IN THE SUPREME COURT OF FLORIDA

Case No. 83,013

On Petition For Discretionary Review
From The Third District Court Of Appeal

FREDERICK E. MELVIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER FREDERICK E. MELVIN

HOLLAND & KNIGHT

Julian Clarkson
Susan L. Turner
P.O. Drawer 810
Tallahassee, FL 32302
(904) 224-7000

Counsel for Petitioner

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INTRODUCTION

FREDERICK E. MELVIN ("Melvin") has petitioned the Court to review a decision of the Third District Court of Appeal certified as involving the same question of great public importance that was involved in Novaton v. State, 610 So. 2d 726 (Fla. 3d DCA 1992), aff'd, 634 So. 2d 607 (Fla. 1994):

> Does a defendant, who knowingly entered into a plea agreement, thereby waive an otherwise viable double jeopardy claim?

Melvin v. State, 630 So. 2d 1139 (Fla. 3d DCA 1993), pending, Case No. 83,013 (Fla. Jan. 1, 1994) [A 1].

The Court postponed its decision on jurisdiction[1] and set a briefing schedule, pursuant to which Melvin filed briefs on the merits pro se. After Respondent STATE OF FLORIDA (the "State") had filed its answer brief, this Court rendered its decision affirming Novaton but disapproving the Third District's statement in Novaton that an unbargained plea constitutes a waiver of double jeopardy objections. Novaton, 634 So. 2d at 609. The Court appointed undersigned counsel to file briefs on behalf of Melvin addressing the effect of Novaton.

Novaton does not control this case because materially different facts are involved here. Unlike the defendant in Novaton, Melvin did not voluntarily and intelligently enter a plea bargain as to which he understood and agreed to each individual

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[1] The Court has jurisdiction under article V, section 3(b)(4), Florida Constitution, and should exercise its jurisdiction to answer the certified question because this appears to be a case of first impression involving materially different facts from those in Novaton.

sentence and the total sentence. As a result, his plea could not constitute a waiver of his double jeopardy claim.

STATEMENT OF THE CASE AND FACTS

The State charged Melvin with two felonies in each of two separate informations.[2] In Case No. 89-46022 the State charged Melvin with attempted first degree murder under sections 777.04 and 782.04(1), Florida Statutes, enhanced for use of a firearm under section 775.087, Florida Statutes; and unlawful possession of a firearm while engaged in a criminal offense under section 790.07, Florida Statutes [A 3]. Case No. 90-3133 involved a separate incident several months after the first, as to which the State charged Melvin with second degree murder under sections 775.087 and 782.04(2), Florida Statutes, enhanced for use of a firearm under section 775.087, Florida Statutes; and unlawful possession of a firearm while engaged in a criminal offense under section 790.07, Florida Statutes [A 5].

The two informations were consolidated for judgment and sentencing [A 6]. Melvin's appointed counsel informed the trial court that Melvin would plead no contest to both informations in exchange for a sentence of "30 years state prison, concurrent on each case, three years minimum mandatory, concurrent on each case." [A 6 at 3.] Melvin testified that he did not feel as though he had

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[2] In both cases, Melvin was originally arrested on three charges: the two described in the text, plus use of a firearm by a convicted felon (Case No. 89-46022) [A 2], and carrying a concealed firearm (Case No. 90-3133) [A 4]. The informations dropped the two additional charges.

been forced or threatened to enter that plea, that it was free and voluntary, that he had had sufficient opportunity to discuss it with his lawyer, and that he was satisfied with the representation he had received [A 6 at 4].

The trial judge advised Melvin that he would be giving up the following specific rights by entering a plea of no contest: right to trial, right to confront adverse witnesses, right to present witnesses, right to remain silent, right to appeal [A 6 at 4-5]. Melvin said he was willing to give up those rights to enter the plea [A 6 at 5]. The trial judge did not advise Melvin that entering the plea would constitute a waiver of any double jeopardy claims.

After the trial judge advised Melvin of certain rights he would give up by entering a plea of no contest, the Assistant State Attorney "clarified" the proposed sentence, as follows [A 6 at 5-6]:

> On 90-3133, on count one, which is the murder in the second degree, the sentence will be the 30 years. However, in count two, which is possession of a firearm during the commission of a felony, the statutory maximum would be 15; so I would recommend the court sentence him to 15 years concurrent with the 30.
>
> And the same thing would be with case 89-46022, as to count one, attempted first degree murder. That would be 30 years. Count two, possession of a firearm during the commission of a felony, 15 years, to run concurrent on all counts, and sentences to run concurrent with each other.
>
> There is a three-year minimum mandatory for count one of 89-46022 and count one of 90-3133. I would recommend both three-year minimum mandatories run concurrent with each other.

Melvin's appointed counsel then explained his understanding that "[t]he bottom line is that it's 30 years with a minimum mandatory of three included, and all sentences to run concurrent." [A 6 at 6.] Melvin's counsel said that was what he had communicated to Melvin, and Melvin said that was his understanding [A 6 at 6-7].

No one told Melvin that a sentence including both counts of both informations would amount to double jeopardy in each case. In addition, neither the trial judge, Assistant State Attorney, nor Melvin's counsel advised Melvin of the statutory maximum penalties that could be imposed for each count of each information or whether or not there was a mandatory minimum for count two of each information. The Assistant State Attorney said that the statutory maximum penalty for count two of the first information was 15 years, and that the minimum mandatory sentence for count one of each information was three years. No one, however, informed Melvin of the statutory maximum for count one of either information or count two of the second information; and no one informed Melvin whether or not there was a mandatory minimum sentence for count two of either information.

The trial court found that Melvin was "alert and intelligent," that he "understood the terms of the plea as explained to you by your lawyer," and that the plea was free and voluntary [A 6 at 7]. The court accepted Melvin's plea of no contest and adjudicated him guilty on all four counts, sentencing him to 30 years on count one of each information, three years minimum mandatory on each, and 15 years on count two of each information, all to run concurrent [A 6 at 7-8].

Melvin filed a habeas petition with the circuit court, which the court treated as a Motion for Post-Conviction Relief under Florida Rules of Criminal Procedure 3.850 [A 7]. Melvin claimed that his plea was not knowing and voluntary because the trial court had failed to inform him of the statutory maximum and minimum mandatory penalties for each count [A 7 at 8], and that the assistance of his appointed counsel was ineffective because his counsel had allowed him to plead to a judgment and sentence constituting double jeopardy [A 7 at 10].

The trial court denied Melvin's motion for post-conviction relief, without an evidentiary hearing, as untimely and legally insufficient [A 8]. Melvin appealed to the Third District, which affirmed on the authority of Novaton, which was then pending before this Court, and later certified to this Court the same question of great public importance that had been certified and was on review in Novaton [A 1]:

> Does a defendant, who knowingly entered into a plea agreement, thereby waive an otherwise viable double jeopardy claim?

SUMMARY OF THE ARGUMENT

Melvin has a viable double jeopardy claim because all of the elements of his count II offenses, possession of a firearm while committing his count I felonies, are included within the elements of his enhanced count I felonies. Melvin did not waive his double jeopardy claim, because he did not voluntarily and intelligently agree to the individual sentences involved and the total sentence. He agreed only to the "bottom line" sentence as explained to him by his appointed counsel, and the transcript of his sentencing hearing reveals that no one gave him the information necessary to constitute a valid waiver.

No one told Melvin the statutory maximum penalty for count I of either information or for count II of the second information; no one told him whether there was a mandatory minimum sentence for count II of each information; and no one, including his appointed trial counsel, told him that the plea included sentences constituting double jeopardy. Without this information, Melvin's plea was not fully informed, and could not constitute a waiver of his double jeopardy claim. The appropriate remedy for the illegal convictions and sentences is to vacate those associated with the lesser (count II) offenses, and remand for preparation of a new scoresheet that omits those offenses, and appropriate adjustments by the Department of Corrections to Melvin's release dates and eligibility for parole.

ARGUMENT

This Court said in Novaton that under certain circumstances not present here, a bargained plea can constitute a waiver of otherwise viable double jeopardy claims. When an otherwise viable double jeopardy claim exists, waiver will result only from (1) a plea bargain (as opposed to a general plea), in which the defendant (2) voluntarily and intelligently (3) agrees to "each individual sentence, as well as to the total sentence," and (4) receives a reduced sentence as a result of the plea bargain. Novaton, 634 So. 2d at 609. Melvin has a viable double jeopardy claim, and he did not waive it, because he did not voluntarily and intelligently agree to each individual sentence imposed against him.

I. Melvin Has A Viable Double Jeopardy Claim.

Before reaching the waiver issue, the threshold question is whether Melvin has a viable double jeopardy claim. The certified question assumes the existence of an otherwise viable double jeopardy claim, and the State seems to concede [1 A. Br. 20-23][3] that Melvin would have such a claim under the standards established by this Court's decision in Cleveland v. State, 587 So. 2d 1145 (Fla. 1991). The State asks the Court to overrule Cleveland.

In Cleveland, the Court held that double jeopardy impermissibly attached to separate convictions and sentences for

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[3] The parties had already briefed the merits before this Court appointed counsel for Melvin and required new briefs in light of Novaton, and therefore references to the State's first answer brief are designated "[1 A. Br. __]."

robbery enhanced by use of a firearm and for use of a firearm in committing the same robbery. 587 So. 2d at 1146. Under the Cleveland rule, Melvin was subjected to double jeopardy in both cases brought against him, because in each case the first count offense was enhanced for use of a firearm and the second count offense was for use of a firearm while committing the first count offense. The State recognizes the Cleveland rule, but asks the Court to reconsider and overrule Cleveland, on the basis of a statutory amendment that pre-dated Cleveland.[4]

The legislature amended section 775.021, Florida Statutes, in 1988 to require a separate sentence for each separate criminal offense committed, regardless of whether multiple offenses were committed during a single episode. The statute as amended defines offenses as "separate if each offense requires proof of an element that the other does not." § 775.021(4)(a), Fla. Stat. (1989) (emphasis added). Thus, in order to impose a separate sentence on two (or more) offenses committed during a single criminal act, the first offense must have at least one element that the second does not, and the second offense must have at least one element that the first does not. In this manner the defendant is protected from double punishments for the same offense.

The following chart illustrates that the cases against Melvin do not qualify for separate sentences under section 775.021 as amended, because in each case all of the elements of the count II offense are included in the count I offense as charged. Each

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[4] The same arguments were raised and expressly rejected in Cleveland. 587 So. 2d at 1146.

count I offense was enhanced in the information with a charge that it was committed with a firearm. Thus, although each count I offense contains a statutory element that the count II offense does not contain, the reverse is not true. All of the elements of possession of a firearm while committing a felony are included within the count I felony-with-a-firearm charges, and cannot be separately sentenced under section 775.021.

	Elements of Count I	**Elements of Count II**
Case No. 89-46022	Attempted First Degree Murder; 777.04, 782.04(1), 775.087: 1. attempt/act toward an 2. unlawful killing with 3. premeditated design and 4. displays/uses firearm but is 5. unsuccessful.	Possession of firearm while committing Count-I felony; 790.07: 1. display/use fire-arm while 2. attempting first-degree murder as defined at left.
Case No. 90-3133	Second Degree Murder; 782.04(2), 775.087: 1. non-premeditated 2. unlawful killing with 3. display/use of firearm.	Possession of firearm while committing Count-I felony; 790.07: 1. display/use fire-arm while 2. committing second-degree murder as defined at left.

Cleveland was correctly decided under section 775.021, which permits separate sentences only when each offense charged has at least one element that the other does not. That is not the case here because both of the count II offenses are totally subsumed

within the count I offenses as enhanced; i.e., all of the elements of the count II offenses are included in the enhanced count I offenses, making section 775.021(4)(a) inapplicable. In Cleveland, as here, the primary felony was enhanced for use of a firearm. The enhancement itself results in an upward reclassification under section 775.087, and therefore a separate sentence for use of a firearm subjects the defendant to still another punishment for the same offense. That is a classic illustration of double jeopardy, against which both the Federal and Florida Constitutions promise protection.[5] Melvin was subjected to double jeopardy in each case against him.

II. Melvin's Plea Bargain Did Not Constitute A Waiver Of His Double Jeopardy Claim.

Having established that Melvin has a viable double jeopardy claim, the next issue is whether he waived that claim when he entered the plea agreement. Novaton reaffirms that such a waiver is possible; however, no waiver occurred on the facts of this case. Melvin's plea bargain could not create a waiver because it lacked the elements required under Novaton.

A Novaton waiver requires that the defendant voluntarily and intelligently agree to each individual sentence as well as to the total sentence to be imposed. Such a requirement is consistent

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[5] U.S. Const. amend. V ("nor shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb"); art. I, § 9, Fla. Const. ("No person shall be ... twice put in jeopardy for the same offense ... ."). See also Lippman v. State, 633 So. 2d 1061, 1064 (Fla. 1994) (guarantee against double jeopardy " 'protects against multiple punishments for the same offense.' " (quoting from North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

with Florida Rules of Criminal Procedure 3.172(c), which requires the trial judge to determine that the defendant understands "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." A voluntary and intelligent agreement cannot occur unless the defendant is fully informed as to the statutory maximum penalties available for each separate offense charged, the mandatory minimum sentences accompanying each offense, and the sentence to be imposed for each offense under the plea bargain. See also Fla. R. Crim. P. 3.170(j) (as to general pleas, requiring the trial court to determine that the defendant has a "full understanding" regarding the plea).

In Novaton, this Court stated that the defendant entered his plea bargain "recognizing [the] possibility" that he could be treated as a habitual felony offender and receive a life sentence without parole. 634 So. 2d at 608. Novaton was given all of the specific information he needed in order to make a voluntary and intelligent choice:

> All of the charges and sentences included in the plea agreement were part of the colloquy between Novaton and the trial judge, and Novaton specifically agreed to plead guilty to the charged offenses and to the sentences imposed.

Id. In contrast to Novaton, Melvin was not so informed. Melvin's attorney said he had told Melvin the "bottom line" deal of 30 years, three years mandatory minimum, all concurrent; Melvin said that was what he was agreeing to accept.

The trial judge said nothing at all about the individual charges and sentences until after the plea colloquy, when he

adjudicated Melvin guilty and sentenced him in a manner constituting double jeopardy. No one told Melvin the statutory maximum penalty for count I of either information or for count II of the second information; no one told him whether there was a mandatory minimum sentence for count II of each information; and no one told him that the plea included sentences constituting double jeopardy.[6] These omissions distinguish Melvin's case from that at issue in Novaton, and require a result different from that in Novaton. Here, there was no waiver and Melvin is entitled to relief from the convictions and sentences constituting double jeopardy.

III. The Appropriate Remedy Is To Vacate Melvin's Convictions And Sentences For The Two Count II Offenses.

The State argues that the only appropriate remedy for a double jeopardy violation is to reinstate the charges, unless the State chooses to enforce the objectionable sentences [1 A. Br. 23-24 (citing Forshee v. State, 579 So. 2d 388 (Fla. 2d DCA 1991); Prestridge v. State, 519 So. 2d 1147 (Fla. 3d DCA 1988); Jolly v. State, 392 So. 2d 54 (Fla. 5th DCA 1981)]. The State claims that otherwise, it will lose the benefit of its bargain while giving Melvin more than his bargain. Neither the law nor the facts

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[6] By failing to be aware of this Court's ruling in State v. Smith, 547 So. 2d 613, 616 (Fla. 1989), which explains the circumstances under which multiple punishments may and may not be imposed for separate offenses, Melvin's attorney arguably fell below the standard of competence required of attorneys in criminal cases.

support the State's remedy arguments. The appropriate remedy is to vacate the illegal convictions and sentences.

At most, Melvin agreed to a "bottom line" maximum term of thirty years, a mandatory minimum of three years, and concurrent sentences. He did not agree to be subjected to double jeopardy. If the improper sentences on each count II are vacated, Melvin is left with exactly the prison term he bargained to receive, and the double jeopardy violation is cured. If, on the other hand, the charges and sentences are left in place, then the State has obtained much more than the law entitles it to receive: double punishment, in excess of the State's authority, for the same offense. The State's "windfall" in the form of double punishment impacts Melvin's release dates and eligibility for parole for these cases. See Glisson v. Florida Parole and Probation Commission, 420 So. 2d 336 (Fla. 1st DCA 1982) (concurrent sentences for other offenses a proper aggravating factor for presumptive parole release date); Griggs v. Florida Parole and Probation Comm'n, 420 So. 2d 367 (Fla. 1st DCA 1982) (even when sentences are concurrent, multiple offenses can result in aggravation of presumptive parole release date); Fla. Admin. Code R. 23-19.001(5), 23-21.008, 23-22.008(e). In addition, the presence of these convictions and sentences in Melvin's records would adversely impact any future scoresheets.

The cases upon which the State relies for the principle that the only remedy is to vacate the entire plea are inapposite. They all involved a negotiated plea where the respective defendants knowingly and voluntarily agreed to specific sentences that were

later discovered to be illegal. Forshee, 579 So. 2d at 389; Prestridge, 519 So. 2d at 1148; Jolly, 392 So. 2d at 56.

Here, Melvin never agreed to the illegal double jeopardy sentence, because he was not given the information or assistance of counsel necessary to constitute a valid agreement. In these circumstances, the appropriate remedy is to vacate the illegal double jeopardy convictions and sentences imposed for count II of each case. Joseph v. State, 625 So. 2d 109, 110 (Fla. 3d DCA 1993) (remedy for double jeopardy violation involving same charges as Melvin's Case No. 90-3133 was to "reverse the conviction and sentence" for the second count offense); Kio v. State, 624 So. 2d 744, 747 (Fla. 1st DCA 1993) (remedy for same type of double jeopardy violation at issue here was to vacate sentence for second count and correct scoresheet by deleting points for that offense), rev. denied, 634 So. 2d 627 (Fla. 1994); Forshee, 579 So. 2d at 389 (if all parties had not agreed to the specific portions of the sentence challenged, the court "would reverse and remand for the imposition of a legal sentence.") Accordingly, the Court should vacate the convictions and sentences for count II of each case against Melvin and remand with instructions to prepare a corrected scoresheet that eliminates these offenses.

CONCLUSION

Melvin's two count II convictions and sentences for possession of a firearm while committing a felony violated his double jeopardy rights because the same offense was subsumed within the enhanced count I felonies. Melvin did not waive his double

jeopardy claim under the Novaton test because he did not voluntarily and intelligently accept each individual sentence and the total sentence; no one, including his appointed trial counsel, gave him the information he needed to make a knowing waiver of his double jeopardy rights. The appropriate remedy for the illegality is to vacate the convictions and sentences for count II of each case, and remand for preparation of a new scoresheet and corresponding adjustments by the Department of Corrections to Melvin's release dates and parole eligibility.

HOLLAND & KNIGHT

Julian Clarkson (FBN 013930)

Susan L. Turner (FBN 772097)
Post Office Drawer 810
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(904) 224-7000

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail to Consuelo Maingot, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, Post Office Box 013241, Miami, FL 33101, this 16th day of June, 1994.

Susan L. Turner
Attorney

TAL-45058

INDEX TO APPENDIX

A 1 Third District's decision in Melvin and certification of question of great public importance

A 2 Arrest Affidavit, Case No. 89-46022

A 3 Information, Case No. 89-46022

A 4 Arrest Affidavit, Case No. 90-3133

A 5 Information, Case No. 90-3133

A 6 Transcript of sentencing hearing

A 7 Melvin's habeas petition (treated as R. 3.850 motion)

A 8 Trial court's denial of habeas petition/R. 3.850 motion

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1993

FREDERICK E. MELVIN, **

Appellant, **

vs. ** CASE NO. 93-2146

89-46022
90-3133

THE STATE OF FLORIDA, **

Appellee. **

Opinion filed October 26, 1993.

An Appeal under Fla.R.App.P. 9.140(g) from the Circuit Court of Dade County, Leslie Rothenberg, Judge.

Frederick E. Melvin, in proper person.

Robert A. Butterworth, Attorney General, for appellee.

Before SCHWARTZ, C.J., and HUBBART and COPE, JJ.

PER CURIAM.

Affirmed on the authority of Novaton v. State, 610 So. 2d 726 (Fla. 3d DCA 1992), review granted, No. 81,183 (Fla. July 14, 1993).

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1993

FREDERICK E. MELVIN, **

Appellant, **

vs. ** CASE NO. 93-2146

THE STATE OF FLORIDA, **

Appellee. **

Opinion filed December 14, 1993.

An Appeal under Fla.R.App.P. 9.140(g) from the Circuit Court for Dade County, Leslie Rothenberg, Judge.

Frederick E. Melvin, in proper person.

Robert A. Butterworth, Attorney General, for appellee.

Before SCHWARTZ, C.J., and HUBBART and COPE, JJ.

ON MOTION FOR CERTIFICATION

PER CURIAM.

We hereby certify to the Supreme Court that this case involves the same question, which is of great public importance, as the one involved in Novaton v. State, 610 So. 2d 726 (Fla. 3d DCA 1992), review granted, 624 So. 2d 267 (Fla. 1993):

> Does a defendant, who knowingly entered into a plea agreement, thereby waive an otherwise viable double jeopardy claim.

STATE OF FLORIDA)
)
COUNTY OF DADE)

I, LOUIS J. SPALLONE, Clerk of the District Court of Appeal, Third District, State of Florida, DO HEREBY CERTIFY that the attached are copies of documents, consisting of pages numbered 1 to 42, inclusive, taken from the court file in the case of FREDERICH E. MELVIN, appellant, vs. STATE OF FLORIDA, appellee.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court on the 27th day of January, 1994.

LOUIS J. SPALLONE

Clerk District Court of Appeal
of Florida, Third District

By _____
Deputy Clerk

2 CATY

89 NOV 26 PM 4:44

COMPLAINT/ARREST AFFIDAVIT

0 0 2 5 8 8 0 0 5 — ☑ Felony ☑ Misdemeanor ☐ Traffic ☐ Juvenile ☐ Warrant — 118615 — Police Case No. 6632-R

6603725 — Agency Code: 16 — Municipal P.D. Dist. ID No.: 89-11-89 — 89-460

Name (Last, First, Middle): MELVIN FREDRICK EUGENE — DOB mo/day/yr: 03/04/61 — Sex: M — Race: B — 5-1 145 BLK

Address: 913 NW 3 ST F.C FL 33034 — Phone: U/K — Alias: SHORTY

S/A LOCAL

N/A — Phone: N/A — NONE FL

U/K — Social Security No.: 264-49-0221 — NOT OBSERVED

Arrest Date mo/day/yr: 11/26/89 — Arrest Time: 1245 ☐ AM ☒ PM — 913 NW 3 ST F.C FLA Residence

03 — ☑ Unknown — ☑ Unknown — Citizenship: USA — Residence Type: ☑ City ☐ Dade ☐ Florida ☐ Out of State

Charges	Activity	Type	Counts	Statute
AGGRAVATED BATTERY	N	N	1	784.045
USE OF FIREARM IN THE COMMISSION OF A FELONY	N	N	1	790.07
USE OF FIREARM BY A CONVICTED FELON	N	N	1	790.23
—	—	—	—	—

FLA C

The undersigned certifies and swears that he has just and reasonable grounds to believe and does believe that the above named Defendant, On the 01 day of Oct 19 89 at 1245 ☐ AM ☒ PM (Time)

1205 NW GAVE F.C PARK (Location: include name of business)

Committed the following violation of law. Narrative (Be specific): ON THE ABOVE DATE AND TIME OFFICERS WERE DISPATCHED TO THE ABOVE LOCATION IN REFERENCE TO A SHOOTING. UPON ARRIVAL THE VICTIM WAS FOUND LYING FACE DOWN BLEEDING PROFUSELY FROM A SINGLE GUNSHOT WOUND IN THE LEFT CHEEK. THE VICTIM WAS FULLY CONSCIOUS AND COHERENT. UPON QUESTIONING THE VICTIM STATED, "HOB SHORTY SHOT ME BECAUSE OF AN ARGUMENT" I THINK HE USED A — PAGE 1 of

184045 00 7900703 7902304

For Other Agency — Verified by

I swear that the above Statement is correct and true to the best of my knowledge and belief.

☐ HOLD FOR BOND HEARING. DO NOT BOND OUT (Officer Must Appear at Bond Hearing)

☐ I understand that should I willfully fail to appear before the court by this notice to appear that I may be held in contempt of court and for my arrest shall be issued. Furthermore, I agree that notice of the time, date, and place of all court hearings should be sent to address. I agree that it is my responsibility to notify Clerk of Juveniles notify Family Division Juvenile Section anytime that changes.

P. RODRIGUEZ
Officer's Name (Print)

Sworn to and subscribed before me, the undersigned authority, this 26 day of NOV 19 89

☐ You need not appear in court, but must comply with the instructions on reverse side hereof.

Officer's Signature — Deputy of the Court or Notary Public

(16)

COMPLAINT/ARREST AFFIDAVIT
CONTINUATION

DET'S Number 10162518801015 | ☒ Felony ☒ Misdemeanor ☐ Traffic ☐ Juvenile ☐ Warrant | Jail No 118615 | Police Case No 6632-R

IDS No | Agency Code 16 | Municipal P.D. Def. ID No 89-11-89 | MDPD Records and ID No | Court Case No

DEFENDANT'S NAME Last First Middle | DOB mo. da. yr. 1 1

ADDITIONAL CHARGES	Activity	Type	Counts	STATUTE	FELONY or MISDEMEANOR
N A					69-.
					FLA.

.38 CAL". MELVIN HAD BEEN INVOLVED IN A VERBAL ARGUMENT WITH THE VICTIM APPROXIMATELY FIFTEEN MINUTES PRIOR TO THE SHOOTING. THE WITNESS FURTHER ADVISED THAT MELVIN LEFT THE AREA RETURNING APPROX 10-15 MINUTES LATER, WALKED UP TO THE VICTIM, REMOVED A BARRELED REVOLVER FROM HIS WAIST BAND AND SHOT THE VIC ONCE IN THE FACE. THE VICTIM FELL TO THE GROUND AND A THIS TIME THE DEF. SHOT THE VICTIM TWICE. THE DEFEN Then entered the BROWN, FOUR DOOR PONTIAC BONNEVILLE AND NORTH BOUNDS ON NORTH WEST NINETH AVE THE DEFENDANT then ONCE MORE TOWARDS THE CROWD THROUGH THE DRIVERS WINDOW ON THIS DATE R/O RESPONDED TO DEF'S. HOME RESIDENCE. DEF. TAKEN IN CUSTODY AND TRANS. TO F.C.P.D. FOR PROCESS, LATER D.C.J., DEF. A OIZED AT F.C.P.D. PRIOR TO QUESTIONING. DEF. REFUSED TO MAKE ANY STATEMENTS.

PAGE 2 OF

Hold for Other Agency

Y _____ Verified by _____

I swear that the above Statement is correct and true to the best of my knowledge and belief.

P. RODRIGUEZ
Officer's Name (Print)

Officer's Signature

F.C.P.D. M55 16

☐ HOLD FOR BOND HEARING DO NOT BOND OUT (Officer Must Appear at Bond Hearing)

Sworn to and subscribed before me the undersigned authority this 26 day of DEC 19 89

Deputy of the Court or Notary Public

☐ I understand that should I willfully fail to appear [illegible] court by this notice to appear that I may be held in contempt of court for my arrest shall be issued [illegible] that notice the time, date and [illegible] address. I agree that it is my responsibility to notify the Court's [illegible] changes

☐ You need not appear in court. But you must [illegible] reverse side hereof.

IN THE CIR[illegible] COURT OF THE ELEVENTH JUDICI. CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA FALL TERM, 19 89

FILED
MAR 20 1990
RICHARD BRINKER
CLERK

THE STATE OF FLORIDA v.

FREDRICK EUGENE MELVIN
also known as
"HOG SHORTY"

INFORMATION FOR

I. ATTEMPTED MURDER - FIRST DEGREE
782.04 (1) & 777.04 FE[illegible]
II. UNLAWFUL POSSESSION OF A FIREARM
WHILE ENGAGED IN A CRIMINAL OFFE

Defendant(s)

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

I, JUAN M. VARGAS, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, on the authority of JANET RENO, State Attorney, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that

FREDRICK EUGENE MELVIN also known as "HOG SHORTY"

on the 1st day of OCTOBER, 19 89, in the County and State aforesaid,

did unlawfully and feloniously attempt to commit a felony, to wit: MURDER IN THE FIRST DEGREE, upon JEFFREY BERNARD JOHNSON and in furtherance thereof, the defendant: FREDERICK EUGENE MELVIN, also known as "HOG SHORTY" with felonious intent and from a premeditated design to effect the death of a human being, attempt to kill JEFFREY BERNARD JOHNSON, a human being and in such attempt did shoot JEFFREY BERNARD JOHNSON, with a FIREARM, to wit: A HANDGUN, in violation of 782.04 (1), 777.04 and 775.087 Florida Statutes.

contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

JMV:hp
3/14/90
CIRCUIT COURT DIRECT FILE
Jail No. 1189615, Bkd. 11/26/89, Jkt. No. 270721
89-46022
J/ROTHENBERG(13)
DO NOT ISSUE CAPIAS

T131:CircInfoR1:2/9[illegible]

COUNT II

I, JUAM M. VARGAS, Assistant State Attorney of the Elevent Judicial Circuit of Florida, on the authority of JANET RENO, State Attorney, prosecutir for the State of Florida, in the County of Dade, under oath, information makes that FREDRICK EUGENE MELVIN also known as "HOG SHORTY"

on the 1st day of OCTOBER, 19 89, in the County and State aforesaid,

did unlawfully and feloniously display a certain firearm, to wit: A HANGUI while at said time and place the defendant was committing a felony, tc wit: ATTEMTPED MURDER as provided by 777.04, 782.04 (1) Florida Statutes, the possession and display of said firear, as aforesaid being, in violatior of 790.07 Florida Statutes.

contrary to the form of the Statute in such cases made and provided, and against th peace and dignity of the State of Florida.

STATE OF FLORIDA, COUNTY OF DADE:

Personally appeared before me, the Assistant State Attorney of the Eleventh Judicial Circuit of Florida whose signature appears below, and being first duly sworn, says that the allegations set forth in thi Information are based upon facts which have been sworn to as true, and which if true, would constitute th offenses therein charged, and that this prosecution is instituted in good faith.

Juan M Vargas
Assistant State Attorney
Florida Bar # 578674

Sworn to and subscribed before me this 15 day of March, 19 90

CIRCUIT & COUNTY COURTS CLERK IN GOD WE TRUST Dade County, Florida

By Sheila Lyons
Deputy Clerk for Richard P. Brinker, Clerk
or Notary Public

T131:InfoBackPage:2/9

D. CATY

JAN 25 1990

90 JAN 22 PM 5:07

COMPLAINT/ARREST AFFIDAVIT

OBTS Number: 2298380 | [X] Felony [ ] Misdemeanor [ ] Traffic [ ] Juvenile [ ] Warrant | Jail No. 8007 | Police Case No. 38361-K

IDS No. 6603725 | Agency Code: 30 | Municipal P.D. Def. ID No. | MDPD Records and ID No. | Court Case 90-3[illegible]

DEFENDANT'S NAME (Last, First, Middle)	DOB mo/day/yr	Sex	Race	Ethnic	Height	Weight	Hair
Melvin, Fredrick Eugene	03/04/61	M	B		5'4	145	Blk

LOCAL ADDRESS (Street, City, State, Zip): 913 NW 3 Street, Florida City, Fla. | Phone: 245-1634 | Alias: "Hog"

PERMANENT ADDRESS: S/A/ Local | Phone: | Address Source: [ ] Verbal [ ] Voter's I.D. [ ] Driver's License [X] Other Rap

BUSINESS ADDRESS: None | Phone: | Occupation: Laborer | Place of Birth: Miami

DRIVER'S LICENSE NO: | State: | Social Security No. 264-49-0221 | Scars, Tattoos, Unique Physical Features: Scar on right forearm

Weapon Seized? Type: [ ] Yes [X] No | Arrest Date mo/day/yr: 01/22/90 | Arrest Time: 11:45 [X] A.M. [ ] P.M. | Arrest Location (include name of business): 1320 NW 14 Street, Metro Headquarters

No. of Cases Cleared: 1 | Influence of Drugs: [ ] Yes [ ] No [X] Unknown | Influence of Alcohol: [ ] Yes [ ] No [X] Unknown | Citizenship: U.S. | Residence Type: [X] City [ ] Dade [ ] Florida [ ] Out of State

CO-DEFENDANTS (Last, First, Middle, DOB mo/day/yr):
1. N/A — [ ] In Custody [ ] At Large [ ] Felony [ ] Misdemeanor
2. — [ ] In Custody [ ] At Large [ ] Felony [ ] Misdemeanor

DRUG ACTIVITY CODE: N. N/A, P. Possess, S. Sell, B. Buy, T. Traffic, R. Smuggle, D. Deliver, E. Use, K. Dispense/Distribute, Z. Other, M. Manufacture/Produce/Cultivate
DRUG TYPE: N. N/A, A. Amphetamine, B. Barbiturate, C. Cocaine, E. Heroin, H. Hallucinogen, M. Marijuana, O. Opium/Deriv., P. Paraphernalia/Equipment, S. Synthetic, U. Unknown, Z. Other

	CHARGES	Activity	Type	Counts	STATUTE	[ ] AC [ ] CAPIAS [ ] BW [ ] FW [ ] PW [ ] CIT #	VIOLATION OF THE CODE
1	Murder Second-Degree	N	N	1	782.04		
2	C.C.F.	N	N	1	790.01		
3	Possession of a Weapon While Committing a Felony	N	N	1	790.07		
4							

RICHARD [illegible] CLERK, CIRCUIT [illegible] DADE C[illegible] 1990 JAN 23 FILED

The undersigned certifies and swears that he has just and reasonable grounds to believe, and does believe that the above named Defendant

On the 21st day of Jan., 19 90 at 10:02 (Time) [ ] A.M. [X] P.M. at 250 SW 14 Avenue, #13 Homestead, Fla. (Location, include name of business)

committed the following violation of law: Narrative: (Be specific)

The victim and defendant were involved in a verbal altercation over domestic affairs. During the course of this altercation, the defendant, who had a .38 calibre revolver concealed inside of his waistband, produced this weapon and shot the victim. The victim was transported to J.M.H., where she expired. The defendant was taken into custody, whereupon he was advised of his Rights, to which he signed a waiver of his Rights. The defendant then made a full sworn confession. The defendant was transported to DCJ.

PAGE 1 OF

Hold for Other Agency ______ By ______ Verified by ______

[ ] HOLD FOR BOND HEARING. DO NOT BOND OUT (Officer Must Appear at Bond Hearing).

[ ] I understand that should I willfully fail to appear before the court as required by this notice to appear that I may be held in contempt of court and a warrant for my arrest shall be issued. Furthermore, I agree that notice concerning the time, date, and place of all court hearings should be sent to the above address. I agree that it is my responsibility to notify Clerk of Court (Juveniles notify Family Division Juvenile Section) anytime that my address changes.

[ ] You ... court, but must comply with the instructions ...

I swear that the above Statement is correct and true to the best of my knowledge and belief.

C. McCully
Officer's Name (Print)

[signature]
Officer's Signature

M.D.P.D. 3630 (H)

Sworn to and subscribed before me, the undersigned authority, this 26 Jan. 1990

[signature]
Deputy of the Court or Notary Public

1872408, 7900103, 7900268

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,

IN AND FOR DADE COUNTY 90-3133

FALL TERM, 1989

THE STATE OF FLORIDA

vs.

FREDRICK EUGENE MELVIN

INFORMATION FOR

I. MURDER-SECOND DEGREE
782.04 (2) and 775.087
Fel.
II. UNLAWFUL POSSESSION OF A FIREARM WHILE ENGAGED IN A CRIMINAL OFFENSE

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

JUAN M. VARGAS, Assistant State Attorney of the Eleventh Judicial Circuit, on the authority of JANET RENO, State Attorney, in the County of Dade, alleges the above-stated charge(s) on the following Information:

JMV:rhg
2/9/90
RCUIT COURT DIRECT FILE
ail No. 8007, Bkd. 1/22/90, Jkt. No. 270721
90-3133
J/MARGOLIUS (07)

COUNT I

I, JUAN M. VARGAS, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, on the authority of JANET RENO, State Attorney, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that FREDRICK EUGENE MELVIN, on the 21st day of January, 1990, in the County and State aforesaid, did unlawfully, feloniously and by an act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, kill BARBARA McCLAIN, by shooting BARBARA McCLAIN with a FIREARM, to wit: A HANDGUN, in violation of 782.04(2) and 775.087 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT II

And I, JUAN M. VARGAS, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, on the authority of JANET RENO, State Attorney, prosecuting for the State of Florida, in the County of Dade, under oath, further information makes that FREDRICK EUGENE MELVIN, on the 21st day of January, 1990, in the County and State aforesaid, did unlawfully and feloniously display a certain firearm, to wit: A HANDGUN, while at said time and place the defendant was committing a felony, to wit: MURDER, as provided by 782.04 (2) Florida Statutes, the possession and display of said firearm as aforesaid being in violation of 790.07 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

STATE OF FLORIDA:
COUNTY OF DADE:

Personally appeared before me, JUAN M. VARGAS, Assistant State Attorney for the Eleventh Judicial Circuit of Florida, who, being first duly sworn, says that this prosecution is instituted in good faith and certifies that the State Attorney of the Eleventh Judicial Circuit of Florida has received testimony under oath from the material witness or witnesses for the offense, and the allegations as set forth in the foregoing information, if true, would constitute the offense therein charged.

Juan M Vargas

Assistant State Attorney
Eleventh Judicial Circuit of Florida
Florida Bar Number 578673

Sworn to and subscribed before me this 12th day of February, 1990.

CIRCUIT & COUNTY COURTS CLERK IN GOD WE TRUST Dade County, Florida

Richard P. Brinker, Clerk
Circuit Court of the Eleventh Judic
Circuit of Florida in and for Dade
County

By: _____

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION
(Rothenberg)

CASE NO. 89-46022

THE STATE OF FLORIDA, :

Plaintiff, :

vs. : ORIGINAL

FREDRICK MELVIN, :

Defendant. :

_____:

Metropolitan Justice Building
1351 NW 12th Street
Miami, Florida
June 14, 1990

The above-entitled cause came on for hearing before the Honorable Arthur Rothenberg, Judge of the above-styled court, at the Metropolitan Justice Building, 1351 NW 12th Street, Miami, Florida, on the 14th day of June, 1990, commencing at or about 9:00 o'clock, a.m.

Exhibit "B"

APPEARANCES:

JANET RENO,
State Attorney,
by JUAN VARGAS,
Assistant State Attorney,
on behalf of the Plaintiff.

ROBERT S. SINGER, ESQUIRE
2000 South Dixie Highway,
Miami, Florida,
on behalf of the Defendant.

- - -

(Thereupon, the following proceedings were had:)

THE COURT: Now, what about Frederick Melvin?

MR. VARGAS: Good morning; Juan Vargas on behalf of the State. I'm waiting for Mr. Singer. I know he's in deposition. I'll be happy to drop by--

THE COURT: He's here somewhere.

MR. VARGAS: Oh, perfect timing.

THE COURT: Four and five.

MR. SINGER: Judge, what happened? I'm sorry.

All right. I'll move over there, then.

You have it on page four and five. I'm sorry.

THE COURT: It's all right.

MR. SINGER: Judge, at this time,

B 2

predicated on negotiations with the State, we would tender a plea of no contest to both Informations, predicated that Mr. Melvin will receive 30 years state prison, concurrent on each case, three years minimum mandatory, concurrent on each case, and that he will need an order from you requiring that he stay within the confines of TGK until he is transferred to state custody, and that he not go over to the Dade County Jail.

THE COURT: Very well.

Anything else?

Thirty years; guilty; three year minute mandatory in all cases, concurrent.

MR. SINGER: We pled no contest.

THE COURT: No contest.

Swear in defendant, please.

(Thereupon, the defendant was duly sworn.)

THE COURT: What is your name, Sir?

THE DEFENDANT: Fredrick G. Melvin.

THE COURT: How old are you?

THE DEFENDANT: Twenty-nine.

THE COURT: How far have you gone in school?

THE DEFENDANT: Tenth grade.

THE COURT: Are you currently under the influence of any drugs or alcohol?

THE DEFENDANT: No, Sir.

THE COURT: Are you currently taking any medication for any mental or physical ailment?

THE DEFENDANT: No, Sir.

THE COURT: Do you feel as though you have been forced or threatened to enter this plea today?

THE DEFENDANT: No, Sir.

THE COURT: Is this plea free and voluntary on your part?

THE DEFENDANT: Yes, Sir.

THE COURT: Have you had sufficient opportunity to discuss the terms of this plea with your lawyer?

THE DEFENDANT: Yes, Sir.

THE COURT: Are you satisfied with the representation you have received?

THE DEFENDANT: Yes, Sir.

THE COURT: Are you a citizen of the United States?

THE DEFENDANT: Yes, Sir.

THE COURT: Mr. Melvin, you have a number of rights that you are giving up in order to

enter this plea today. You have a right to trial; you have a right to confront all those people who accuse you of these crimes; you have a right to bring your own witnesses to court to testify on your behalf; you have a right to remain silent, and you have a right to appeal.

Are you willing to give up those rights in order to enter into this plea today?

THE DEFENDANT: Yes, Sir.

THE COURT: And Mr. Singer, will you stipulate that the Information in case number 89-46022 and 90-3133, if proved, would constitute a prima facie case of guilt?

MR. SINGER: So stipulated, Judge.

THE COURT: The defendant is not entitled to a pre-sentence investigation.

MR. SINGER: That's correct, Judge.

MR. VARGAS: Judge, a clarification, if I may. On 90-3133, on count one, which is the murder in the second degree, the sentence will be the 30 years. However, in count two, which is possession of a firearm during the commission of a felony, the statutory maximum would be 15; so I would recommend the court sentence him to 15 years concurrent with the 30.

And the same thing would be with case 89-46022, as to count one, attempted first degree murder. That would be 30 years. Count two, possession of a firearm during the commission of a felony, 15 years, to run concurrent on all counts, and sentences to run concurrent with each other.

There is a three-year minimum mandatory for count one of 89-46022 and count one of 90-3133. I would recommend both three-year minimum mandatories run concurrent with each other.

THE COURT: Is that your understanding?

MR. SINGER: That's correct, Judge. The bottom line is that it's 30 years with a minimum mandatory of three included, and all sentences to run concurrent.

THE COURT: This is what you communicated to your client?

MR. SINGER: Pardon me?

THE COURT: Is this what you communicated to your client?

MR. SINGER: That's correct, Judge.

THE COURT: That's your understanding, Mr. Fredrick Melvin?

THE DEFENDANT: Pardon me?

Yes, Sir.

THE COURT: Mr. Fredrick Melvin, I find that you are alert and intelligent, that you have understood the terms of the plea as explained to you by your lawyer, you have had ample opportunity to discuss this case with your lawyer, your lawyer is able and competent, your plea is free and voluntary, you understand the nature and consequences of your plea, you have no right to a pre-sentence investigation, and there is ample evidence to support the plea based upon the stipulation of counsel.

In case number 89-46022, and 90-3133, Fredrick Melvin, I will accept your plea of no contest, find you guilty and adjudicate you guilty, and I will sentence you to 30 years in case number 89-46022 on count one; and on count two, I'll sentence to you 15 years in state custody to run concurrent with the three-year minimum mandatory imposed on the first count.

In case number 90-3133, I'll sentence to you 30 years state prison system on count one, with a three-year minimum mandatory, and 15 years on the second count, that's possession

of a weapon in the commission of a felony. I'll sentence to you 15 years in the state prison system on that count to run concurrent with the sentence on the first count. All counts in both cases are to run concurrent, one with the other, and I'll impose court costs in both cases.

Is there anything else from State or defense?

MR. VARGAS: No, Your Honor.

MR. SINGER: Judge, I'll submit that order to you.

THE COURT: Thank you. I'm orally ordering right now, Corrections, not to transfer Mr. Melvin.

THE CORRECTIONS OFFICER: Judge, we're going to need an order because that's an automatic deal as far as TGK is concerned.

MR. SINGER: I'll have it delivered to Corrections today.

THE CORRECTIONS OFFICER: There's no one out there over four years.

MR. SINGER: They have some people on the eighth floor; they're lifers.

THE CORRECTIONS OFFICER: At TGK?

MR. SINGER: That's correct.

We have a security problem at Dade County Jail with my client. Obviously, there's a problem.

THE COURT: I'll sign an order as soon as I get it.

MR. SINGER: Thank you.

(Thereupon, the hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA)

SS.

COUNTY OF DADE)

I, PATRICIA A. BERNERO, Court Reporter, hereby certify that the foregoing transcript, numbered from page 1 to and including 9, is a true and correct transcription of my stenographic notes of the proceedings had and the testimony taken in the aforementioned cause before the Honorable Arthur Rothenberg, at the Metropolitan Justice Building, Miami, Florida, on the 14th day of June, 1990.

DATED at Miami, Dade County, Florida, this 7th day of September, 1990.

Patricia A. Bernero

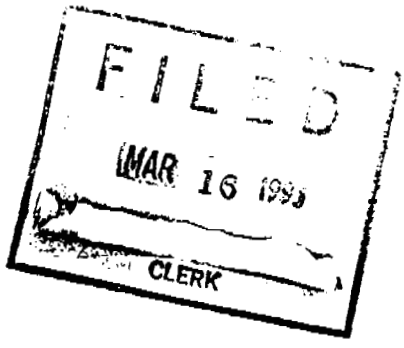
PATRICIA A. BERNERO
Court Reporter

Castillo & Castillo
— Official Reporters, 11th Judicial Circuit —
133 N.W. 12th AVENUE, MIAMI, FL 33128
Telephone (305) 324-6311

B 10

242

Already Ruled on



IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA. CATY

CASE NO.

L.T. Case no. 89-46022, 90-3133

FREDERICK E. MELVIN,
Petitioner

vs.

THE STATE OF FLORIDA,
Respondent.

(1st) RULE 3 (From Habeas Corpus)
Judge Leslie B. (13) Rothenberg

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Frederick E. Melvin, petitioner herein, and files this petition for writ of habeas corpus, as grounds it would show the following in support:

JURISDICTION

The jurisdiction of this Court is invoked pursuant to section 9.030, Fla. Rules. App. P.; and article V, section 3;4;5;(B) F.S. Const.

When facts give rise to a claim that a plea was entered involuntarily, Fisher -v- Wainwright, 584 F.2d 691(5th Cir.1978), The judgement and sentencing order which serves as a basis of the inprisonment is subject to a collateral attack by application

for writ of habeas corpus, compelling an inquiry into the proceeding which may have operated to render the process issued therein absolutely void. Anderson -v- Chapman, 109 Fla. 54,146 So.675(1934); Buchanan -v- State,167 So.2d 43(Fla. 3d DCA, 1964); Sneed -v- Mayo, 66 So.2d 865 (Fla. 1953); Robinson -v- State,373 So. 2d 898 (Fla.1979); Martinez -v- State, 420 So.2d 637(Fla.3d DCA,1982); Hut -v- State, 519 So.2d 1 (Fla.3d DCA, 1988).

SUPPORTING FACTS

On January 22, 1990, Petitioner was arrested by the Florida City, police and taken to Florida City, police department and some hours later transported to Metro Dade police Headquarters where he was charged in Case No. 90-3133, with (I) count of second degree murder; (I) count of carrying a concealed firearm; (I) count of possession of a weapon while committing a felony.Then after being charged petitioner was transported to Dade County jail.

At the arraingment held on February 12, 1990, The State filed an information charging petitioner with (I) count of second degree murder with a firearm,and unlawful possession of a firearm while engaged in a criminal offense.

(SEE ATTACHED EXHIBIT"A")

The Circuit Court appointed Mr. Henri Rauch, a Public Defender to represent petitioner in Case No. 90-3133, at the arraingment petitioner pleaed not guilty.

On March 23,1990, petitioner went back to court for conflict in the case, not knowing what the conflict was but once in the courtroom petitioner was advised by Mr. Robert S. singer, that the court had appointed him to represent petitioner in CASE NO. 90-3133, petitioner then at that time asked Mr. Singer, what happen to Mr.Racuh, Mr.Singer, replyed to petitioner with well Mr.Rauch, withdraw from the case because of some kind of conflict in the case, at which time the State refiled an information charging petitioner with the following crimes: (I) count of attempted first degree murder with a firearm, and unlawful possession of a firearm while engaged in a criminal offense in Case No.89-46022.

(SEE ATTACHED EXHIBIT "B")

On June 14,1990, The State negotiated a plea bargin with the petitioner based on the advice of his court appointed counsel Mr.Robert S. Singer. The State agreed to sentence petitioner to a term of thirty(30)years with a three year minimum mandatory for second degree murder with a firearm and unlawful possession of a firearm while engaged in a criminal offense in Case No. 90-3133, and attempted first degree murder with a firearm and unlawful possession of a firearm while engaged in a criminal offense in Case No. 89-46022. Both Cases 89-46022,and 90-3133 to run concurrent with eachother for exchange for a no contest plea.

Petitioner is currently incarcerated in the custody of the department of corrections at Glades Correctional Instition 500 Orange Avenue Circle, Belle Glade, Florida 33430.

ARGUMENT AND AUTHORITY

GROUND(I)

Petitioner alleges that his plea of no contest was not entered voluntarily and with a full understanding of the consequences.

The United States Supreme Court recognized plea bargaining as an essential component of the criminal justice system. Blackedge -v- Allison,431 U.S. 63,71(1977); Santobello -v- New York, 404 U.S. 257, 260 (1941). When the government and a defendant agree to negotiate aplea, both parties must comply with Federal Rules of Criminal Procedure. Rule 11 (e).

In the State of Florida, before the court may accept a plea of guilty or nolo contedere, the trial Judge must comply with Florida Criminal Procedure Rule 3.172 and the indicated subsections which states:

(c) Except where a defendant is not present for a plea, pursuant to the provisious of rule 3.180 (C). The trial judge should, when determining voluntariness, place the defendant under oath, and shall address him personally to determine that he understand:

(c)(i) The nature of the charge to which is offered, the mandatory minimum penalty by law, if any, and the maximum possible penalty provided by law; and

(c)(iv) That tha defendant pleads guilty or nolo contendere without expressed reservation of the right to appeal all matters relating to the judgement, including the issue of guilty or innocence: and

(c)(vii) The complete terms of the plea agreement, including specifically all obligations defendant will incur as a result.

The three-core concern underlying Rule 11, Federal Rules of Criminal Procedure, governing acceptance of a guilty or nolo contendere plea, applicable to all states through the Fourteeth Amendment to the United States Constitution. U.S. -v- Bell, 776 F.2d 965, rehearing denied, 782 F. 2d 180, cert. denied, 106 S. Ct. 3272,477 U.S. 904 (11th Cir. 1985). As outlined by the State of Florida. (1) The plea must be voluntary; (2) The defendant must understand the nature of the charge and the consequences of his plea; and (3) There must be a factal basis for the plea. William -v- State,316 So.2d 267 (Fla.1975); incorporated into Florida Rules of Criminal Procedure 3.172, Id. at 343 So.2d 1247 (Fla.1977).

No plea of guilty or nolo contendere shall be accepted without first determining, in open court, with the means of record--ing the proceedings stenographically or by mechaniacl means, that the circumstances surrounding the plea reflect a full understand--ing of the significance of the plea and its voluntariness, and that there is a factual basis for the plea, guilty or nolo contendere, Fla. Rules. Crim. Proc. 3.170(j)3.172(e),(f). Harden -v- State, 453 So.2d 31 at 32-33(Fla. 1st DCA, 1987).

The trial judge must advise defendant of the maximum possible penalty for the crime; otherwise, the plea is void. West's F.S.A. Rules of Crim. Proc.,Rule 3.172(c)(i). Gaza -v- State,519 So.2d 727(Fla.2d DCA,1988); Blackshear -v- State,455 So.2d 555(Fla.1st DCA,1984); State -v- Coban,520 So.2d 40(Fla.1988); U.S. -v- Stizer, 785 F.2d 1506(11th Cir.1986), cert. denied, Perna -v- U.S.107 S. Ct.479 U.S. 823; Henderson -v- Morgan,426 U.S. 637 (1976); Smith -v- O'Grady,312 U.S. 329(1941); Gaddy -v- Linahan,780 F.2d 935(11th Cir.1986); LoConte -v- Dugger,847 F.2d 745 (11th Cir.), cert. denied, U.S.109 S.Ct.397(1988); Gaddy, Supra, at 1786-87. Lott -v- United States,367 U.S.421(1961); United States -v- American Service Corp,580 F.2d 823(5 Cir.),cert. denied, 439 U.S. 1071(1979). cf. Gaddy, supra, at 1789.

The trial judge must advise defendant of the possible minimum mandatory penalty, if applicable, in order that a guilty or nolo contendere plea may be intelligently and voluntarily entered.

West's F.S.A. Rules of Crim. Proc.,Rule 3.172(c)(i).Perez -v- State,449 So.2d 407(Fla.2d DCA,1984); Vann -v- State,366 So.2d 1241(Fla. 3d DCA 1979); Green -v- State,406 So.2d 1148(Fla.1st DCA 1981), approved 421 So.2d 508(Fla. 1982); Garza -v- State, 519 So.2d 727(Fla. 2d DCA 1988).

The trial judge must advise defendant that without the expressed reseration of the right to appeal, he will give up the right to appeal matters relating to the judgement. West's Rules of Crim. Proc., Rule 3.172(c)(vii); West's F.S.A.,sec.924.06(3).Santos -v- State,380 So.2d 1284(Fla.1980).

Failure to so advise porhibits defendant form rendering a truely voluntary and knowledgable waiver of his constitutional rights inherented in the plea arrangment, Boykin -v- Alabama, 395 U.S. 238, 89 S.Ct. 1709(1969); Brady -v- U.S.,397 U.S. 742, 755,90 S.Ct.1463,1472,25 L.Ed.2d 747(1970).

No plea offer or negotiation is binding until it is accepted by the trial judge, formally, after making all necessary inquiries, advisements and determinations required by law. Until that time, it may be withdrawn by either party without any necessary justification.West's F.S.A. Rules of Crim. Proc. Rule 3.172(f). Howard -v- State, 516 So.2d 31 at 32-33 (Fla.1st DCA 1987); Harden -v- State,453 So.2d 550 (Fla.4 DCA 1984).

The court's failure to address any one of three core concerns shall constitute an automatic reversal, Federal Rules of Crim. Proc. Rule 11, 18 U.S.C.A., U.S. -v- Bell, 776 F.2d 965, rehearing denied 782 F.2d 180.cert. denied 106 S.Ct. 3272, 477 U.S.904(11th Cir.

(SEE ATTACHED EXHIBIT "C")

POINT (I): In the case at bar nither the trial court, nor defense counsel, nor the state attorney, advise petitioner of the maximum possible sentence that he could be sentenced to for each offense, nor did they inform petitioner of the elements of the crimes with which he was charged, whether the facts of his case fits those elements, or whather the state had reasonable proof to obtain a conviction based on those elements at trial. By not doing these two things petitioner plea was not voluntary.See U.S. -v- Bell, 776 F.2d 965; Henderson -v- Morgan, 426 U.S.637; Smith -v- O'Grady, 312 U.S. 329 and Gaddy -v- Linahan, 780 F.2d 935).
(SEE ATTACHED EXHIBIT "C")

POINT (II): The court, state attorney and defense counsel allowed petitioner to plea a no contest plea to two counts of unlawful possession of a firearm while engaged in a criminal offense which is in volation of the double jeopardy clause of the U.S. Constitution. and Florida State Constitution. Petitioner was not fully advised and his plea is null and void Ab initio. A defendant cannot be allowed by the court to plea guilty or nolo contendere to any

charge that is illegally placed against him, and it is the trial Judges duty to protect the defendant rights.

(SEE ATTACHED EXHIBIT "A" "B" and "C")

GROUND (II)and(III)

Petitioner alleges that he was charged with two counts of unlawful possession of a firearm while engaged in a Criminal offense, in volation of the dauble jeopardy clause of the U.S. and State Constitution.

"The trial court erred in entering convictions for both Second degrree murder with a firearm and unlawful possession of a firearm while engaged in a criminal offense". Stanley -v- State,560 So.2d 1269(Fla.App. 3 Dist.1990); Cleveland -v- State,587 So.2d 1145(1991); Hall -v- State, 517 So.2d 678(Fla.1988); Carawan -v- State,515 So.2d 161(Fla.1987); Davis -v- State, Case No.90-2443(Fla.3d DCA December,1991); Young -v- State, Case No. 91-184,17 F.L.W.(D) 846 3d Dist. Opinion filed March 31,1992).

In Gonzalez -v- State,543 So.2d 386 "The court vacated the defendant's conviction of unlawful possession of a firearm while in engaged in a criminal offense,790.07,Fla.Stat.1985); as violative of the double jeopardy provisious of the State and Federal Constitution because he has also been charged and convicted of first degree murder with a firearm for the some offense." Carawan -v- State,515 So.2d 161(Fla.1987);

Mozqueda -v- State,541 So.2d 777 (Fla.3d DCA 1989); Tunidor -v- State,541 So.2d 165 (Fla.3d DCA 1989); Smith -v- State,539 So.2d 601 (Fla.3d DCA 1989); Henderson -v- State,526 So.2d 743(Fla.3d DCA 1988); coutra. Harper -v- State, 537 So.2d 1131 (Fla.1st DCA 1989).

In the case at bar petitioner was charged in Case No.89-46022, with attempted first degree murder with a firearm and unlawful possession of a firearm while engaged in a criminal offense. And in Case No. 90-3133, petitioner was charged with second degree murder with a firearm and unlawful possession of a firearm while engaged in a criminal offense. It is a violation of the double jeopardy of the United States Constitution and Florida State Constitution to charge petitioner with the two counts of unlawful possession of a firearm while engaged in a criminal offense, and both of these charges must be vacated in light of law and facts of these cases. See. Cleveland -v- State,587 So.2d 1145 and Stanley -v- State,560 So.2d 1269.

GROUND (IV)

Ineffective Assistance Of Counsel.

(A) Counsel allowed petitioner to plea to two counts of possession of a firearm while engaged in a criminal offense. These charges are a violation of the duoble jeopardy clause and counsel has a duty to properly inform petitioner about all charges and law.

(B) Counsel allowed petitioner to plea guilty without first telling him the maximum sentence he could recieve for each charge and also Counsel failed to inform petitioner of all the elements that the State must prove beyond a reasonable doudt as to each charge.

(C) Counsel failed to file a motion to dismiss the two counts of possession of a firearm while engaged in a criminal offense, when both of these charges are a violation of thispetitioner State and Constitution rights, these charges violate the double jeopardy clause of the State and Federal Constitution.

ARGUMENT

(1) Effectiveness of counsel is not tested merely by counsel's performance in courtroom but must also be measured by attorney's familiarity with facts and law of case. Hollingshead -v- Wainwright, 423 F.2d 1059.

On march 23, 1990 petitioner appeared before the Court with court appointed counsel **Mr. Henri Rauch** who negotiated a plea of 15 years with the State. However, when petitioner arrived in the court room he was met by **Mr. Robert S. Singer**. At that point **Mr. Singer** adivsed petitioner that **Mr. Rauch** had withdraw from his case because there was a conflict of interest. But petitioner was never advised as to what the conflict actual was. **Mr. Singer** further advised petitioner that he new of the Fifteen year deal but advised that the fifteen years where no-longer available to him that if he wish to plea the offer was 30 years, simply because of the conflict of interest. During this point petitioner was further advised by the court that the State was refiling an information in case no: 89-46022, once the information was filed petitioner was returned to the County Jail to await trial. Two months later **Mr. Singer** appeared at the County jail and advised petitioner that he could not pervail at a jury trial. **Mr. Singer** again advised petitioner that the states offer was 30 years with a 3 year **Minimum Mandatory** and that if he did not accept the offer the State would up grade the charge from second degree murder to first degree with the States right to seek the imposition of the death penalty. Petitioner's counsel further stated that it would be in his best interest to accept the 30 years and to resovlve this matte in an expedient fashion. Petitioner then told **Mr. Singer** that if he felt that strongly as to petitioner's guilt or innocence he should withdraw from the case. In response to petitioner request counsel stated that the " Judge would not let him withdraw " from the case. That because of continuing inducement by counsel and the State petitio finally gave in. Counsel error was further compounded where he permitt

petitioner to plead guilty to two counts of unlawful possession of a firearm while engaged in a criminal offense. Counsel's advise was not informed choice, because both charges are in violation of the double jeopardy clause both State and Federal Constitutions. **See Cleveland v. State, 587 So.2d 1145 (Fla.1991).**

In the case at bar reasonably effective assistance of counse claims requires a two-prong showing. Under the first part of the **Strickland v. Washington, 466 U.S. 668 (1984)** test " the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. " **466 U.S. at 688.** As a corollary, the appropriate standard for evaluating counsel's pretrial investigations is " reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgement. " **466 U.S. at 691, Chatom v. White, 858 F.2d 1479 at 1485 (11th Cir. 1988). "** (counsel's representation must be showen to below an objective standard of reasonableness. The court also noted that an attorney had an obligation " to consult w his client on important decisions and to keep his client infor of important developments in the course of the proscution." **Strickland 466 U.S. at 688,** the court, however, recognized that " [j]udicial scrutiny of counsel's performance must be highly deferential, " and th courts should make certain " that every effort be made to eliminate th distorting effects of hindsight, to reconstruct the circumstnces of counsel's challenged conduct, and to evaluate the conduct from counsel perspective at the time. " **466 U.S. at 689.**

In order to succeed on an ineffective assistance of counsel claim, petitioner must surmount " a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. " **Strickland, 466 S.U. at 689.**

Overcoming the first part of the **Strickland** test does not guarantee relief. Regrading the second part of the test, the court has recongnized that " [a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a crimina proceeding if the error had no effect on the judgment. " Moreovere **Hill v. Lockhart, 474 U.S. 52 at 58 (1985);** clarified the **Strickland** second or " prejudice must show that there is a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would insisted on going to trial. "

The essence of petitioner's argument is that, his guilty plea was not entered knowingly, voluntarily and intelligently. For counsel had a duty owed to defendant in " investgating and evaluating his options in the course of the proceedings and then to advise petiti er as to the merits of each. " In the present case counsel permitted petitioner to plead guilty to the above mentioned charges in violation of petitioners fifth amendment right to be put twice jeopardy for the same offense. That is, to be sentence twice for the same offense. In additi **Mr. Singer** also permitted petitioner to plea non-contender without first advising him of the **maximum possible penalty provided by law.** For it is counsel's duty to ascertain if the plea is entered voluntari and knowingly. **Lamb v. Beto, 423 F.2d 85 at 87 (5th Cir. 1970).** In sum counsel should of been aware that petitioner was pleading guilty to double jeopardy charges, thereby rendering his services ineffective Had counsel provided petitioner with the proper understanding of the law the end results would have been different. Therefore, had counsel investigated these cases properly he would have learned that both cases where in violation of the double jeopardy clause. Counsel's

failure to file a motion to dismiss the above mention charges renders counsel's performance below the objective standard of reasonableness. Therefore, in light of counsel's unprofeessional conduct petitioners plea should be withdrawn.

CONCLUSION

Based upon the above and foregoing, it is respectfully submitted that Counsel was ineffective in this case, and his plea was involuntary and petitioner should be allowed to withdraw his plea.

Respectfully submitted,

Frederick E. Melvin

Frederick E. Melvin # 095246
Glades Correctional Institution
500 Orange Avenue Circle
Belle Glade, Florida 33430

CERITIFICATE OF SERVICE

I HEREBY CERTIFY taht a true and correct copy of the foregoing has been furnished to: Janet Reno, State Attorney, by U.S. mail, at 1351 N.W. 12 Street, Miami, Florida 33125 on this 17th day of December, 1992.

Frederick E. Melvin

Frederick E. Melvin

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

Case Nos. 89-46022 and 90-3113
Judge Rothenberg

STATE OF FLORIDA v.

FREDRICK E. MELVIN, Defendant

ORDER DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

THIS CAUSE having come before this Court on the defendant, FREDRICK E. MELVIN's, Petition for Writ of Habeas Corpus, which the Court is treating as a Motion for Post-Conviction Relief and this Court having reviewed the motion, the State's response thereto, the Court files and records in this case, and being otherwise fully advised in the premises therein, hereby denies the defendant's Motion for Post-Conviction Relief on the following grounds:

1. This motion, although, filed by the petitioner as a Writ of Habeas Corpus, is being treated by the Court as a Motion for Post-Conviction Relief under Rule 3.850 pursuant to State v. Broom, 523 So.2d 639 (Fla. App. 2 Dist. 1988).

2. Under Florida Rule of Criminal Procedure 3.850, the defendant's Motion is untimely. Florida Rule of Criminal Procedure 3.850(b) requires that the defendant's motion be filed within two (2) years from the time that the defendant's judgment and sentence become final. The defendant's judgment and sentence was entered on June 14, 1990. The defendant's Motion for Post-Conviction Relief was mailed to the State Attorney's Office in Dade County, Florida on December 17, 1992. (See defendant's attached motion.) This is clearly outside of the required period for filing.

3. The defendant's motion is legally insufficient on its face. Florida Rule of Criminal Procedure 3.850(c) requires that the defendant's motion be under oath. A motion not containing an oath can thus be summarily denied due to legal insufficiency. Williams v. State, 539 So.2d 9 (Fla. 1st DCA 1989). The defendant's motion contains no oath that the defendant "has read the foregoing Motion for Post-Conviction Relief and as personal knowledge of the facts and matters therein set forth and alleged; and that each and all of the facts and matters are true and correct" as required by Florida Rule of Criminal Procedure 3.850(c).

4. The defendant's motion is legally insufficient on its face because it fails to indicate whether there was an appeal from judgment and sentence thereof, as required by Florida Rule of Criminal Procedure 3.850(b)(2).

It is hereby ORDERED AND ADJUDGED that the defendant, FREDRICK E. MELVIN's, Motion for Post-Conviction Relief is hereby DENIED.

The defendant, FREDRICK E. MELVIN, is hereby notified that he has the right to appeal this order to the District Court of Appeal of Florida, Third District, within thirty (30) days of the signing and filing of this order.

The Clerk of this Court is hereby ordered to send a copy of this order to the defendant, FREDRICK E. MELVIN, #095246, at Glades Correctional Institution, 500 Orange Avenue Circle, Belle Glade, Florida 33430.

In the event that the defendant takes an appeal of this order, the Clerk of this Court is hereby ordered to transport, as part of this order, to the appellate court the following:

1. Defendant's Motion for Post-Conviction Relief, filed on December 17, 1992.

2. This order.

DONE AND ORDERED in Miami, Dade County, Florida, on this the 16th day of March, 1993.

LESLIE ROTHENBERG
Circuit Judge

cc: Defendant, FREDRICK E. MELVIN
ANNE LYONS, Assistant State Attorney

I CERTIFY that a copy of this order has been furnished to the MOVANT, FREDRICK E. MELVIN, by mail this 31st day of MARCH, 1993

DEPUTY CLERK