Immediately following the jury's death recommendation, the court imposed a death sentence without making any findings whatsoever (R. 802). A written order was not entered into the record until almost three (3) weeks later (R. 817-18). However, the findings within the order in support of Mr. Melendez's death sentence fail to comport with the statutory mandate set out in section 921.141(3). The trial court based the death sentence merely on a written recitation of the aggravating and mitigating factors applicable under the statute (R. 2847-2848). The trial court failed to point out the specific factual circumstances used to find the existence of the factors in aggravation and mitigation. Mr. Melendez's death sentence does not rely on a "well-reasoned application" of the statute. His death sentence is unlawful, must be vacated and a life sentence imposed in accordance with section 921.141(3).

The trial court may not reasses the factual circumstances supporting the determination of the death sentence once jurisdiction was initially relinquished on direct appeal. Van Royal. Once the trial court has relinquished initial jurisdiction over the trial proceedings, it is too late for the court to supplement the initial record and provide an adequate written factual basis in support of the death sentence. The record may not be supplemented at this juncture because the record "is inadequate and not merely incomplete." Van Royal, 497 So. 2d at 698. Accordingly, Mr. Melendez's death sentence must be vacated.

ARGUMENT VII

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.

The manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel" provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe any murder to be heinous, atrocious or cruel. Mills v. Maryland, 108 S. Ct. 1860 (1988). Jurors must be given adequate guidance as to what constitutes "especially heinous, atrocious, or cruel." Maynard v. Cartwright, 108 U.S. 1853 (1988).

Recently, the Supreme Court explained its holding in Maynard:

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Mavnard and Godfrey.

Walton v. Arizona, 110 S. Ct. 3047, 3056-57 (1990).

In Walton, the Arizona capital scheme did not provide for a jury in the penalty phase of a capital trial. Thus, the Court's conclusion that no error occurred in Walton is not controlling here. That is because in Florida a jury in the penalty phase returns a verdict recommending a sentence. The jury's verdict is binding as to the presence and weight of aggravating circumstances as well as the sentence recommended unless no reasonable person could have reached the jury's conclusion. Hallman v. State, 560 So. 2d 223 (Fla. 1990). See Ferry v. State, 507 So. 2d 1373 (Fla. 1987)("The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.") The Florida standard for an override is exactly the same standard that the United States Supreme Court adopted for federal review of a capital sentencing decision. In Lewis v. Jeffers, 110 S. Ct. 3092, 3102-03 (1990), the

Supreme Court stated:

> **Rather,** in determining whether a state court's application of its constitutionally adequate aggravating circumstance was **so** erroneous as to raise an independent due process or Eighth Amendment violation, we think the more appropriate standard of review is the "rational factfinder" standard established in Jackson v. Virginia, *443* U.S. 307 (1979). We held in Jackson that where **a** federal habeas corpus claimant alleges that his state conviction is unsupported by the evidence, federal courts must determine whether the conviction was obtained in violation of In re Winship, 397 U.S. **358** (1970), by asking "whether, after viewing the **evidence** in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *443* **U.S.**, at 319 (citation omitted); **see also id,** at 324 ("We **hold** that in a challenge to a state criminal conviction brought under **28** U.S.C. Sections *2254* -- if the settled procedural prerequisites for such a claim have otherwise been satisfied .. the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt") (footnote omitted). The Court reasoned:
>
> > "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic fact to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." *443* U.S., at 319 (footnote omitted).
>
> These considerations **apply** with equal force to federal habeas review of a state court's finding of aggravating circumstances.

The significance of this is that certainly a federal court conducting the review mandated by Lewis v. Jeffers cannot be regarded **as** the sentencer. In Florida, therefore, the courts, which review the jury's recommendation in order to determine whether it has a "reasonable basis" and whether a "rational factfinder" could have reached the **jury** recommendation, are not replacing the jury as sentencers for eighth amendment purposes. In Florida a capital jury and judge both act as sentencers in the penalty phase. Because the jury's factual determinations are binding **so** long **as a** reasonable basis exists, it must be regarded as **a** sentencer. In fact, that was the holding in Hitchcock v. **Dugger**, 481 U.S. 393 (1987); Jackson **v.** Dugger, 837 F.2d *1469* (11th Cir. 1988); Mann **v.**

Dugger, 844 F.2d 1446 (11th Cir. 1988) (in banc), cert. denied 109 S. Ct. 1353 (1989); and Hall v. State, 541 So. 2d 1125 (Fla. 1989).

The issue raised by Mr. Melendez's claim is identical to that raised in Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Oklahoma's "heinous, atrocious, or cruel" aggravating circumstance was founded on Florida's counterpart, see Cartwright v. Maynard, 802 F.2d 1203, 1219, and the Florida Supreme Court's construction of that circumstance in State v. Dixon, 283 So. 2d 1 (Fla. 1973), was the construction adopted by the Oklahoma courts. Under the Cartwright decision, Mr. Melendez is entitled to relief. The issue is also identical to that raised in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(en banc).

Here the jury was not told what was required to establish this aggravator. See Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Cochran v. State, 547 So. 2d 528 (Fla. 1989); Hamilton v. State, 547 So. 2d 630 (Fla. 1989). In the present case, as in Cartwright, the jury instructions provided no guidance regarding the "heinous, atrocious or cruel" aggravating circumstance. The jury was simply told: "the crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel." (R. 793). No further explanation of the aggravating circumstance was given. At sentencing, the trial judge found that "heinous, atrocious and cruel" applied to Mr. Melendez's case.

Where an aggravating factor is struck in Florida, a new sentencing must be ordered unless the error was harmless beyond a reasonable doubt. Error before a sentencing jury must be reversed where the record contained evidence upon which the jury could reasonably have based a life recommendation. Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1988) ("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for the recommendation.") Mitigation was before the jury which could have served as a reasonable basis for a life recommendation. Mr. Melendez

is entitled to relief under the standards of Maynard v. Cartwright.

ARGUMENT VIII

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

The decision in Maynard v. Cartwright, 108 S. Ct. 1853 (1988), applies to overbroad applications of aggravating circumstances and holds them to be violative of the eighth amendment, As the record in its totality reflects, the sentencing jury never applied the limiting construction of the cold, calculated aggravating circumstance as required by Maynard v. Cartwright. Mr. Melendez was sentenced to death based on a finding that his crime was "cold, calculated and premeditated," but neither the jury nor trial judge had the benefit of the proper definitions. Mr. Melendez's sentence violates the eighth and fourteenth amendments. The record in this case fails to disclose a shred of evidence which could support a finding of "careful plan" or "prearranged design," In fact, the record establishes precisely the opposite. The judge did not require any "heightened" premeditation and certainly he did not properly construe the statutory language and understand the obvious legislative intent.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630 (Fla. 1989). In fact, Mr. Melendez's jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Melendez's jury received no instructions regarding the elements of the "cold, calculated and premeditated" aggravating circumstance submitted for the jury's consideration. Its discretion was not channeled and limited in conformity with Cartwright.

Under the analysis of Witt v. State, 387 So. 2d 922 (Fla. 1980), cert.

denied, 449 U.S. 1067 (1980), Cartwright represents a fundamental change in the constitutional law of capital sentencing that, in the interests of fairness, requires the decision to be given retroactive application. See Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). Since mitigation was contained in the record, the error can not be harmless beyond a reasonable doubt. Rule 3.850 relief is warranted.

ARGUMENT IX

MR. MELENDEZ'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHIH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S.CT. 2633 (1985) AND MANN 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.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(in banc), relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discusses below violated Mr. Melendez eighth amendment rights, Juan Melendez should be entitled to relief under Mann, for there is no discernible difference between the *two* cases. A contrary result would result in the totally arbitrary and freakish imposition of the death penalty and violate the eighth amendment principles.

Throughout Mr. Melendez's trial, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase (R. 92, 93, 124, 164, 180, 197, 201, *204,* 776, 780-78, 792, 796). In preliminary instructions to the jury in the penalty phase of the trial. the judge emphatically told the jury that the decision as to punishment was his alone, After closing arguments in the penalty phase of the trial, the judge

reminded the jury of the instruction they had already received regarding their lack of responsibility for sentencing Mr. Melendez, but noted that the "formality" of a recommendation was required.

In Hitchcock v. Dugger, 481 U.S. 393 (1987), the Supreme Court for the first time held that instructions for the sentencing jury in Florida were governed by the eighth amendment. This was a retroactive change in law, see Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), which excuses counsel's failure to object the adequacy of the jury's instructions and the impropriety of prosecutor's comments. The intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Mr. Melendez's jury, however, was led to believe that its determination meant very little. Under Hitchcock, the sentencer was erroneously instructed.

In Caldwell, the Supreme Court held, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere." 472 U.S. at 328-29. The same vice is apparent in Mr. Melendez's case, and Mr. Melendez is entitled to relief. This Court must vacate Mr. Melendez's unconstitutional sentence of death.

ARGUMENT X

THE SHIFTING OF THE BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT 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,

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more

aggravating circumstances before the death penalty could be imposed . . .

> {S}uch a sentence could be given if the state showed aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Melendez's capital proceedings. To the contrary, the burden was shifted to Mr. Melendez on the question of whether he **should** live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Hitchcock v. Dugger, 481 U.S. 393 (1987); and Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Mr. Melendez's jury was unconstitutionally instructed, as the **record** makes abundantly clear (See R. 776, 792, 794)

Under Hitchcock, Florida juries must be instructed in accord with the eighth amendment principles. Hitchcock constituted a change in law in this regard. Under Hitchcock and its progeny, an objection, in fact, was not necessary. Mr. Melendez's sentence of death is neither "reliable" nor "individualized." This error undermined the reliability of the jury's sentencing determination and prevented the jury and the judge from assessing the full panoply of mitigation contained in the record. The Court must vacate Mr. Melendez's unconstitutional sentence of death.

ARGUMENT XI

MR. MELENDEZ'S 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.

In Florida, the "usual form" of indictment for first degree murder under sec. 783.04, Fla. Stat. (1984), is to "charge{e} murder . . . committed with a premeditated designed to effect the death of the victim." Barton v. State, 193 So. 2d 618, 624 (Fla. 2d DCA 1968). Mr. Melendez was charged with first-degree murder in the "usual form": murder "from a premeditated design to effect the

death of" the victim in violation of Florida Statute 782.04 (R. 2-3). An indictment such as this charges felony murder: section 782.04 is the felony murder statute in Florida, Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983). In this case, Mr. Melendez was convicted on the basis of felony murder. The State argued for a conviction based on the felonies charged, and argued that the victim was killed in the course of a felony. The death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the felony murder finding that formed the basis for conviction. The jury was instructed that it was entitled automatically to return a death sentence upon its finding of guilt of first degree (felony) murder because the underlying felony justified a death sentence. The state argued to the jury that the jury should find Mr. Melendez guilty of felony murder and that the aggravation was automatic (R. 785).

According to this Court the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984)(no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987)("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty"). However, here, the jury was instructed on this aggravating circumstance and told that it was sufficient for a recommendation of death unless the mitigating circumstances outweigh the aggravating circumstances. The jury did not receive an instruction explaining the limitation contained in Rembert and Proffitt. There is no way at this juncture to know whether the jury relied on this aggravating circumstance in returning its death recommendation. In Maynard v. Cartwright, 108 S. Ct. at 1858, the Supreme Court held that the jury instructions must "adequately inform juries

what they must find to impose the death penalty." Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and its progeny require Florida sentencing juries to be accurately and correctly instructed in compliance with the eighth amendment. Moreover, Hitchcock and its progeny according to this Court was a change in Florida law which excuses procedural default of penalty phase jury instruction error. Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988).

Trial counsel rendered ineffective assistance of counsel in that he did not object to the State's argument before the jury that the finding of this automatic aggravating circumstance requires the imposition of death. Trial counsel was also ineffective in not requesting that the jury be adequately instructed that if only the automatic aggravating factor was found that an advisory opinion of life was required. Surely the jury should have been informed that the automatic aggravating circumstance alone would render a death sentence violative of the eighth amendment. Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988); Zant v. Stephens, 462 U.S. 862 (1983); Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984). A new sentencing is required.

CONCLUSION

On the basis of the arguments presented herein, Mr. Melendez respectfully submits that he is entitled to an evidentiary hearing. Mr. Melendez respectfully urges that this Honorable Court remand to the trial court for such a hearing, and that the Court set aside his unconstitutional conviction and death sentence.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing has been furnished by United States Mail, first-class, postage pre-paid, to Candance Sunderland, Assistant Attorney General, Department of Legal Affairs, Westwood Building, 7th Floor, 2002 North Lois Avenue, Tampa, FL 33607 this 20th day of May, 1991.

Gail E. Anderson