4

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,829

OMAR BLANCO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

TODD G. SCHER
Chief Assistant CCR
Florida Bar No. 0899641

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1444 Biscayne Boulevard
Suite 202
Miami, FL 33132
(305) 377-7580

COUNSEL FOR APPELLANT

JABLE OF CONTENTS

Page

TABLEOFCONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY iii

ARGUMENT I

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. BLANCO'S CONVICTION IS UNRELIABLE AND THAT HE IS THEREFORE ENTITLED TO A NEW TRIAL iii

ARGUMENT II 14

THE TRIAL COURT ERRED IN DENYING MR. BLANCO'S MOTION TO DISQUALIFY, AND THE FOURTH DISTRICT COURT OF APPEALS ERRED IN DENYING A WRIT OF PROHIBITION 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Chastine v. Broome,
629 So. 2d 293 (Fla. 4th DCA 1993) 15

Duest v. Goldstein,
654 So. 2d 1004 (Fla. 4th DCA 1995) 15

Gonzalez v. Goldstein,
633 So. 2d 1183 (Fla. 4th DCA 1994) 12, 16

Haves v. State,
22 Fla. L. Weekly 081 (Fla. 4th DCA, Dec. 26, 1996) 12, 16

Johnson v. Singletary,
647 So, 2d 106 (Fla. 1994) 4

Maharaj v. State,
684 So. 2d 96 (Fla. 1996) 14, 17

Marshall v. Jerrico, Inc.,
446 U.S. 238 (1980) 17

Mitchell v. State,
642 So. 2d 1109 (Fla. 4th DCA 1994) 12, 16

Porter v. Singletary,
49 F. 3d 1483 (11th Cir. 1995) 17

ARGUMENT IN REPLY

ARGUMENT I

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. BLANCO'S CONVICTION IS UNRELIABLE AND THAT HE IS THEREFORE ENTITLED TO A NEW TRIAL.

Interspersed between the vitriolic and irrelevant arguments set forth in the State's brief,[1] the State's argument boils down to the fact that the evidence it

---

[1]It is clear from the tenor of most of the State's brief that the legal arguments set forth therein are clouded by the personal biases and feelings about this case as well as the Office of the Capital Collateral Representative maintained by the State. See Answer Brief at 23; 37; 49; 56 n.2. As it did below, the State continues complain about CCR's participation in Mr. Blanco's proceedings. See Answer Brief at 56 n.2. However, the State's brief fails to inform this Court that resentencing counsel, Hilliard Moldof, had requested that CCR assist in a limited capacity, and that the trial court overruled the State's objections. Mr. Moldof explained:

> MR. MOLDOF: Judge, so the Court understands, I guess the way this case has traveled, my understanding when I got this case was it was argued previously. All the work had been done by CCR and in an effort to become familiar with the file, I mean I have here the equivalent of maybe three bankers boxes. There is about fifteen in my office of everything from transcripts of the trial, evidentiary hearings, the affidavits for in support of the motion to set the sentencing aside, the 3.850 originally filed, and really to make sense of that, I had to rely upon the services of CCR. They have been invaluable in the sense of getting me focused on boxes and boxes of things. To that extent it would. I think I'd be dilatory and I'd be incompetent if I wasn't consulting with them. So, in that respect, Ms. Doherty from CCR at this point she hasn't been here I think, but once before. I've not asked her to attend any of the hearings until such time it became something like this, where it is a lot for one lawyer to do. In fact it's a lot for two to do.

* * *

presented below should be believed simply because the State presented it, whereas the evidence presented by Mr. Blanco should not. The State's theory is as ill supported by the facts as it is by the law.

The State argues that "the testimony presented at the evidentiary hearing established beyond any reasonable doubt that Blanco's allegations of newly discovered evidence were a sham engineered and fabricated by Blanco himself" and that "Blanco has failed to prove that his alleged newly discovered evidence was unknown to him or his counsel at the time of the original trial and that Blanco or his counsel could not have known of the evidence by the use of due diligence" (Answer Brief at 47). In its blinding zeal to deny the fact that it convicted an

---

> THE COURT: I am going to overrule the objection. I think Mr. Moldof needs her because of the age of the case. He probably needs the experience, not in trial experience, but in the case experience.
>
> MR. MOLDOF: I can use all the help I can get.
>
> THE COURT: Objection is overruled.

(R. 3113-15). The State's unprofessionalism continued throughout the evidentiary hearing. During the testimony of Roberto Alonso, the State began referring to a statement and CCR counsel asked if the State Attorney could provide the statement because counsel had never seen it, The State's response to this was as follows:

> MR. SATZ: I have no obligation to provide anything to this lady. We don't believe she should even be here. I provided a Statement to Mr. Moldof,

(R. 3171). The State's personal feelings about the CCR office are irrelevant to the issues before this Court.

innocent man, however, the State itself manifests the fallacy of its own arguments.

As to the testimony of Carmen Congora, the State argues that because Congora was available at the time of trial, the evidence is not newly discovered. See Answer Brief at 48. However, the State recognizes that prior to 1993, Congora had never come forth with the information about Enrique Gonzalez and the bloody shirt. For example, the State acknowledges that in 1982, Congora "did not mention anything about Enrique Gonzales' [sic] pullover having blood on it at that time" (Answer Brief at 48). Further, and most significantly, the State acknowledges that Broward State Attorney Investigator Walter LaGraves "did not learn of Enrique Gonzales' [sic] allegedly bloody shirt until 1993 when he took Carmen Gongora's statement" (Answer Brief at 37). The State goes on to openly aver that "[t]his statement was provided by the State to the Defense on April 19, 1993" (Id.). The State's concession that Congora's information only came to light after being interviewed by a State's investigator in 1993 cannot be squared with the State's current argument that Mr. Blanco has failed to prove "this testimony was unknown."

The State's brief further argues that even if new, Congora's information is unworthy of belief because her testimony at the evidentiary hearing "was totally inconsistent with her prior statements and depositions" (Answer Brief at 36). The State, however, failed to question Congora about her sworn statement during its cross-examination below. The statement, referred to extensively in the State's

Answer Brief, was simply attachments to a post-hearing memorandum (See Answer Brief at 36). The State cannot now impeach Congora with allegedly inconsistent prior statements that were not adduced during the evidentiary portion of this case. The sworn statement referred to by the State was given by Congora to State Attorney's Office investigator Walter LaGraves, the same individual who secreted Congora away from the hallway of the courthouse "to talk to her" (R. 507). No one from the defense was present during this sworn statement taken by LeGraves.[2] However, most significantly, this sworn statement is not evidence, but simply an attachment to the State's pleading.[3]

As to Congora's deposition, the State's position at this point is indeed curious. The State's brief urges that the Court consider various statements in Congora's deposition (Answer Brief at 36). However, when Mr. Blanco sought to rehabilitate Congora below by using portions of her deposition, the State vociferously objected (R. 3138-49). Apparently the State believes it can use the

---

[2]When Mr. Blanco sought to introduce into evidence Congora's affidavit that she have given to Mr. Blanco's attorney (R. 3131-32), the State argued that such an attempt was "silly" (R. 3132). The Court later sustained the State's objection to the introduction of the affidavit, which counsel then proffered for the record (R. 3138).

[3]If the State is permitted to impeach witnesses on appeal with information it did not seek to introduce below, then Mr. Blanco should be entitled to reopen the evidence in this case in order to permit Ms. Congora to explain the alleged inconsistencies the State now wishes to detail as evidence of lack of credibility. Cf. Johnson v. Sinaletarv, 647 So. 2d 106, 111 n.3 (Fla. 1994).

allegedly inconsistent statements of Congora to its advantage while disallowing Mr. Blanco from demonstrating otherwise with the same deposition.[4]

Notwithstanding any allegedly inconsistent prior statements (which were not elicited below), Congora's testimony at the evidentiary hearing clearly established that she was not confused about her testimony about the bloody shirt:

> **Q.** Now, about the shirt that you just talked about, are you confused about that?
>
> **A.** No.
>
> **Q.** Do you remember for sure?
>
> **A.** Yes, I remember almost everything?
>
> **Q.** And are you saying this just to help Omar Blanco?
>
> **A.** No.
>
> **Q.** Are you saying this to help the prosecutor?
>
> A. No one. I'm telling the truth.

a

---

[4]After attempting to point to alleged inconsistencies in Congora's sworn statement, the State then argues that Congora cannot be believed because she is "a medicated mental patient" (Answer Brief at 52). Ms. Congora was on medication at the time she testified, however she explained that she did not have any problems remembering the events and felt competent to talk about them (R. 3134). Mr. Blanco's counsel argued that if there was a concern about Congora's mental state, then he would request a psychological evaluation "so the Court could receive some evidence with regard to whatever illness Ms. Congora has suffered from and presently when she's on her medication if she's psychologically sound or not" (R. 3135). The Court stated that Ms. Congora was "lucid and able to answer the questions" (R. 3136). Therefore to the extent that the State now raises questions about Congora's competency to testify, Mr. Blanco was denied his right to fully explore the issue because he was led to believe by the lower court that this was not an issue. A remand to fully explore this issue is therefore required, as the State is now making an issue of Congora's mental condition.

(R. 527-528) (emphasis added).

As to the testimony of Roberto Alonso, the State's brief does not contest that Alonso's information is newly discovered evidence, but simply argues that it is incredible "in light of the testimony presented by the State" (Answer Brief at 38).[5] While the State points out that Alonso is a convicted murderer (Answer Brief at 37), it ignores that the evidence presented by the State below consisted exclusively of convicted felons who admittedly had an ax to grind with Omar Blanco. For example, State' witness Eduardo Chong admitted that his initial impression that his relationship with Omar Blanco had been "the best" changed after Chong heard that Mr. Blanco was saying that Chong was a snitch (R. 615).[6] Chong explained that his testimony was driven by the fact that "he was hurt by what [Mr. Blanco] did' (R. 615) and "to show him that he lost a friend and a family" (R. 641). Chong also explained that he wrote a letter to the State

[5]As evidence that Alonso was "incredible," the State notes that Alonso "previously stated that he was released from a federal prison in Atlanta on the 2nd of January or February in 1982" (Answer Brief at 37). During the State's cross-examination of Mr. Alonso, there was confusion about when Mr. Alonso was released from his INS immigration hold. The State showed Mr. Alonso a prior deposition in which he stated that he was released from "the Atlanta Prison" on February 2, 1982, in an attempt to show that Mr. Alonso could not have been in Broward County in January, 1982, and was therefore lying (R. 571). Mr. Alonso explained that he "made a mistake" (R. 571). Mr. Alonso's testimony that he was in Broward County in January was corroborated by documentation from the Immigration and Naturalization Service, which indicates that Mr. Alonso's immigration hold was lifted on January 7, 1982 (R. 2214). The INS documentation was proffered to the trial court below (R. 2214). Alonso's testimony that he was in Broward County when the events to which he testified occurred is therefore perfectly consistent with these records.

[6]Chong did, in fact, turn out to be a snitch in Mr. Blanco's own case.

Attorney's Office was "not only because [Omar Blanco] hurt me, he also hurt my wife" (R. 618). Chong finally admitted on cross-examination that "[t]here were so many lies, I can't remember them all" (R. 3236). This is the testimony that the State presented to counter Mr. Blanco's evidence.

Chong's testimony in no way contradicted the evidence presented by Mr. Blanco, nor did the evidence provided by snitch Carlos Ruiz. In fact, Ruiz acknowledged that Omar Blanco never said he was there or that he had committed the murder (R. 645; 649). Ruiz did have a prior relationship with Chong, whom he had met while they were both in the South Florida Reception Center (R. 3247). After acknowledging that Mr. Blanco "never said I did it" (R. 3249), Ruiz admitted that "maybe if I would have stayed longer in Broward County things would have been more beneficial" (R. 3249). As to the alleged conversation "in the church" that is mentioned in the State's brief (Answer Brief at 44), Ruiz admitted that "they didn't want me to be in it" (R. 3250), and therefore had no knowledge of what was allegedly discussed. As to the situation with inmate George Gonzalez, who Mr. Blanco allegedly asked to testify falsely, Ruiz explained that according to Gonzalez, Mr. Blanco had also promised to pay Gonzalez millions of dollars for this testimony (R. 3253). This is another example of the "credible" testimony that the State presented below.

As to the last snitch that was presented by the State, Jorge Gonzalez testified on behalf of the State that Mr. Blanco never told him anything about his case and never indicated that he had committed the murder (R. 652).

The State argues that none of Mr. Blanco's new evidence is corroborated.[7] However, Mr. Blanco presented below numerous documents which corroborated his claims of innocence. First, Mr. Blanco proffered a document from the Immigration and Naturalization Service which showed that Roberto Alonso's immigration hold was released on January 7, 1982 (R. 2214); this is significant because there was some confusion during his testimony about whether he was in Broward County as of January, 1982, when the crime occurred. Mr. Blanco further proffered handwritten notes from the Florida Department of Law Enforcement which revealed that "much dirt, sand, and vegetable matter" were discovered in Mr. Blanco's shoes, a fact which supported his testimony that he was running on the beach at the time the crime occurred (R. 2214; 2224-25). To corroborate this point, Mr. Blanco introduced a statement from witness German Berrios (Exhibit A). Mr. Berrios' statement included the fact that Mr. Blanco often "rode a bicycle in the area where he was arrested, that he ran ten, twelve miles a day, that he was in very good shape" (R. 592) and had previously seen Mr. Blanco running on the beach late at night. This statement, along with the FDLE notes, corroborate Mr. Blanco's innocence and the testimony adduced at the evidentiary hearing. None of this evidence was known by Mr. Blanco's jury.

---

[7]The State also complains that it is precluded from investigating the authenticity of various letters presented below because "members of the Broward State Attorney's Office have been refused entry into Cuba by the Cuban government" and that "counsel for Blanco was only able to travel to Cuba to investigate Blanco's claims by traveling improperly under a tourist visa" (Answer Brief at 49). None of these groundless allegations (and accusations) are remotely relevant to the issue in this case or supported by the facts.

Mr. Blanco also proffered for the trial court's consideration the BOLO prepared by the Ft. Lauderdale Police Department from January, 1982, which shows the assailant's description to be approximately 5'1 0", black curly hair, wearing a gray or light green jogging suit, dark complexion, with a mustache (R. 2214); Mr. Blanco also proffered the booking report from January 1982, showing that the Sheriff's Office listed Mr. Blanco as being 5'8" tall and weighing 140 pounds (R. 2215). To corroborate the accuracy of the latter report, Mr. Blanco proffered as a booking report prepared by the Broward County Sheriff's Office dated July 20, 1981, in which the Sheriff's Office again **lists** Mr. Blanco as being 5'8" and weighing 140 pounds (R. 2215).

Finally, Mr. Blanco proffered a Ft. Lauderdale Police Department report prepared by an Officer Gardnsr which shows that a latent print was discovered on the hall side of the bedroom door, where the incident occurred, and that the latent print did not match Omar Blanco, Thalia Vezos, John Ryan, or any of the officers on the scene (R. 2215). The latent print discovered at the murder scene was never compared to the fingerprints of Enrique Gonzalez.

To the extent that the State urges this Court to rely on the findings of the lower court, Mr. Blanco would point out that Judge Goldstein's **ability** to be impartial in this case was severely compromised by his relationship with the prosecutor, Michael Satz. **See** Argument II. Further, Judge Goldstein has been repeatedly chastised in various legal opinions for his expressed inability and/or refusal to apply the law fairly and to remain impartial, **See** Mitchell v. **State**, 642

So. 2d 1109, 1112 (Fla. 4th DCA 1994) (Judge Goldstein "does not shrink from announcing fixed ideas on what he will do in a given case before he hears the evidence and arguments of the parties in open court"); Gonzalez v. Goldstein, 633 So. 2d 1183 (Fla. 4th DCA 1994) (Judge Goldstein's ex parte discussion with defense counsel wherein he indicated that he would not listen to any mitigation evidence but would instead sentence defendant to maximum sentence "is the paradigm of judicial bias and prejudice"). Most recently, the Fourth District Court of Appeals again addressed a case where Judge Goldstein had stated that he would never sentence a defendant to time served on a violation of probation case. Haves v. State, 22 Fla. L. Weekly D81 (Fla. 4th DCA, Dec. 26, 1996). After observing that "[t]his is not the first time we have been required to review Judge Goldstein's imprudent pronouncements," id. at 082, the District Court held that Judge Goldstein's "[p]ublic pronouncement indicated his bias in refusing to consider a sentencing option that was among the range of sentencing options available to him in appellant's case." Id. Given Judge Goldstein's displayed bias toward criminal defendants, any findings made below are called into question, as is Judge Goldstein's ability to be impartial at all. See Argument II.

Mr. Blanco relies on his Initial Brief to counter the remainder of the State's arguments. Mr. Blanco is entitled to a new trial.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING MR, BLANCO'S MOTION TO DISQUALIFY, AND THE FOURTH DISTRICT COURT OF APPEALS ERRED IN DENYING A WRIT OF PROHIBITION.

The State raises imaginary procedural impediments to this Court's consideration of the merits of this claim, citing no case law for its proposition that "this issue is not properly part of this appeal" (Answer Brief at 55). These arguments should be summarily rejected, as they are supported by no legal authority. There should be no impediment for the Court to entertain this claim; in the interests of due process and fairness, the Court has even entertained judicial disqualification claims when no motion to disqualify was filed below. Maharaj v. State, 684 So. 2d 96 (Fla. 1996).

Mr. Blanco filed a motion to disqualify below, and even though he had filed a notice of appeal in the instant case, his resentencing proceedings were still pending below. This Court held the instant case in abeyance pending the outcome of the resentencing proceedings. There is no meaningful difference between the situation in Maharaj and the instant case; in fact, Mr. Blanco filed a motion to disqualify below, whereas none was filed in Maharaj. The State's complaints are groundless.

Perhaps in recognition of the weakness of its legal argument, the State's brief then launches into a lambasting of Mr. Blanco's counsel, accusing them of filing a "sham pleading, filed to avoid Blanco's capital sentencing, was not filed in good faith, and legally insufficient on its face" (Answer Brief at 56). While the lower court did rule that the motion was legally insufficient, the court made no findings in relation to the vituperative and grounless accusations that the State

makes now on appeal. See Answer Brief at 56. The lower court likewise made no findings that the motion was untimely filed, as the State now makes in its Brief.[8]

Turning to the merits of the motion, the State disputes the allegations in the motion (Answer Brief at 60) ("State Attorney Michael J. Satz at no time ever discussed this case when then Assistant State Attorney Barry Goldstein, nor did Assistant State Attorney Barry Goldstein assist in any capacity in the prosecution of Blanco"). It is inappropriate to go into the facts of the motion, facts which are to be accepted as true when determining their legal sufficiency. The true facts regarding the nature and extent of the personal relationship between Judge Goldstein and State Attorney Satz, when considered together with their prior twelve-year association and the fact that State Attorney Satz was not merely a co-worker to Judge Goldstein but rather a close personal friend to whom he was indebted, instill a reasonable fear in Mr. Blanco and therefore require Judge Goldstein's disqualification. Duest v. Goldstein, 654 So. 2d 1004 (Fla. 4th DCA 1995); Chastine v. Broome, 629 So. 2d 293, 295 (Fla. 4th DCA 1993) (while the fact that trial judge and prosecutor worked together in the Office of the State Attorney alone may not warrant disqualification, other relevant facts concerning relationship "may be viewed in conjunction with the prior association in analyzing

---

[8]If, as the State argues, resentencing counsel Hilliard Moldof "knew of Judge Goldstein's previous employment long before the Motion was filed" (Answer Brief at 59), then Mr. Blanco received ineffective assistance of counsel due to Mr. Moldof's failure to timely raise the issue before Judge Goldstein.

whether, from the defendant's viewpoint, he had a reasonable fear of not receiving a fair and impartial trial and sentencing decision in his death penalty case").

As to Mr. Blanco's discussion about the various legal opinions regarding Judge Goldstein's inability to be fair and impartial, particularly with regard to sentencing issues, the State argues that they "have no bearing on this case" (Answer Brief at 62). The issue, however, is not whether the State thinks these facts are relevant but rather whether they create a reasonable fear in Mr. Blanco that Judge Goldstein cannot be fair and impartial. On numerous occasions, courts have ruled that Judge Goldstein's publicly stated comments regarding his views on criminal sentencing create a reasonable fear to warrant disqualification. See Mitchell v. State, 642 So. 2d 1109, 1112 (Fla. 4th DCA 1994) (Judge Goldstein "does not shrink from announcing fixed ideas on what he will do in a given case before he hears the evidence and arguments of the parties in open court"); Gonzalez v. Goldstein, 633 So. 2d 1183 (Fla. 4th DCA 1994) (Judge Goldstein's ex parte discussion with defense counsel wherein he indicated that he would not listen to any mitigation evidence but would instead sentence defendant to maximum sentence "is the paradigm of judicial bias and prejudice").

Most recently, the fourth District Court of Appeals again addressed a case where Judge Goldstein had stated that he would never sentence a defendant to time served on a violation of probation case. Haves v. State, 22 Fla. L. Weekly D81 (Fla. 4th DCA, Dec. 26, 1996). After observing that "[t]his is not the first time we have been required to review Judge Goldstein's imprudent

pronouncements," id. at 082, the District Court held that Judge Goldstein's "[p]ublic pronouncement indicated his bias in refusing to consider a sentencing option that was among the range of sentencing options available to him in appellant's case." Id. In Hayes, the Court ordered Judge Goldstein's disqualification even though the comments did not directly address the case of the appellant Hayes. The State's argument in Mr. Blanco's case that because Judge Goldstein never expressed a prejudice as to Mr. Blanco himself, disqualification is not warranted, is therefore faulty.

"The law is well-settled that a fundamental tenet of due process is a fair and impartial tribunal." **Porter v. Singletary**, 49 F. 3d 1483, 1487-88 (11th Cir. 1995). In Marshall v. Jerrico, Inc., 446 U.S. 238 (1980), the United States Supreme Court observed:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. . . . The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' . . , by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

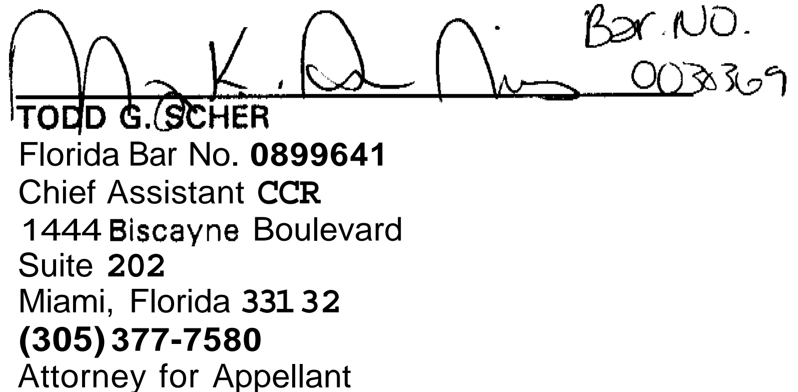
Id. at 242 (citations omitted).

Based on the fact that Judge Goldstein has an announced predilection in favor of imposing the maximum sentence in cases and of ignoring evidence presented in mitigation, Mr. Blanco had a reasonable fear that he will not receive a fair hearing before this Judge, notwithstanding any imaginary procedural impediments that have been raised by the State. Maharaj v. State, 684 So. 2d 96 (Fla. 1996). Relief is proper.

CONCLUSION

On the basis of the argument presented herein, and on the basis of what was submitted to the Rule 3.850 trial court, Omar Blanco respectfully submits that he is entitled to relief from his unconstitutional conviction for murder, and to all other relief which the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing REPLY BRIEF has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 27, 1997.



TODD G. SCHER
Florida Bar No. 0899641
Chief Assistant CCR
1444 Biscayne Boulevard
Suite 202
Miami, Florida 33132
(305) 377-7580
Attorney for Appellant

Copies furnished to:

Carolyn McCann
Special Assistant Attorney General
675 Broward County Courthouse
Fort Lauderdale, FL 33301