IN THE SUPREME COURT OF FLORIDA

NO. 82570

JUAN ROBERTO MELENDEZ,

Petitioner,

v.

HARRY K. SINGLETARY, Secretary,
Department of Corrections, State of Florida,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION OF CLAIMS

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Melendez was deprived of the effective assistance of counsel on direct appeal, that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives, and that his death sentence is neither fair, reliable, nor individualized.

PROCEDURAL HISTORY

Juan Roberto Melendez was indicted in the Circuit Court of the Tenth Judicial Circuit, Polk County, Florida, for first degree murder and armed robbery, to all of which he pled not guilty.

A jury trial commenced before the Honorable Edward F. Threadgill, Jr., on September 17, 1984. On September 20, 1984, the jury returned a verdict finding Mr. Melendez guilty of first degree murder and armed robbery. Mr. Melendez testified at the innocence portion of his trial.

On September 21, 1984, the jury began the penalty portion of Mr. Melendez's trial. The sentencing jury returned a sentence of death by a vote of 9-3. The judicial sentencing proceeding was conducted on the same day and the court imposed a sentence of death. Mr. Melendez did not testify at the sentencing portion of his trial but he did make a brief statement.

Four aggravating circumstances were found by the trial court. These included 1) that Mr. Melendez had previously been convicted of a felony involving the use or threat of violence to a person, 2) that the murder was committed while Mr. Melendez was engaged in the commission of a robbery, 3) the crime was especially wicked, evil, atrocious and cruel and 4) the crime was committed in a cold, calculating and premeditated manner.

On direct appeal the convictions and sentence of death were affirmed by the Florida Supreme Court. Melendez v. State, 498 So. 2d 1258 (Fla. 1986). Certiorari was denied by the United States Supreme Court.

A motion for post conviction relief was filed in the Circuit Court on January 16, 1989, under Rule 3.850 of the Florida Rules of Criminal Procedure. A supplement was filed on April 21, 1989. The State of Florida filed a responsive pleading on May 15, 1989. On July 17, 1989, the Circuit Court denied relief without an evidentiary hearing.

An appeal of the denial of post conviction relief was timely presented to the Florida Supreme Court. On November 12, 1992, the Florida Supreme Court affirmed the denial of post conviction relief. Melendez v. State, 612 So. 2d 1366 (Fla. 1992). The Florida Supreme Court denied rehearing of this decision on February 18, 1993. Mr. Melendez's petition for a writ of certiorari to review this decision was denied. Melendez v. Florida, ___ U.S. ___ (Oct. 18, 1993).

In April, 1993, Mr. Melendez filed a federal petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. That petition is pending.

JURISDICTION TO ENTERTAIN PETITION AND TO GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985), and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Melendez's conviction and sentence of death, and of this Court's appellate review. Mr. Melendez's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct errors such as those herein pled, is

warranted in this action. As the petition shows, habeas corpus relief is more than proper. This Court therefore has jurisdiction to entertain this petition and to grant habeas corpus relief.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Melendez asserts that his capital conviction and sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

MR. MELENDEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS REQUIRED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(a) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Mr. Melendez's direct appeal was marked by a total lack of advocacy on the part of direct appeal counsel. The lack of appellate advocacy on Mr. Melendez's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Appellate counsel's initial brief presented only seven pages of argument, raising only four issues. Counsel's written and oral presentations on direct appeal, along with the meritorious issues which were not presented, demonstrate

that his representation of Mr. Melendez involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986).

The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Melendez. "[E]xtant legal principles...provided a clear basis for ... compelling appellate arguments[s]." Fitzpatrick, 490 So.2d at 940. The issues were preserved at trial and available for presentation on appeal. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson, 474 So. 2d at 1164. When "[t]he propriety of the death penalty is in every case an issue requiring the closest scrutiny," Wilson, 474 So.2d at 1164, appellate counsel's failure to raise any issue regarding the manner in which the penalty phase was conducted demonstrates appellate counsel's "failure to grasp the vital importance of his role as a champion of his client's cause." Individually and "cumulatively," Barclay, 444 So.2d at 959, the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165. (emphasis in original). In Wilson, this court said:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a

> zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

Wilson, 474 So.2d at 1165. In Mr. Melendez's case appellate counsel failed to act as a "zealous advocate," and Mr. Melendez was therefore deprived of his right to the effective assistance of counsel by the failure of direct appeal counsel to raise the following issues to the Florida Supreme Court. Mr. Melendez is entitled to a new direct appeal.

A. THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN MR. MELENDEZ WAS PREVENTED FROM CROSS-EXAMINING WITNESSES AND FROM INTRODUCING EVIDENCE NECESSARY TO PROVE HIS INNOCENCE OF THIS CRIME.

The trial court prevented the defense from cross-examining key State witnesses on issues which would have seriously undermined the State's theory of Mr. Melendez's guilt. The trial court also prevented the defense from presenting evidence in support of Mr. Melendez's innocence. The Due Process Clause of the Fourteenth Amendment to the United States Constitution guaranteed Mr. Melendez a fundamentally fair trial. The exclusion of evidence vital to his defense denied Mr. Melendez this Fourteenth Amendment guarantee.

The State's case rested upon the testimony of David Luna Flacon, who testified that Mr. Melendez had admitted participating in the homicide. The defense theory was that Mr. Melendez was innocent, that the offense had been committed by someone other than Mr. Melendez, that Falcon had obtained his

information about the offense from a source other than Mr. Melendez, and that Falcon was testifying to avoid prosecution for other offenses. However, the trial court prevented the defense from cross-examining State witnesses on issues supporting this defense and presenting evidence supporting this defense.

Prior to Mr. Falcon's accusation of Mr. Melendez the police had focused their attention on Vernon James. A great deal of evidence pointed towards Mr. James' guilt and a great number of police hours had been spent investigating this evidence. However, during the cross examination of John Knapp, a police sergeant with the Auburndale Police Department, the trial court sustained a State objection to questions concerning Mr. James. (R. 388-89). Additionally, Agent Roper of the FDLE had questioned Mr. James about this offense (R. 643). When the defense asked Agent Roper whether James acknowledged being present at the murder, the State objected that the question called for hearsay (R. 643-44). Although defense counsel correctly argued that James' statement to Agent Roper was admissible as an admission against interest, the trial court sustained the State's objection (R. 644). Had the defense been permitted to pursue this questioning, Agent Roper would have testified that James did admit being present at the homicide. Another witness, a jail inmate, testified that James had admitted committing the murder along with other men, none of whom was Mr. Melendez (R. 634-35). Agent Roper's testimony, which was not permitted by the trial court, would have fully corroborated this

testimony. The defense was prevented by the trial court from asking questions about Agent Roper's conversations with Mr. James. These actions prevented Mr. Melendez from putting evidence to the jury which conclusively proved his innocence.

The defense also attempted to present evidence attacking the credibility of Falcon's account. The defense theory was that Mr. Melendez did not confess to Falcon but that Falcon learned the information about which he testified either from the police, from newspaper accounts or because Falcon himself was involved in the offense. The defense also contended that Falcon was testifying to curry favor with the government to avoid prosecution from a shooting which occurred at the home of a family named Reagan. Despite the relevance of all the evidence proffered by the defense, the trial court would not allow its presentation.

At the trial it was stipulated that Mr. Falcon had entered into the home of James and Rita Reagan and fired several gunshots into the Reagans' car (R. 557-58). The State stipulated that the Reagans would testify that Falcon did this shooting but the State would not agree that Falcon actually did the shooting (R. 558). Falcon denied involvement in the Reagan shooting (R. 457). When defense counsel attempted to ask Agent Roper about Falcon's involvement in the Reagan shooting, the trial court would not allow the questioning (R. 472).

Additionally, the defense contended that the bullets taken from the Reagan's car matched the bullets taken from the body of the victim in Mr. Melendez's case. The trial court refused to

allow the defense to present to the jury testimony from a state firearms expert from the Florida Department of Law Enforcement which would have shown that State's Exhibits 3 and 4 (the bullets from the victim) and Defense Exhibit 4 (the bullet from the Reagan automobile) were similar. The expert stated that the caliber and the rifling of all the bullets were the same but that he needed the gun for a positive identification (R. 552-55). This evidence, which would indicate that Mr. Falcon himself was involved in this crime, and not Mr. Melendez, was not allowed to be presented to the jury. (R. 551, 557). Thus, Mr. Melendez was not permitted to present evidence supporting his arguments that Falcon was testifying to avoid prosecution for the Reagan shooting and that Falcon knew information about the homicide because he himself had been involved in the homicide.

Mr. Melendez was also precluded from presenting evidence showing that the information about the homicide to which Falcon testified was readily available to the public. The defense attempted to ask Detective John Knapp, who had investigated the offense, what information about the offense had been provided to the public (R. 650). When the State objected (Id.), the defense argued that the question did not call for hearsay because the answer was not offered for the truth of the matter but simply to show what information was available to the public (R. 651). The defense wanted to present this evidence to illustrate that Falcon did not know details of the offense from Mr. Melendez but that Falcon could have learned this information from the newspaper (R.

651-52). The court stated that the defense could make this argument without presenting the evidence or that the defense could ask Falcon where he got his information (R. 652). The defense responded that in order to make such an argument, "I have to put some sort of proof in the record of what was in the newspaper" (Id.), and that Falcon had testified he did not read the newspaper (R. 653). The court sustained the State's objection (Id.), and the defense proffered newspaper articles about the offense which were marked as a defense exhibit (R. 654). Mr. Melendez was prevented from presenting evidence demonstrating that Falcon's knowledge of the offense was readily available to the public.

The trial court's refusal to admit all of this evidence denied Mr. Melendez his right to present a complete defense, in violation of the sixth, eighth and fourteenth amendments. See Washington v. Texas, 338 U.S. 14 (1967); Crane v. Kentucky, 476 U.S. 683, 690 (1986); Pointer v. Texas, 380 U.S. 400 (1965). Due process requirements supersede the application of state evidence rules. Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Rock v. Arkansas, 107 S. Ct. 2704 (1987); Taylor v. Illinois, 108 S. Ct. 646 (1988). Where a defendant is prevented from presenting evidence which is 'plausibly relevant' to his theory of defense then this constitutes reversible error. Coxwell v. State, 361 So. 2d 148 (Fla. 1978); Coco v. State, 62 So. 2d 892 (Fla. 1953). The evidence discussed above was more than plausibly relevant. It would have conclusively shown to the jury that there were

other suspects in the case, one of whom had confessed and one of whom was connected to the crime by direct physical evidence, and that Falcon's account was not reliable.

The trial court's failure to permit Mr. Melendez to introduce evidence that would have rebutted the State's case and shown his innocence violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These violations denied Mr. Melendez the latitude necessary to present his defense to this weak charge and eviscerated his right to confrontation under the Sixth Amendment, requiring a reversal of his conviction and a new trial. United States v. Berkowitz, 662 F.2d 1127 (11th Cir. 1981). If also denied him a fundamentally fair trial under the due process clause of the Fourteenth Amendment to the United States Constitution. Haas v. Abrahamson, 910 F.2d 384, 389 (7th Cir. 1990). This exclusion of evidence creates a reasonable doubt as to Mr. Melendez's guilt. United States v. Agurs, 427 U.S. 97 (1976). The trial court's exclusion of evidence was constitutional error of the first order "and no showing of want of prejudice [will] cure it." Davis v. Alaska, 415 U.S. 308, 317-18 (1974).

These issues should have been presented to the Florida Supreme Court on direct appeal. The issues were preserved for appeal. The failure of the trial court to allow a defense and the failure of appellate counsel to raise these issues on direct appeal clearly undermine confidence in the outcome of the direct appeal. A new direct appeal should be ordered.

B. THERE IS INSUFFICIENT EVIDENCE TO CONVICT MR. MELENDEZ OF THIS CRIME.

Although no physical evidence or eyewitness testimony connected Mr. Melendez to the offense, appellate counsel failed to raise any issue on direct appeal regarding the sufficiency of the evidence to convict Mr. Melendez of murder. The defense moved for a directed verdict at the close of the State's case (R. 476-81), and at the close of all the evidence (R. 681). The issue of the sufficiency of the evidence was clearly preserved for appeal, but appellate counsel failed to raise it. As this Court has stated, "our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate." Wilson v. Wainwright, 474 So. 2d at 1165. Mr. Melendez is entitled to a new direct appeal.

The State maintains that Mr. Melendez, along with George Berrien and John Berrien, drove to the victim's hairdressing school on September 13, 1983. John, the driver, dropped Mr. Melendez and George off and returned approximately two hours later. During this time period, according to the State, was when Mr. Melendez and George were supposed to have robbed and killed Mr. Delbert Baker,[1] the victim.

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[1]Throughout most of the trial testimony Mr. Delbert Baker, the victim, is referred to by his commonly known name of "Mr. Del." In an attempt to avoid confusion and for the sake of consistency, Mr. Baker will be referred to as Mr. Del. Also, for the sake of clarity John Berrien and George Berrien will be referred to by their first names.

According to the State's theory, George cut Mr. Del and Mr. Melendez shot the victim. The next day, according to John's testimony, he drove Mr. Melendez and George to the train station where George boarded a train north. Prior to boarding, Mr. Melendez is supposed to have given George some jewelry and a gun which George was to sell.

This theory rests solely on the testimony of John Berrien and David Luna Falcon. The only piece of physical evidence presented by the State was an Amtrack record indicating that George had taken a train to Wilmington, Delaware, which of course does not connect Mr. Melendez to this offense. No physical evidence was presented at trial that placed Mr. Melendez at the scene of the crime or in any way connected Mr. Melendez with the victim's death. In fact most of the physical evidence found at the scene of the crime was either destroyed or at least not preserved by the state.

On the basis of this evidence Mr. Melendez was convicted of murder and robbery and sentenced to death. John pled **nolo contendere** to being an accessory after the fact and received two years' probation. George, incredible as it may seem, was never charged with any offense, even though the State's theory of the case is that George physically participated in the victim's death.

Since the entire case rests upon the testimony of John Berrien and David Luna Falcon it is important to examine their 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 one and a half to two 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).

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 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 Delaware (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).

David Luna Falcon was the other key 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 operation.

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 were 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 Florida Department of Law Enforcement (F.D.L.E.) (R. 447), after finding out who else was involved. (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 this crime 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 have Mr. Melendez killed. (R. 454-55). Falcon also testified that he had worked closely with Detective Glisson and that he, his brother Gilbert Luna Falcon, 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).

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 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).

There was no credible evidence to prove beyond a reasonable doubt that Mr. Melendez was guilty of this offense. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). Taking all of the evidence presented by the state as true, no rational trier of fact could agree that Mr. Melendez is guilty of this offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979).

The failure of appellate counsel to present the issue of Mr. Melendez's innocence and the issue that no credible evidence was presented to prove his guilt beyond a reasonable doubt to the Florida Supreme Court on direct appeal has prevented this Court from correcting the miscarriage of justice that occurred at trial. The flimsy evidence presented to obtain this conviction should have prompted appellate counsel to raise this claim in the Florida Supreme Court. Also the failure to present this issue for review has denied Mr. Melendez the two tiered review of death penalty cases contemplated by the United States Supreme Court. Parker v. Dugger, 111 S.Ct. 731 (1991); Gregg v. Georgia, 428 U.S. 153 (1976). Mr. Melendez must be given a new direct appeal.

C. JUAN MELENDEZ'S DEATH SENTENCE WAS ARBITRARILY AND CAPRICIOUSLY IMPOSED IN LIGHT OF THE FACT THAT AN ALLEGED CO-PERPETRATOR WHOM THE STATE ADMITTED TO BE EQUALLY GUILTY WAS NEVER CHARGED WITH THE CRIME, IN VIOLATION OF THE EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Throughout Juan Melendez's trial the State focused on trying to link George Berrien to this crime and the victim. According to John Berrien, George Berrien was the man who accompanied Juan Melendez to Mr. Del's school of cosmetology on the night in question. (R.305-8). Much of the testimony focused on the fact that George Berrien knew about the victim's jewelry (R.281), had connections with the victim and ultimately slashed his throat. (R.443).

During his penalty phase closing argument the prosecutor argued:

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

(R. 787)(Emphasis added). Despite this assertion, however, there is no case of "State v. Berrien" because Mr. Berrien was never arrested, let alone charged, with this murder. When Mr. Melendez's conviction and death sentence was secured in large part by testimony which indicated the equal or greater culpability of George Berrien, and when the state put forth argument which indicated its belief in George Berrien's guilt, then it is clear that Mr. Melendez's conviction and death sentence rest on whim and caprice. However, appellate counsel unreasonably failed to raise any issue about the arbitrary and capricious nature of Mr. Melendez's death sentence on direct appeal.

In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court reviewed the constitutionality of the death penalty as it then operated. This review came against a background of increasing concern that those being chosen to pay society's ultimate penalty were being chosen on a more or less random basis.

The Court found these concerns to be well founded. Justice Douglas wrote:

> [W]e deal with a system of law and of justice that leaves to the uncontrolled discretion of judges and juries the determination whether defendants committing these crimes should die or should be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man, or of twelve.

408 U.S. at 253. After noting the small number of executions carried out in the preceding years Justice Brennan wrote:

> When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No-one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison.

408 U.S. at 294. The phrase which summed up the essence of the unconstitutional nature of the death penalty was written by Justice Stewart:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual....the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

408 U.S. at 309. The justices who agreed that the death penalty as then applied was unconstitutional recognized that inherent in the Eighth Amendment's prohibition of cruel and unusual punishment was a requirement that the penalty not be administered capriciously or arbitrarily.

More than twenty years after the Supreme Court decided Furman v. Georgia the conclusions reached by Justices Douglas, Brennan, and Stewart remain valid and have become the cornerstones of modern Eighth Amendment jurisprudence. Gregg v. Georgia, 428 U.S. 153 (1976). Statutes which provide for the death penalty must be structured in a way which prevents the penalty from being arbitrarily applied. California v. Brown, 107 S.Ct. 538 (1987).

In Parker v. Dugger, 111 S.Ct. 731 (1991), the Supreme Court overturned a Florida death sentence for reasons which amounted to

an affirmation that the death sentence was arbitrary. Writing for the Court, Justice O'Connor stated:

> "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 466-467. We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.

This court recognized in State v. Dixon, 283 So. 2d 1 (1973), that Furman v. Georgia required that the discretion inherent at every stage of the criminal justice process be exercised in a manner that is reasonable and controlled. This requirement was not met in this case. According to the State Mr. Melendez and Mr. Berrien were equally guilty, and yet one received death while the other was not even charged. The State offered no justification for this dichotomy, and the requirement of Parker v. Dugger that a rational distinction exist between Mr. Berrien and Mr. Melendez cannot be met. It is difficult to imagine treatment which so clearly violates the Eighth Amendment's prohibition on arbitrary and capricious punishment.

Appellate counsel failed to raise this issue on direct appeal to the Florida Supreme Court. Mr. Melendez has been denied the effective assistance of counsel on direct appeal and this Court should grant Mr. Melendez a new appeal.

D. MR. MELENDEZ DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT TO PRESENT EVIDENCE IN MITIGATION IN THE SENTENCING STAGE OF HIS CAPITAL TRIAL.

After the jury returned their verdict of guilty of first degree murder, 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 defense counsel informed the court as follows:

> 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 affect his "speedy trial" rights. The judge did ask him if he had talked to his attorney and if the attorney, Mr. Alcott, 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 Mr. Alcott had told Mr. Melendez about his rights.

It is not clear whether a defendant can waive the penalty phase of a capital trial. Florida case law indicates that it is proper to waive an advisory jury recommendation. State v. Carr, 336 So. 2d 358 (Fla. 1976). However, many state courts have held that a capital defendant cannot waive challenges to his death sentence. See Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978)("The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue -- the propriety of allowing the state to conduct an illegal execution of a citizen." (footnote omitted)).

In State v. Hightower, 518 A. 2d 482 (N.J. Super. A.D. 1986), the defendant ordered his counsel not to present evidence in mitigation during the penalty phase, and said that he wanted the death penalty granted. In reversing the case, the Court concluded that a jury would have difficulty discharging its

statutory duty to weigh aggravating factors against mitigating factors if it did not hear the evidence in mitigation; also an appellate court would not be able to review the case for proportionality issues if relevant mitigation were not preserved for the record. Concluding that "the jury should hear all relevant testimony," that court said, "'there are higher values at stake here than a defendant's right to self-determination,' quoting Chief Justice Burger in Mayberry v. Pennsylvania, 400 U.S. 455, 468, 91 S. Ct. 409, 506, 27 L.Ed.2d 532 (1971)." Id. at 484.

In holding that a defendant cannot waive his right to present mitigating evidence during the penalty phase of a capital trial, even if that waiver is "knowing and voluntary," the Supreme Court of New Jersey said, "The policy reasons are based substantially on the state's 'interest in a reliable penalty determination.' People v. Deere, 41 Cal.3d 353, 710 P.2d 925, 931, 222 Cal. Rptr. 13 (1985); State v. Koedatich, supra, 98 N.J. at 554 (O'Hern, J, concurring in part, dissenting in part); State v. Hightower, 214 N.J. Super. 43, 44 (App. Div. 1986)." State v. Koedatich, ___ A.2d ___ (Decided Aug. 3, 1988)(1988 New Jersey Lexis 83).

The Supreme Court of California also has determined that the State's right to a reliable sentencing determination outweighs a defendant's right to waive the introduction of mitigating evidence.

> Since 1976 the United States Supreme Court has repeatedly recognized that the qualitative difference

> between death and all other penalties demands a correspondingly higher degree of reliability in the determination that death is the appropriate punishment. (Woodson v. North Carolina (1976) 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (plur. opn.).) And since 1978 the high court has insisted that the sentencer must be permitted to consider any aspect of the defendant's character and record as an independently mitigating factor. (Lockett v. Ohio (1978) 438 U.S. 586, 604-605, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (plur. opn. of Burger, C.J.).)
>
> To allow a capital defendant to prevent the introduction of mitigating evidence on his behalf withholds from the trier of fact potentially crucial information bearing on the penalty decision no less than if the defendant was himself prevented from introducing such evidence by statute or judicial ruling. In either case the state's interest in a reliable penalty determination is defeated.

People v. Deere, 710 P.2d 925, 931 (Cal. 1985)(footnote omitted). See also, People v. Bloyd, 729 P.2d 802 (Cal. 1987).

There is no discussion on the record as to whether Mr. Melendez understood the consequences of his actions. Given the statements of record made by Mr. Melendez, it is not at all clear that he had any true understanding of what the process was. The record certainly does not establish that Mr. Melendez knowingly, voluntarily and intelligently waived constitutional rights.

Adding to the confusion is the fact that 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.

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. That was his thought process as reflected in the record. 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. Neither did he waive the presence of the jury. Instead he spoke to the jurors and proclaimed his innocence and expressed his disbelief of the testimony of John Berrien and David Luna Falcon.

Furthermore, and of equal significance, is the fact that defense counsel did not ask the jury to recommend death, as his client requested. 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." Mr. Melendez was simply unaware, uninformed and confused as to the nature and seriousness of the penalty phase of his trial. There was no "knowing and intelligent" waiver by Mr. Melendez.

It should be noted that the trial judge specifically said that he would not let Mr. Melendez waive a jury recommendation:

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

(R. 774). Yet, of what value is that recommendation when the jury heard only one side of the story?

Appellate counsel should have raised this claim on direct appeal. Counsel should have presented the claim that Mr. Melendez did not make a knowing and intelligent waiver of his right to present evidence to this jury. The reliability of the death penalty depends upon the ability of the defendant to present evidence in mitigation. Lockett v. Ohio, 438 U.S. 586 (1978). This claim should have been presented to this Court. The failure of appellate counsel to present this claim has denied Mr. Melendez the effective assistance of counsel on direct appeal. Mr. Melendez should be granted a new direct appeal to this Court.

E. 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 nor was it raised on direct appeal. 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, violating Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987); and Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853 (1988). Mr. Melendez's jury was unconstitutionally instructed. (See R. 776, 792, 794) Mr. Melendez was denied the effective assistance of counsel on direct appeal and therefore a constitutionally sound appeal by the failure of counsel to present this issue to the Florida Supreme Court.

Under Hitchcock, Florida juries must be instructed in accord with eighth amendment principles. Mr. Melendez's sentence of death is neither "reliable" nor "individualized." This error undermines 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. Appellate counsel's failure to present this claim on direct appeal denied Mr. Melendez effective counsel as well as undermining the confidence in the opinion of this Court on direct appeal. Mr. Melendez should be given a new direct appeal.

F. MR. MELENDEZ'S SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Under Florida law, capital sentencers may reject or give little weight to any particular aggravating circumstance. A jury may return a binding life recommendation because the aggravators are insufficient. Hallman v. State, 560 So. 2d 233 (Fla. 1990). The sentencer's understanding and consideration of aggravating factors may lead to a life sentence.

Mr. Melendez was convicted of one count of felony murder, with robbery being the underlying felony. The death penalty in this case was predicated upon unreliable automatic findings of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for the conviction.

A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 112 S. Ct. 1130 (1992). The sentencer was entitled automatically to return a death sentence upon a finding of first degree felony murder. Every felony murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment. This is so because an automatic aggravating circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and one which therefore renders the sentencing process unconstitutionally unreliable. Id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly

arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988). Because Mr. Melendez was convicted of felony murder, he then automatically faced statutory aggravation for felony murder. These aggravating factors were "illusory circumstance[s]" which "infected" the weighing process; these aggravators did not narrow and channel the sentencer's discretion as they simply repeated elements of the offense. Stringer, 112 S. Ct. at 1139. In fact, the Florida Supreme Court has held that the felony murder aggravating factor alone cannot support the death sentence. Rembert v. State, 445 So. 2d 337 (Fla. 1984).

Recently the Wyoming Supreme Court addressed this issue in Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991). In Engberg, the Wyoming court found the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance to violate the eighth amendment:

> In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was used not once but three times to convict and then enhance the seriousness of Engberg's crime to a death sentence. All felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the Furman/Gregg narrowing requirement.
>
> Additionally, we find a further Furman/Gregg problem because both aggravating factors

> overlap in that they refer to the same aspect of the defendant's crime of robbery. While it is true that the jury's analysis in capital sentencing is to be qualitative rather than a quantitative weighing of aggravating factors merely because the underlying felony was robbery, rather than some other felony. The mere finding of an aggravating circumstance implies a qualitative value as to that circumstance. The qualitative value of an aggravating circumstance is unjustly enhanced when the same underlying fact is used to create multiple aggravating factors.
>
> When an element of felony murder is itself listed as an aggravating circumstance, the requirement in W.S. 6-5-102 that at lest one "aggravating circumstance" be found for a death sentence becomes meaningless. **Black's Law Dictionary**, 60 (5th ed. 1979) defines aggravation as follows:
>
> "Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, **but which is above and beyond the essential constituents of the crime or tort itself.**" (emphasis added).
>
> As used in the statute, these factors do not fit the definition of "aggravation." The aggravating factors of pecuniary gain and commission of a felony do not serve the purpose of narrowing the class of persons to be sentenced to death, and the Furman/Gregg weeding-out process fails.

820 P.2d at 89-90.

Wyoming, like Florida, provides that the narrowing occur at the penalty phase. See Stringer v. Black. The use of the "in the course of a felony" aggravating circumstance is unconstitutional. As the Engberg court held:

> [W]here an underlying felony is used to convict a defendant of felony murder only, elements of the underlying felony may not again be used as an aggravating factor in the

> sentencing phase. We acknowledge the jury's finding of other aggravating circumstances in this case. We cannot know, however, what effect the felony murder, robbery, and pecuniary gain aggravating circumstances found had in the weighing process and in the jury's final determination that death was appropriate.

820 P. 2d at 92.

This error cannot be harmless in this case:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer, 112 S. Ct. at 1137.

When a jury is given two options from which to chose, one constitutional and the other not, and the jury does not affirmatively chose the constitutional option, the conviction must be reversed. Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532 (1931).

Mr. Melendez was denied a reliable and individualized capital sentencing determination, in violation of the sixth, eighth, and fourteenth amendments by the failure of counsel to raise this issue on direct appeal to the Florida Supreme Court. This Court must grant Mr. Melendez a new direct appeal with constitutionally adequate counsel.

CONCLUSION

Appellate counsel's failure to bring constitutional error to the attention of this Court on direct appeal undermines confidence in the fairness and correctness of the outcome of the appeal. Wilson, 474 So.2d at 1165. If these claims, discussed above, had been presented to this Court, it is at least reasonably likely that the outcome would have been different. This Court should grant habeas corpus relief on the basis of the clear violation of Mr. Melendez's rights to effective appellate counsel which Mr. Melendez has presented in these proceedings.

I HEREBY CERTIFY that a true copy of the foregoing Petition has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 18, 1993.

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