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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The State's brief is in large part simply a series of bald conclusions unsupported by any analysis or reasoning and lacking citations to the record. On thie basis alone, the State's arguments illustrate their own weakness, but the State commits even more egregious errors in failing to assess the totality of the circumstances involved in Mr. Melendez's claims and in neglecting to consider the applicable legal precedent.

Mr. Melendez's initial brief presented several substantial issues predicated upon, inter alia, Brady v. Maryland, 373 U.S. 83 (1963), and Strickland v. Washinaton, 466 U.S. 668 (1984), and detailed the extensive facts supporting these arguments. The bottom line of all of these issues is that Mr. Melendez was denied a fair adversarial testing of his guilt or innocence and of the appropriate penalty at his capital trial and sentencing. As Mr. Melendez's initial brief explained, for example, the State's only evidence against Mr. Melendez -- witnesses John Berrien and David Luna Falcon -- was never subjected to "the crucible of meaningful adversarial testing," United States v. Cronic, 466 U.S. 648, 656 (1984), because of failures by both the State and defense counsel. As the initial brief also explained, Mr. Melendez'e capital sentencing proceeding was stripped of all adversarial character because of failures by both the court and defense counsel. Mr. Melendez was thus found guilty and sentenced to death by default -- not because any tribunal made a decision based upon facts presented to it in an adversarial proceeding. Mr. Melendez's Rule 3.850 motion stated valid claims for relief, supported by factual proffers, and required an evidentiary hearing for its proper resolution.

A criminal defendant is entitled to a fair trial. As the United States Supreme Court has explained:

> [A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). To insure that a true adversarial testing, and thus a fair trial, occurs, the Constitution imposes obligations upon both the prosecutor and defenae counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Bradv v. Maryland, 373 U.S. 83, 87 (1963). Defense counsel, on the other hand, is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial teating process." Strickland, 466 U.S. at 688. Of course, the trial court is also obligated to ensure that these and other constitutional guaranteea are fulfilled.

Here, Mr. Melendez was denied a reliable adverearial testing due to both the State's nondisclosures and his own counsel's repeated failures to inveetigate and prepare. Consequently, the jury never heard and considered compelling material evidence which would have established that Mr. Melendez did not kill Del Baker and did not deserve a death sentence. Whatever the cause, the deprivation of a defendant's right to a fair adversarial testing requires a reversal when there is a reasonable probability that the outcome could have been affected, undermining confidence in the results. Strickland; Baaley.[1]

Determining that Mr. Melendez was deprived of a fair adversarial testing of his guilt or innocence and of the appropriate penalty requires coneideration of the totality of the circumstances preeented by Mr. Melendez's trial in light of his post-conviction claims. This is a concept which the State's brief utterly ignores. Under Strickland, a reviewing court must

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[1]Of course in capital cases, the United States Supreme Court haa stated:

> In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. [Citation.] This especial concern is the natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.

Ford v. Wainwright, 477 W.S. 399, 411 (1986).

"determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance . . ., keep[ing] in mind that counsel'e function . . . is to make the adversarial testing process work in the particular case." 466 U.S. at 690 (emphasis added). See also Porter v. Wainwright, 805 F.2d 930, 936 (11th Cir. 1986)(review of ineffective assistance of counsel claim must "take into account all of the Circumstances of the case"); Willis v. Newsome, 771 F.2d 1445, 1447 (11th Cir. 1985)("totality of the circumstances"); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983)(same); Washinaton v. Watkins, 655 F.2d 1346 (5th Cir. 1981)(same). The same totality of the circumetancea approach applies when analyzing prejudice:

> [A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected bv errors than one with overwhelmina record support.

Strickland, 466 U.S. at 695-96 (emphasis added).

The United States Supreme Court also follows the Strickland totality of the circumstances approach when assessing Brady claims. Thus, "the reviewing court may consider directly any adverse effect that the prosecutor's failure to [disclose] might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances . , . ." United States v. Bagley, 473 U.S. 667, 683 (1985). Before Bagley, the Supreme Court had described the totality of the circumstances analysis as follows:

> [I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is alreadv of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

United States v. Agurs, 427 U.S. 97, 112-13 (1976)(emphasis added)(footnote omitted).

These principles -- the constitutional guarantee of a fair adversarial testing; the requirement that Brady and Strickland claims be assessed in the context of all the circumstances -- are essential to keep in mind when analyzing Mr. Melendez's claims. The State, however, chooses to ignore them. As discussed in Mr. Melendez's initial brief, the State's extremely weak case for guilt rested solely upon the testimony of John Berrien and David Luna Falcon.[2] The weakness of that case prompted one member of this Court on direct appeal to have grave concerns about the imposition of the death penalty. Melendez v. State, 498 So.2d 1258, 1262 (Fla. 1986)(Barkett, J., specially concurring)("There are cases . . . when a review of the record leaves one with the fear that an execution would perhaps be terminating the life of an innocent person"). No adversarial testing whatsoever occurred regarding these two witnesses' testimony. The State did not disclose or defense counsel unreasonably failed to discover that David Luna Falcon was not an "undercover agent," was not in Puerto Rico working for the Justice Department at the time of the offense but was in New York after just being released from prison, was not paid by FDLE agent Roper but waa paid $5,000 by police officer Glisson, and was not testifying willingly but was forced to testify out of fear of prosecution for the Reagan shooting. Defense counsel unreaeonably failed to present to the jury John Berrien's prior statements which were significantly at odds with hie trial testimony, or even Berrien's deposition in which he said that most of what he had told the police was false. The obvious inference to be drawn from these facts -- facts which the jury never heard -- is that these two witnesses were motivated solely by self-interest and were, quite simply, making the whole thing up. In light of the totality of the circumstances (i.e., that the State's weak case rested solely

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[2] In these proceedings, the State does not contend that Berrien and Falcon were not the key State witnesses at trial, nor that the State had a strong case against Mr. Melendez, apparently accepting the facts presented in Mr. Melendez's initial brief establishing that these two witnesses were the State's entire case.

upon Falcon and Berrien), defense counsel'e "omissions were outside the range of professionally competent assistance" because defense counsel failed "to make the adversarial testing process work." Strickland, 466 U.S. at 690. So, too, in light of all the circumstances, do counsel's deficiencies establish prejudice: these errors "had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." Strickland, 466 U.S. at 695-96. A case such ae Mr. Melendez's, where the verdict is "only weakly eupported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland, 466 U.S. at 696. Likewise, the Brady violations, viewed in conjunction with all the circumstances, including a verdict of "questionable validity," Aaurs, 427 U.S. at 113, demonstrate that no adversarial testing occurred.

It should be beyond cavil that Mr. Melendez's penalty phase lacked any adversarial character whatsoever. Cf. Klokoc v. State, No. 74,146, slip op. at 7 (Fla. Sept. 5, 1991)(in denying motion to dismiss direct appeal in capital case, the Court advised appellate counsel, "in order for the appellant to receive a meaningful appeal, the Court muet have the benefit of an adverearY proceeding"). In spite of Mr. Melendez's obvious confusion, the court failed to make a proper inquiry of Mr. Melendez, and defense counsel, having failed to prepare for the penalty phase, also failed to properly advise Mr. Melendez. As a result, no mitigating evidence was presented. In light of all the circumstances, including the State's weak case for death where the "equally guilty" (R. 786) codefendant wae never even charged, it is clear that Mr. Melendez was deprived of a meaningful, reliable and individualized capital sentencing decision.

No adversarial testing occurred at Mr. Melendez's capital trial and sentencing. The State's brief ignores the totality of the circumetances establishing Mr. Melendez's entitlement to relief and never addresses (much less explains) haw the Court can confidently rely upon the results of the trial proceedings. As is explained herein and in Mr. Melendez's initial brief, an evidentiary hearing and relief are required.

ARGUMENT I

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

The State's argument on this issue is simply a conclusion (the State's contention that Mr. Melendez is not entitled to an evidentiary hearing), without any explanation regarding why Mr. Melendez's claims do not require an evidentiary hearing, what facts are in the record which "conclusively" refute Mr. Melendez's claims, or how the portions of the record which the trial court attached to its order "conclusively show that [Mr. Melendez] is entitled to no relief." Fla. R. Crim. P. 3.850.[3] For example, regarding some of Mr. Melendez's ineffective assistance of counsel claims, the trial court denied relief by concluding that defense counsel's actions were "tactical" or "strategic," and the State's brief argues that relief is not required for the same reason. However, neither the trial court nor the State has provided a citation regarding where this fact might appear in the record. The reason for that is obvious: this fact is not "of record." Further, this fact is contrary ta Mr. Melendez's allegations that defense counsel had no strategic or tactical reasons for his omissions, but simply neglected his duties to his client, This is precisely the reason an evidentiary hearing must be conducted.

Nor do the portions of the record attached to the trial court's order conclusively refute Mr. Melendez's allegations. Indeed, the State does not contend that they do. Nothing was attached to the trial court's order to refute the ineffective assistance of counsel or Brady claims. See Hoffman v. State, 571 So. 2d 449 (Fla. 1990).

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[3]The State correctly says that a Rule 3.850 movant is entitled to an evidentiary hearing if the facts alleged in the motion, accepted a5 true, would entitle him or her to relief (Answer at 2). See Hoffman v. State, 571 So. 2d 449 (Fla. 1990). However, later in its brief, the State contests many of Mr. Melendez's factual allegations in order to supports its arguments that Mr. Melendez is not entitled to relief. In arguing against the validity of Mr. Melendez's factual allegations, the State is in effect conceding the need for an evidentiary hearing.

This case involves matters which are not "of record." O"Callaghan v. State, 461 So. 2d 1354 (Fla. 1984). The trial court order and its attachments do not demonstrate that the files and records in the case conclusively demonetrate that Mr. Melendez is entitled to no relief. Lemon v. State, 498 So. 2d 923 (Fla. 1986). An evidentiary hearing is required. Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990); Mills v. Dugger, 559 So. 2d 578 (Fla. 1990).

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.

The State's brief completely misses the point on this issue, incredibly arguing that the nondisclosed matters regarding David Luna Falcon discussed in Mr. Melendez's initial brief "either were made known to the jury, would have been inadmissible, or were legally immaterial" (Answer at 4). The point is this: the State presented Falcon as a witness at Mr. Melendez's trial, Falcon's testimony about his background was not true and the State affirmatively relied upon that testimony to urge the jury to believe Falcon. But the State now argues that evidence demonstrating the untruth of Falcon's testimony about his background was "inadmissible" or "legally immaterial." Aa stated in Mr. Melendez's initial brief, Falcon's and Berrien's credibility were the issues in this trial. Falcon's testimony about his background -- testimony which was affirmatively elicited and then relied upon by the State -- clothed Falcon in respectability and enhanced his credibility. The truth (which the jury never heard) gives rise to the opposite inference: that Falcon was not believable because he was a common criminal who had testified against codefendants before in order to save his own neck, because he had not recently been working "undercover" €or the "Justice Department" but had just been released from prison for one murder after testifying against codefendante with whom he was involved in another murder, and because, simply, he was not telling the truth about where he had been and what he had been doing. The facts that Falcon was not the respectable ""undercover" agent he claimed to be

but was simply a violent, mentally ill criminal and that he did not tell the truth about hie own past would surely make any reasonable juror doubt that: he wae telling the truth about Mr. Melendez.

Despite the clear importance of evidence illustrating that Falcon was not telling the truth about his background and the equally clear fact that the jury was never told the truth about Falcon'a background,[4] the State argues that evidence establishing the truth about Falcon'a background was not material or admissible (Answer at 4, 6, 7) and that the State had no obligation to disclose such information (Answer at 4-5). Regarding the supposed inadmissibility of this evidence, the State provides no citations to eupport this proposition. Surely, the State is not suggesting that a witness's untruths about his background, made to enhance his credibility, cannot be Contradicted and shown to be false. Basic concepts of due process and confrontation, as well as common sense, establish the admissibility of such evidence when a witness represents himself to be something he is not.[5]

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[4]The State contends that the jury knew about Falcon's past because he testified that he had two prior convictions, one of which was €or murder, and had used drugs (Answer at 6). As to drug use, all the record reflects is Falcon's statement that he had used cocaine with Mr. Melendez during their alleged conversation in the bar (R. 450), and Falcon's affirmative denial that he was a "cocaine user" (R. 452). As to Falcon's prior convictions, the State is simply missing the point: Falcon still represented himself to be an "undercover" agent for the "Justice Department," a far cry in terms of the inferences to be drawn from the knowledge that Falcon had only cooperated with the government in the past in order to get an early release from prison on the Puerto Rico murder conviction and in order to avoid prosecution on the New Jersey "slaughter".

The State also contends that defense counsel was aware of Falcon's criminal history because he questioned Detective Glisson about it (Answer at 6). All that this questioning revealed, however, is that Glisson knew Falcon had been convicted of "manslaughter" and did not know about any armed robbery conviction (R. 562-63). First, this questioning does not reveal that defense counsel knew the full truth about Falcon's background -- that can only be determined at an evidentiary hearing. Second, this questioning did not inform the jury of the truth regarding Falcon'a background. Thus, whatever the reason -- the State's nondisclosure or defense counsel's ineffectiveness (see Argument 111), the jury did not receive information essential to assessing Falcon's Credibility, and no adversarial testing occurred.

[5]Additionally, under the Florida Evidence Code, "[a)11 relevant evidence is admissible, except as provided by law." Fla. Stat. sec. 90.402. Evidence is relevant when it "tend[s] to prove or disprove a material fact." Fla. Stat. sec. 90.401. The credibility of a witness is always relevant and material.

Nor does the State'e argument that the prosecution had no duty to disclose information regarding Falcon's background or correct his false testimony have any validity. The United States Supreme Court has explained:

> The principles that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, People v. Savvides, 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853, 854-855:
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> > "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. *** That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

Napue v. Illinois, 360 U.S. 264, 269-70 (1959).

The State also preeents several arguments regarding specific aspects of Mr. Melendez's claim which illustrate a misunderstanding of Mr. Melendez's allegations, the record and/or the law. For example, the State argues that evidence regarding Falcon's mental health problems is "stale, irrelevant, and aleo of questionable validity" and that "[t]here is absolutely no evidence that Falcon was suffering from any mental illness in 1983" (Answer at 7). As to the "validity" of this information, that cannot be determined without an evidentiary hearing. As to this information being "stale" or "irrelevant" and the State's contention that no evidence indicates Falcon had mental problems in 1983, Mr. Melendez's initial brief specifically discussed the documentation indicating that Falcon had continuing mental health problems since 1976 and that on September 13, 1983, a federal court judge ordered psychiatric treatment €or Falcon (Initial Brief at 17 n.5). Surely, this not "stale" information, but is evidence directly relevant to the jury'e assessment of Falcon's reliability.

The State also argues that the State had no obligation to correct the testimony of Detective Glisson because Glisson was called by the defense, his testimony was consistent with his report about the incident at the Reagan home, and Mr. Reagan's affidavit does not differ from Glisson's testimony (Answer at 7-8). Again, the State has misread the allegations and the record and is unaware of the applicable law. Mr. Melendez hae contended that Glisson misrepresented his relationship with Falcon and that Glisson went to great lengths to protect Falcon. Had the jurors known this, they could have logically concluded that Falcon was testifying in order to avoid prosecution for the Reagan incident. Of course, if Glisson was protecting Falcon, as Mr. Melendez contends, his report would gloss over the Reagan incident, as did his testimony. Further, Mr. Reagan's affidavit is significantly different from Glisson's testimony. Contrary to Glisson's testimony, Mr. Reagan has sworn that Glisson threatened him into dropping charges against Falcon and that Glisson was clearly protecting Falcon (App. 7). Finally, the fact that Glisson was called by the defense does not relieve the State of it5 obligation to correct any misrepresentations in his testimony and does not circumscribe Mr. Melendez's right to meaningful confrontation. The United States Supreme Court has made the common sense point that "in modern criminal trials, defendants are rarely able to select their witnesses: they must taken them where they find them." Chambers v. Mississippi, 410 U.S. 284, 296 (1973). Thus, "[t]he availability of the right to confront and tw cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State." Id. at 297-98. Information regarding Glisson's misrepresentations was uniquely available to and known by the State, but the State failed to correct those misrepresentations. Criminal trials are not games: the prosecution has a duty to seek truth and assure that justice is done. Berger v. United States, 295 U.S. 78 (1935).

The State also argues that Mr. Melendez did not present facts indicating that Falcon had made "deals" with the State (Answer at 8-9). It is not clear what the State is referring to in this argument because no citations are provided. However, Mr. Melendez did present substantial factual allegations that Falcon had a history

of currying favor with law enforcement and that hie testimony in Mr. Melendez's case was solely the product of his own self-interest. Falcon was serving a federal prison term for a murder in Puerto Rico when he testified against codefendants regarding a New Jersey "slaughter" in which he was also implicated. As a result, Falcon secured an early release from prison and was not prosecuted in the New Jersey case. In Mr. Melendez's case, the affidavits of James Reagan, Dorothy Rivera and Ruby Colon state that Falcon was being pressured and protected by Detective Glisson, who was the original investigator on the Baker homicide. According to Dorothy Rivera, Falcon was being forced to testify by the police, presumably to avoid proeecution for the Reagan incident or other transgressions. According to both Dorothy Rivera and Ruby Colon, Falcon was being paid $5,000 for his cooperation. These facts were all presented in Mr. Melendez's Rule 3.850 motion and were discussed in his initial brief (Initial Brief at 18-21, 27, 28-29).

Finally, the State contends that Mr. Melendez has alleged the State "improper[ly] bolster[ed] . . . known unreliable testimony" (Answer at 9). The State does not say where Mr. Melendez's initial brief makes such an allegation. What Mr. Melendez does contend regarding Falcon, Detective Glisson and Agent Roper is that their trial testimony and the State's arguments regarding that testimony misrepresented the officers' relationship with Falcon, portraying it as one with a trusted informant with whom the officers had an established relationship (see Initial brief at 15, 17-21, 27-29). However, Falcon had never worked with Agent Roper or been paid by him, but had only had one contact with Roper. Falcon was being threatened and protected by Glisson, who paid Falcon $5,000.

The State has said nothing to counter Mr. Melendez's entitlement to relief. The State's arguments establish that this case requires an evidentiary hearing.

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.*

The State argues that trial counsel's failure to impeach John Berrien with his prior inconsistent statements and his deposition testimony was not

ineffective assistance because counsel brought out that Berrien had a prior felony conviction, had falsified information on a Workman's Compensation claim and was only charged as an accessory after the fact in this case (Answer at 13). However, what counsel unreasonably failed to present to the jury was information demonstrating that Berrien was simply making up the story implicating Mr. Melendez under pressure by the police (the prior inconaiatent statements) and that leas than a week before trial, Berrien had testified that everything he had told the police was false except the story about the train station and that he did not believe Mr. Melendez had anything to do with the victim's murder. The State does not explain why the omission of this kind of impeachment -- directly relevant to the reliability of Berrien's account implicating Mr. Melendez -- does not undermine confidence in the outcome of Mr. Melendez's trial. Rather, the State contends that trial counsel knew about the prior statements and made a strategic decision not to use them (Answer at 13-15). The State does not point out where the record reflects that counsel was aware of the prior inconsistent statements or made a strategy decision. It does not. Further, even if trial counsel was aware of the statements, that does not automatically mean that he made a strategic decision not to use them. Mr. Melendez contends that counsel neglected his duty to investigate, prepare and present readily available evidence which was essential to a fair adversarial testing. The record does not "conclusively" refute Mr. Melendez's allegations. An evidentiary hearing is required.

Regarding counsel's failure to properly impeach the testimony of David Luna Falcon, the State again misses the point, contending that counsel was not ineffective because he presented witnesses who contradicted parts of Falcon's testimony (Answer at 14). However, what defense counsel ineffectively failed to investigate and present was readily available evidence directly impeaching Falcon's credibility. This evidence would have shown that Falcon was testifying solely to avoid prosecution for the Reagan incident and to obtain $5,000, as the affidavits of James Reagan, Dorothy Rivera and Ruby Colon establish. This evidence would also have shown that Falcon had not told the

truth about hie background -- that he had not been an "undercover" agent for the "Justice Department," that he was not in Puerto Rico working €or the Justice Department at the time of the offense but in New York having just been released from prison, and that he secured his early release from a sentence on a Puerto Rico murder by testifying against codefendante with whom he was involved in a New Jersey "slaughter". All of this evidence would have seriously damaged Falcon's credibility and was necessary to the jury's decision regarding whether to accept the prosecution theory or the defense theory. The State's contentions that this evidence "is either cumulative or speculative" and that defense counsel made a strategic decision not to use it (Answer at 14) require an evidentiary hearing.

Other contentions by the State also establish the need for an evidentiary hearing. For example, the State contends that the affidavits of Dorothy Rivera and Ruby Colon and the allegations based upon those affidavits should be rejected because Rivera and Colon are "biased" in favor of Mr. Melendez (Answer at 15-16). However, in a case where no evidentiary hearing ha8 been held, the proffered facts must be accepted as true in assessing the need for an avidentiary hearing, a principle the State recognizes early in its brief (Answer at 2), but then fails to follow. The State's contesting the truth of Mr. Melendez's allegations establishes the need for an evidentiary hearing.

Finally, regarding defense counsel's failure to subpoena the Reagans and thus his failure to present their testimony to the jury, the state argues that this Court's direct appeal. consideration of an issue regarding the Reagans disposes of this allegation. The issue presented to this Court on direct appeal was whether the trial court erred in not granting a mistrial when the Reagans did not appear. Melendez v. State, 498 So. 2d 1258, 1260 (Fla. 1986). The issue here is whether trial counsel was ineffective in failing to subpoena the Reagans and, indeed, in failing to talk to them about the incident at their home. On direct appeal, this Court was not presented with this issue and did not have the facts regarding trial counsel's deficient performance or

regarding what the Reagans would have said had they testified. Thue, the Court did not know, just as Mr. Melendez'e jury did not know, the Reagans could identify Falcon as the person who terrorized them, the extent of the terror they experienced, the relationship between Falcon and Gliaaon, or the threate Glisson made to get the Reagana to drop charges against Falcon. All the jury heard was the stipulation that the Reagans would say Falcon entered their home and shot into their car (R. 557-58). The State refused to stipulate that Falcon actually did this (R. 558), and Falcon denied involvement in the incident (R. 457). Thus, the State waa able to argue that Falcon had nothing to gain from his testimony (R. 705). Without the Reagans' testimony that Falcon indeed waa the one who terrorized them, the jury had no way to determine whether Falcon was involved in the incident and thus whether he was testifying to avoid prosecution for that incident.

Mr. Melendez waa denied the effective assistance of couneel at the guilt/innocence phase. The State's argumente do not establish the contrary and do establish the need for an evidentiary hearing.

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.

Mr. Melendez's Rule 3.850 pleadings and his initial brief alleged that Mr. Melendez was deprived of the effective assistance of counsel at the penalty phase because counsel did not properly advise Mr. Melendez regarding the consequences of not presenting evidence at the penalty phase, because counsel did not investigate and prepare for the penalty phase, and because counsel then presented a wholly inadequate penalty defense. All of these allegations require an evidentiary hearing. Despite the clear inadequacy of the record to resolve this claim, the State argues that it was properly denied without an evidentiary hearing. The State's arguments are unpersuasive.

The State comes to its conclueion based upon a simplistic argument that Mr. Melendez had a masterful "plan" at the time of his 1984 penalty phase (Answer at 19) and that he "has received exactly what he bargained for" (Id.

at 18)[6]. This argument ignores the record and Mr. Melendez's allegations. The record reflects that Mr. Melendez waa enormouely confused about the eonsequencee of his actions, and that the trial court'e and defense counsel's actions were utterly inadequate to protect his rights to a reliable and individualized capital sentencing decision and to assure that he understood what he was doing (See Initial Brief at 44-47). Mr. Melendez'e lack of underatanding of hie actions is perhaps best illuetrated by the facts that although he supposedly "waived" the presentation of mitigating evidence, he himself took the stand at the penalty phase and did not request a death aentenca (see R. 778-80), that defense counsel did not requeet a death sentence (see R. 788-89), and that Mr. Melendez did not prevent defense counsel from arguing Mr. Melendez's age, his lack of significant criminal history, and George Berrien's participation in the offense as factors in favor of a life eentence (Id.). Indeed, the State arguee, "despite Melendez's intent to get the death penalty, there was no waiver of the penalty phase" (Answer at 19). The State apparently does not recognize the logical inconsistency between supposedly wanting a death aentence but then not asking for it and allowing argument in favor of a life sentence. Thie logical inconsistency demonstrates that Mr. Melendez had not made a rational, voluntary and understanding decision. These facts do not indicate that Mr. Melendez was intent on receiving death and had reached a rational, voluntary decision, but that he was confused and had not been properly advised by counsel.

This Court has been presented with situations similar to that present in Mr. Melendez's caee. Anderson v. State, 574 So. 2d 87 (Fla. 1991); Klokoc v. State, 16 F.L.W. S603 (Fla. September 5, 1991). In Anderson, trial counsel

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'Regarding Mr. Melendez's supposed "plan," the State arguee that he was counting on "competent repreeentation on a post-conviction relief motion" and that his "plan" worked beeauae he has received "the considerable reaourcee of the Office of the Capital Collateral Representative" (Answer at 18-19). It's hard to imagine how Mr. Melendez could have considered these matters in 1984, when no system existed to represent death row inmates in poet-conviction. The CCR office was not created until 1985. Actions predicated upon such matters surely are not "informed and reasoned," as the State contends (Answer at 19).

informed the trial court that the defendant did not want any mitigation witnesses preaented at the penalty phaae. 574 So. 2d at 94. The trial court conducted an inquiry, during which trial counsel explained in great detail the witneesee he had discovered during hie 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 phaae proceedinge." Id.

On the basis of these explanations and the inquiry conducted by the trial court, this Court affirmed the death sentence in Anderson. The majority concluded that the requirements of Faretta v. California, 422 U.S. 806 (1975), and Johnson v. Zerbst, 304 U.S. 458 (1938), did not apply to this situation. However, three members of the Court indicated that they would not have affirmed the death sentence without the inquiry conducted by the trial court or the information provided by counsel. This inquiry indicated that the waiver was entered "knowingly, intelligently and voluntarily." Anderson, 574 So. 2d at 95 (Ehrlich, J., concurring, joined by Shaw, C.J., and Kogan, J.). One member of the Court believed that Faretta should apply in this situation. Id. (Barkett, J., concurring in part, dissenting in part). Thus, it is clear that the four members of Court believes some kind of colloquy must be conducted in this situation, although the inquiry may not rise to the level of a Faretta inquiry.

In Klokoc, the defendant refused to allow his attorney to participate in the penalty phase, and the trial court "appointed special counsel to represent the public interest in bringing forth mitigating factors." 16 F.L.W. at S603. The penalty phase proceeded, and special counsel presented lay and expert testimony regarding statutory and nonstatutory mitigation. Id. This Court then reversed the death sentence on proportionality grounds, relying upon the mitigation presented by special counsel. Id. at S604.

Neither the procedure followed in Anderson or Klwkoc waa followed in Mr. Melendez's case. Here, trial counsel did not explain what witneesee were

available for the penalty phase or what kind of evidence could be offered at the penalty phase. Trial counsel had conducted no investigation for the penalty phase and thus did not know what was available. Nor was the decision to forgo the presentation of evidence at the penalty phase a longstanding decision as it was in Anderson. Further, the inquiry conducted by the trial court did not indicate that Mr. Melendez understood his decision and its consequences. Nor did the trial court make any provision for the presentation of mitigation.

Mr. Melendez waa denied the effective aesistance 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. Substantial mitigation was readily available had counsel conducted the appropriate investigation (See Initial Brief at 54-59). Based upon these allegations, an evidentiary hearing is clearly warranted.[7]

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[7]The need for an evidentiary hearing, as well aa the validity of Mr. Melendez's claim, is borne out by the State's reliance upon Autry v. McKaskle, 727 F.2d 358 (5th Cir. 1984)(Answer at 21). According to the State, Autry stands for the proposition that a defenae attorney cannot be ineffective when the defendant directs the attorney not to present mitigating evidence. However, what the State does not recognize is that the court denied Autry's claim only after an evidentiary hearing was conducted. The evidence at the hearing established that trial counsel had investigated and prepared for the penalty phase and planned to present mitigating evidence, even though the defendant had consistently said since well before trial that he wanted to ask for the death penalty if he was convicted. 727 F.2d at 360-61. However, the defendant prohibited the attorney from presenting the evidence. Id. at 361. Under these particular circumstances, where the defendant had a longstanding desire to seek the death sentence and where defense counsel had investigated for the penalty phase, the court concluded, "[i]f Autry knowinaly made the choices, [counsel] was ethically bound to follow Autry's wishes." 727 F.2d at 362 (emphasis added). Mr. Melendez'a contention is that trial counsel did not investigate and prepare, that he therefore could not and did not properly advise Mr. Melendez, and that Mr. Melendez therefore did not make a knowing decision. As in Autry, an evidentiary hearing is required.

The State also relies upon Aldridae v. State, 503 So. 2d 1257 (Fla. 1987)(Answer at 20-21), ignoring the later history in that case. In Aldridge v. Dugger, 925 F.2d 1320 (11th Cir. 1991), after an evidentiary hearing had been held in the district court, id. at 1324, the Eleventh Circuit affirmed the district court's grant of relief on the very same claim which this Court had rejected. Id. at 1329-30. In Mr. Melendez's case, as in Aldridae, an evidentiary hearing is required.

REMAINING CLAIMS

As to the remaining argument8 presented by Mr. Melendez, ha relies upon the presentations in his Initial Brief, noting only that the iasuee involve fundamental error and/or the ineffective assistance of counsel which rendered Mr. Melendez's death sentence unfair, unreliable, and unindividualized and which require an evidentiary hearing.

CONCLUSION

For each *of* the reasons discussed herein and in the initial brief, the trial court's summary denial of Mr. Melendez's Rule 3.850 motion was erroneous. An evidentiary hearing and relief are required.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on September 23, 1991.

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