IN THE SUPREME COURT OF FLORIDA

JUAN ROBERTO MELENDEZ,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 88,961

ANSWER BRIEF OF THE APPELLEE

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Appellant, Juan Roberto Melendez, and codefendant, John Arthur Berrien, were charged pursuant to an indictment issued in Polk County, Florida, with one count each of first degree murder and robbery. Melendez entered pleas of not guilty.

Trial commenced on September 17, 1984. On September 20, 1984, the jury found Melendez guilty of first degree murder and robbery. The penalty phase was conducted on September 21, 1984. The sentencing jury returned an advisory sentence of death by a vote of 9 - 3. Immediately thereafter, the trial court imposed a sentence of death. Written findings supporting the death sentence were entered on October 3, 1984. The court found the following aggravating circumstances:

> 1. The defendant has previously been convicted of a felony involving the use or threat of violence to some person.
>
> 2. The crime for which the defendant is to be sentenced was committed while he was engaged or an accomplice in the commission of the crime of robbery,
>
> 3. The crime for which the defendant is to be sentenced is especially wicked, evil, atrocious or cruel.
>
> 4. The crime for which the defendant is to be sentenced was committed in a cold, calculated, premeditated manner without any pretense of moral or legal justification.

(R 817-18)

The court did not find any mitigating circumstances.

Melendez appealed his conviction to this Court. On appeal, appointed counsel, Marshall G. Slaughter, Esq., raised the following issues:

> POINT I: IF A LAW ENFORCEMENT AGENCY IS GROSSLY NEGLIGENT IN THE PRESERVATION OF, AND COLLECTION OF EVIDENCE WHICH COULD BE EXCULPATORY TO A DEFENDANT, HAS HE BEEN DENIED DUE PROCESS OF LAW?
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> POINT II: IF THE STATE FAILS TO PROVE AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT, SHOULD A DEATH SENTENCE BE SET ASIDE?
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> POINT III: IF A DEFENDANT HAS A POTENTIAL WITNESS WHO COULD GIVE VERY DAMAGING TESTIMONY AGAINST THE PROSECUTION'S MAIN WITNESS, AND POSSIBLY COULD INDICATE THAT THE STATE'S WITNESS WAS A PARTICIPANT IN THE SUBJECT CRIME, IS IT A DENIAL OF DUE PROCESS NOT TO DECLARE A MISTRIAL WHEN THE WITNESSES REFUSES TO APPEAR?
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> POINT IV: IF A DEFENDANT IS FOUND GUILTY OF FIRST DEGREE MURDER AND ARMED ROBBERY, ALL OF WHICH WAS ONE TRANSACTION, IS IT IMPROPER TO SENTENCE HIM FOR BOTH OFFENSES?

Melendez's conviction and sentence were affirmed by this Court on direct appeal on December 11, 1986. Melendez v. State, 498 So.2d 1258 (Fla. 1986). (Attached as Exhibit A) Melendez did not take a petition for writ of certiorari to the United States Supreme Court.

On January 16, 1989, Melendez filed a Rule 3.850 motion for a post conviction relief in the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida. The motion raised the following issues:

> CLAIM I: JUAN MELENDEZ'S CONVICTION AND DEATH SENTENCE ARE UNCONSTITUTIONALLY DISPROPORTIONATE AND IN DISPARITY WITH THE TREATMENT OF HIS ACCOMPLICE, IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.
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> CLAIM II: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADVISE MR. MELENDEZ OF THE CONSEQUENCES OF NOT PRESENTING EVIDENCE DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL.
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> CLAIM III: THE COURT AND PROSECUTOR MISINFORMED THE JURY THAT THEIR SENTENCING VERDICT CARRIED NO INDEPENDENT WEIGHT, DIMINISHING THE JURY'S SENSE OF RESPONSIBILITY FOR ITS SENTENCING DECISION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.
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> CLAIM IV: THE STATE'S INTENTIONAL WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE VIOLATED THE CONSTITUTIONAL RIGHTS OF JUAN ROBERTO MELENDEZ UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.
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> CLAIM V: FAILURE TO INSTRUCT THE JURY ON THE NONSTATUTORY MITIGATING CIRCUMSTANCES OF DISPARATE TREATMENT VIOLATED MR. MELENDEZ'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.
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> CLAIM VI: THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DEPRIVED MR. MELENDEZ OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE TRIAL COURT'S APPLICATION OF THIS UNCONSTITUTIONAL STANDARD TO ITS OWN SENTENCING DETERMINATION ALSO VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VII: THE JURY WAS MISLED AND INCORRECTLY INFORMED ABOUT ITS FUNCTION AT CAPITAL SENTENCING, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VIII: MR. MELENDEZ'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE.

CLAIM IX: JUAN MELENDEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE GUILT-INNOCENCE AND SENTENCES PHASES OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM X: THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. MELENDEZ'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

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

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

CLAIM XIII: BECAUSE THE FAILURE ON THE PART OF DEFENSE COUNSEL, MR. MELENDEZ WAS DENIED AN INDIVIDUALIZED AND RELIABLE SENTENCING DETERMINATION BECAUSE THERE WERE NO EXPERTS TO EVALUATE COMPETENCY OR MITIGATION, IN CONTRAVENTION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XIV: DURING THE COURSE OF VOIR DIRE EXAMINATION THE PROSECUTION AND THE COURT IMPROPERLY ASSERTED THAT SYMPATHY TOWARDS MR. MELENDEZ WAS AN IMPROPER CONSIDERATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XV: MR. MELENDEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO PRESENT KNOWN EXCULPATORY

EVIDENCE TO THE JURY IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM XVI: THE PROSECUTOR'S CLOSING ARGUMENT IMPROPERLY DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY IN DETERMINING PENALTY AND THEREBY DEPRIVED MR. MELENDEZ OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO AN INDIVIDUALIZED SENTENCING.

CLAIM XVII: JUAN MELENDEZ WAS DENIED HIS RIGHT TO FUNDAMENTAL DUE PROCESS AND A FAIR TRIAL BY A COMBINATION OF FACTORS, IN CONTRAVENTION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Melendez filed **a** supplement to the Rule 3.850 motion on April 21, 1989, which did not raise any new issues. On July 17, 1989, the circuit court summarily denied relief.

An appeal from the denial of the motion for post conviction relief **was** then taken to the Florida Supreme Court where Melendez raised the following allegations:

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

ARGUMENT II: THE STATE'S INTENTIONAL WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE AND ITS RELIANCE UPON FALSE EVIDENCE DEPRIVED MR. MELENDEZ OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

ARGUMENT III: JUAN MELENDEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

ARGUMENT IV: JUAN MELENDEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

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

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

C. TRIAL COUNSEL PRESENTED AN UTTERLY INADEQUATE CLOSING ARGUMENT AT THE PENALTY PHASE REGARDING THE NONSTATUTORY MITIGATING CIRCUMSTANCE OF DISPARATE TREATMENT OF CODEFENDANT.

D. AS A RESULT OF DEFENSE COUNSEL'S FAILURES, MR. MELENDEZ WAS DENIED AN INDIVIDUALIZED AND RELIABLE SENTENCING DETERMINATION BECAUSE THERE WERE MENTAL HEALTH EXPERTS TO EVALUATE COMPETENCY OR MITIGATION.

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

ARGUMENT VI: MR. MELENDEZ'S SENTENCE OF DEATH, RESTING ON THE "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE JURY INSTRUCTIONS REGARDING HIS AGGRAVATING CIRCUMSTANCE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

ARGUMENT VII: MR. MELENDEZ'S SENTENCE OF DEATH, RESTING ON THE "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE JURY INSTRUCTIONS REGARDING THIS AGGRAVATING CIRCUMSTANCE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

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

ARGUMENT IX: MR. MELENDEZ'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI, **105** S.CT. **2633 (1895) AND MANN V. DUGGER 844** F.2D **1446** (11TH **CIR.** 1988), **AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. MELENDEZ RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE.**

ARGUMENT X: THE SHIFTING OF BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT SENTENCING DEPRIVED MR. MELENDEZ OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

ARGUMENT XI: MR. MELENDEZ'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE IN VIOLATION OF MAYNARD V. CARTWRIGHT LOWENFIELD V. **PHELPS** HITCHCOCK V. DUGGER, **AND THE EIGHTH AMENDMENT:**

On November 12, 1992, this Court issued it's opinion affirming the denial of the motion for post conviction relief. Melendez v. State, **612** So.2d **1366** (Fla. **1992). (Attached as Exhibit** B) **A petition for writ of certiorari was taken to the United States Supreme Court and denied on October 18, 1993.** Melendez v. Florida, **510 U.S. 934, 114** S.Ct. **349, 126** L.Ed.2d **313 (1993).**

Melendez then sought relief in the Florida Supreme Court by way of a Petition for Writ of Habeas Corpus filed in April, 1993. The State habeas petition raised the following claims:

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

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

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

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

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

E. THE SHIFTING OF THE BURDEN OF PROOF IN JURY INSTRUCTIONS AT SENTENCING DEPRIVED MR. MELENDEZ OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

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

The state habeas was denied by this Court on September 8, 1994. Melendez v. Singletary, 644 So.2d 983 (Fla. 1994). The subsequent motion for rehearing was denied on November 16, 1994.

Melendez then filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District on October 18, 1993, raising the following claims:

> ISSUE I: AN INNOCENT MAN HAS BEEN CONVICTED AND SENTENCED TO DIE BECAUSE VIOLATIONS OF RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION HAVE PREVENTED CRITICAL EVIDENCE FROM BEING DISCLOSED TO MR. MELENDEZ'S JURY.
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> ISSUE II: JUAN MELENDEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
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> ISSUE III: THE WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE BY THE STATE OF FLORIDA AND ITS RELIANCE UPON FALSE EVIDENCE DEPRIVED MR. MELENDEZ OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.
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> ISSUE IV: FAILURE OF FLORIDA LAW ENFORCEMENT AGENCIES TO COLLECT AND PRESERVE EVIDENCE AT THE SCENE OF THE CRIME PREVENTED THE JURY FROM CONSIDERING ALL INFORMATION CONCERNING THIS MATTER IN DENIAL OF MR. MELENDEZ'S RIGHT TO DUE PROCESS OF THE LAW UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
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> ISSUE V: JUAN MELENDEZ WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

ISSUE VI: INACCURATE COMMENTS OF BOTH THE PROSECUTOR AND THE TRIAL COURT GREATLY DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY IN DECIDING WHETHER MR. MELENDEZ SHOULD LIVE OR DIE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

ISSUE VII: THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE FOUND IN BOTH THE FLORIDA STATUTES AND IN THE INSTRUCTIONS TO THE JURY WAS SO VAGUE THAT IT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS LACKING ANY EVIDENTIARY SUPPORT.

ISSUE VIII: THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. MELENDEZ'S CASE AND FOUND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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

ISSUE X: THE SHIFTING OF THE BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT SENTENCING DEPRIVED MR. MELENDEZ OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

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

ISSUE XII: THE TRIAL COURT FAILED TO PROVIDE A FACTUAL BASIS IN SUPPORT OF THE PENALTY OF DEATH AND IT MUST THEREFORE BE VACATED.

Melendez moved to hold the federal proceedings in abeyance pending the outcome of a second motion for post conviction relief filed in state court. The federal habeas corpus petition is still pending.

Melendez filed his second motion for post-conviction relief on September 13, 1994, raising the following claims:

> CLAIM I: NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. MELENDEZ IS INNOCENT OF THE OFFENSE FOR WHICH HE WAS CONVICTED AND SENTENCED TO DEATH AND THUS, HIS CONVICTION AND DEATH SENTENCE VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS;
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> CLAIM II: MR. MELENDEZ WAS DENIED AN ADVERSARIAL TESTING BECAUSE THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE AND PRESENTED FALSE EVIDENCE IN VIOLATION OF MR. MELENDEZ'S CONSTITUTIONAL RIGHTS. DEFENSE COUNSEL'S REPRESENTATION WAS INEFFECTIVE IN VIOLATION OF FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

An evidentiary hearing was held before the Honorable Dennis P. Maloney, Circuit Court Judge in and for the Tenth Judicial Circuit on the second 3.850 motion on May 23 and 24, 1996. Judge Maloney entered an Order denying the motion on July 17, 1996. (PCR 425-28) (Attached as Exhibit C) Melendez's motion for rehearing was denied on August 6, 1996. (PCR 433) The instant appeal was filed on August 29, 1996.

STATEMENT OF THE FACTS

A. Trial

In the opinion affirming Melendez's original conviction and sentence, this Court set forth the salient facts as follows:

> Police responded to a call from the victim's sister on the evening of September 13, 1983, and found the body of Delbert Baker on the floor in the back room of his beauty school in Auburndale. His throat had been slashed, and he had been shot in the head and shoulders. No jewelry was found on his body.
>
> John Berrien testified at trial that there was an occasion around the time of September 12, 1983, on a rainy day that he, his cousin George Berrien, and appellant were together and appellant asked him to drive him to Auburndale so he could get his hair done and pick up some money. The three of them left at about 4 p.m. Appellant had a bulge in the back of his pants that John suspected was a gun. George and appellant said to pick them up from Mr. Del's beauty school in about one and one-half to two hours, and he did so. The next day George asked John to drive him to the train station so that he could go to Delaware to see his children. Appellant went with them to the station and gave George two rings, a watch an a gun to sell in Wilmington. John had seen appellant with watches and rings before, but could not say if they were the same ones. The watch looked like one appellant previously had tried to sell him. Amtrak records reflecting that a Mr. G. Berrien made a reservation on September 14, 1983, to go from Lakeland to Wilmington, Delaware, and a ticket lift indicating that the train was actually boarded were introduced into evidence. There was testimony that the victim had worn his missing wrist watch, gold bracelet and four diamond rings for years and that he had been wearing them on the day of

the murder. A bank bag containing $50 in petty cash was missing from the victim's desk drawer.

David Falcon, a convicted felon, testified that several months after the murder appellant told him of having participated in the crimes. According to Falcon's rendition, appellant and another had made an appointment with the victim because he was supposed to have money and jewelry. The driver, John, stayed in the car. Appellant and his accomplice went inside, and the latter cut the victim's throat. The victim begged them to take him to a hospital, but appellant said that that could not be done because the victim would tell the police. Appellant then shot him in the head. The perpetrators cleaned up any fingerprints and took jewelry and money.

George Berrien testified for the defense and denied riding with appellant in the car to Auburndale and said he had seen him only once before at his cousin John's house. Appellant testified and denied culpability. A prisoner named Roger Mims testified that his cellmate, Vernon James, told him that he, his partner and a homosexual killed Baker. There was police testimony that Harold Landrum was a close friend of James' and that James and Landrum were initially suspects in the case, but that Landrum **was** eliminated as a suspect based on an interview with Landrum's employer.

Appellant's lover testified that Falcon had told her he **was** going to testify falsely against appellant. She also stated that she had been with appellant the evening of the murder, and this was corroborated by her sister's testimony. There was additional testimony that Falcon did not like appellant and said he was going to have him killed.

The jury convicted appellant of first-degree murder and armed robbery and recommended the death penalty for the murder. The trial court

sentenced him to death in accordance with the jury's recommendation, finding four aggravating and no mitigating factors.

B. **Evidentiary Hearing**

An evidentiary hearing was held on Melendez's second 3.850 Motion on May 23 - 24, 1996. At this hearing, the Office of the Capital Collateral Representative, representing appellant, presented ten witnesses, including Shelly Wilson, Deborah Ciotti, Janice Fay Dawson, Sandra Kay James, John Berrien, Harun Shabazz, Dwight Wells, Donna Harris, Roger A. Alcott and Dr. Richard J. Ofshe, in support of their motion. The state presented FDLE agent Thomas H. Roper and Detective Gary Glisson in opposition to the motion.

Debra Ciotti, a convicted felon, drug user and prostitute, testified that she and Vernon James were best friends; that Vernon James was **a** homosexual and that he used to recruit young guys for homosexual performances for Mr. Del, who was also a homosexual. (PCR 90, 93-95) A few days before the murder Vernon James came to her about a drug deal that **was** 'going to go down" at the beauty school. He told her that he intended on taking the money and the drugs; that he and **a** couple of his buddies were going to rob Mr. Del. (PCR 91) The evening before the murder he told her he was going to the beauty school and he asked if she wanted to ride along. He told her that she wouldn't have to get out; that she could sit in the car. She declined. When Vernon drove off, she

was on Hobbs Lane in Auburndale about midways down the street. she claimed that she saw him pick up two black males about a block and a half from the beauty school. She saw the car pull into the beauty school. Vernon James was driving Bobo's car (Harold Landrum) at the time. (PCR 92) The two black males were both very dark complected. The next morning when she came back from her previous engagement she approached Vernon and she said, "Well did you get what you went for?" In response, he showed her a wad of money and a big bag of cocaine. (PCR 93) On cross examination Ciotti admitted that in her affidavit she did not say anything about observing Vernon and the two men pull up to the beauty shop. (PCR 96) Ciotti testified that when she saw James the next morning on Hobbs Road, she was just back from turning a trick the night before and she had gone back up to Hobbs to buy some dope or rock. (PCR 97) Vernon James **was** talking to another black male in a little shack that people used for drugs and prostitution. (PCR 98) She could not say whether it was one of the two men he had picked up the night before because of the distance between her and the guys he picked up. (PCR 99) He did not mention any jewelry to her because she told him she did not "want to know nothing." (PCR 101) She was pretty high at the time. (PCR 102) Ciotti said that if Vernon had any jewelry from the robbery he would not have had it by the next day; he would have already hocked it. (PCR 103) Vernon James did not tell her that he had killed Mr. Del; Vernon

was not a violent person. (PCR 103) Ciotti then added for the first time that she saw Vernon James go into the beauty shop. (PCR 104) She was never questioned and she was never approached about this incident "until the attorney at that table" contacted her and told her a man was sitting on death row for something he did not do. She was available to be interviewed because she walked the streets twenty-four hours a day. (PCR 104) Ciotti said she does not believe Mr. Melendez was one of the men getting into the car because he is not dark enough and she thinks Melendez is six inches taller than the man she saw getting into the car. Although they got in from the back and she never saw their faces, she knows just from their skin color and size that Melendez was not one of the men she saw 13 years ago from a block away. (PCR 106-7)

Debra Ciotti testified that she asked Vernon James point blank if he killed Mr. Del and he said he did not do it. He never told her who did it, He also never told her how Mr. Del was killed. (PCR 107) She doesn't know what time it was when Mr. James and the two men he picked up pulled up to the beauty shop because rockheads don't where watches; they hock them for a rock. She thinks it was evening around dusk. (PCR 108-09) The only reason she saw Vernon get out of the car and enter the building was because that was the direction her trick was coming from. Just as Vernon went to go through the door her trick pulled up and she got in the vehicle and headed south on Newhope, away from the beauty school. (PCR 109)

Ciotti said that for all she knows Mr. Del could have been dead when Vernon got there. (PCR 110) At the time of this event she was living on the street and her permanent address was at her mother's. (PCR 111) Everybody from the streets knew that she and Vernon were like brother and sister, Mutt and Jeff. "Where he went, I went. Where I went, he went." If people saw Vernon they would see her too. If she wasn't there, she wasn't too far behind or vice versa. (PCR 111)

Janice Fay Dawson, who had a daughter with Vernon James, testified for Melendez that Vernon wrote to her while they were both incarcerated and he mentioned the death of Mr. Del. (PCR 112-13) He never gave any details but he told her that he could get life or the electric chair for his part in the murder of Mr. Del. (PCR 114) They developed a boyfriend-girlfriend relationship and they moved in together when she got out of prison in 1985. (PCR 119) One day he gave her two rings saying, "Well, here's two rings that I been had for a few years, I've just been holding on to them." He told her the rings came from Mr. Del or something to that affect. (PCR 115) Dawson didn't question him because "you just didn't question Vernon about nothing." She pawned them in 1986 in Bartow. (PCR 116) Dawson did not meet Vernon James until December 1983, She did not know him in September 1983 when the murder of Mr. Del happened. (PCR 117) He never told her he killed Mr. Del. (PCR 120) He never told her how many people were

involved or who actually killed Mr. Del. (PCR 121) He did tell her that he was there when it happened but he did not say who did it. After she moved in with him it only got brought up one time. And it was a very short conversation. At the time she was talking to Vernon about it he was on drugs and she was drinking. (PCR 123) Dawson testified that Vernon tended to exaggerate a lot; Vernon was a con man. (PCR 124) Vernon could make people believe him when he talked about things he really had nothing to do with. (PCR 125) Vernon was good liar. (PCR 125)

Vernon James' sister, Sandra James, testified that she is currently incarcerated at Florida Correctional Institution for Women. (PCR 126) She and Vernon were very close and she knew Mr. Del and Vernon were lovers. It was a prostitute relationship. In the latter part of 1983 she asked Vernon about the death of Mr. Del because there were rumors going around that he had killed Mr. Del. James asked him point blank did he do it, he started crying and said, "No. I didn't kill him. I set up the robbery and I was there but I didn't kill him." (PCR 127) This conversation took place a couple of months after Mr. Del's death. Sandra James testified that she has been convicted of between ten and fifteen felonies, (PCR 129) She also mentioned she was serving a 30 year sentence. (PCR 129) James hung around with her brother a lot when he wasn't with his girlfriend. (PCR 130) She doesn't know how Mr. Del was killed other than what she read in the papers; that

Vernon didn't tell her anything. (PCR 131) He did not tell her how many other people were involved. James had a fairly bad drug problem at the time. (PCR 132) She knew they were looking for her boyfriend Harold Landrum as a suspect but she did not know they were looking for her brother. She doesn't know if the police interviewed Vernon. (PCR 134) James knew Mr. Melendez's lawyer, Roger Alcott, pretty well and Vernon knew his lawyer also. (PCR 135)

John Berrien, currently serving 30 year sentence in Santa Fe, New Mexico, testified on direct that he was interviewed by Detective Glisson and Sgt. Knapp of the Auburndale Police Department in Auburndale. (PCR 135) They told him that someone told them he was involved in the killing of Mr. Del and they threatened him. They wanted him to give them a statement as to what happened. They told him that he had planned the murder, that he was going to get a cut of the money and that they knew that he knew all about it. Berrien claimed that they told him not to end up like by Mr. Del. (PCR 136) He testified that they had a tape, that they would tell him what they wanted him to say, and if he made a mistake they would stop the tape. Berrien claims that they told him what time of day he was supposed to have been in Auburndale and how he was supposed to have killed and "stuff like that." (PCR 137) He testified that they told him to say that on this certain day that "I dropped Juan Melendez off and I was

supposed to have robbed Mr. Del and I was supposed to be going to get a cut of it and I came back and picked him up and took him back to Lakeland and none of this was true." Berrien claims he was not involved in the murder of Mr. Del and that he did not know about the robbery or plan the robbery of Mr. Del. (PCR 138) As far as his testimony at trial that he saw Juan Melendez give George two rings, a watch and a gun, Berrien claimed he was told that by the officers. (PCR 139) He denied ever seeing Juan Melendez give George Berrien two rings or a watch or a gun. After the officers finished taping his statement they arrested him and charged him with first-degree murder and strong arm robbery. (PCR 140) He was not supposed to be sentenced until after he testified at Melendez's trial. (PCR 141) Berrien admitted having eight felony convictions. After he gave the affidavit in this case Mr. Hardy Pickard and another man from the State Attorney's office came to speak to him but he refused to talk to them. (PCR 142) He later entered a plea to being accessory after the fact. Berrien claims that his lawyer, Dwight Wells, told him it would be the best thing for him to accept that because he didn't know what would happen down the line.

On cross examination, Berrien admitted that prior to the interview with Knapp and Glisson in Auburndale where he claimed he was threatened, he was interviewed by the police on this case at the Lakeland Police Department on March 7, 1984. At the interview

was Ed Hunley, Agent Tom Roper, and Mr. Glisson and Mr. Knapp. (PCR 143-144) He remembered telling Agent Roper and the officers that Melendez had asked him to take him to Auburndale to Mr. Del's school in order to get his hair done. (PCR 144) He told the officers that he dropped Melendez off at the school to get his hair done along with his cousin, George. (PCR 145) Berrien recalled telling the officers during the first interview that after he dropped off Melendez he went to a friend's house to wait while he **was** having his hair done. He remembered telling the police during this first interview on March 7th that he and Mr. Files went to the Top Hat Lounge in Auburndale, drank some beer and waited about two hours. (PCR 146) He picked Melendez and his cousin, George up outside the building. Berrien did not recall telling the officers that Melendez had a yellow-colored towel balled up in his hand. He did not recall telling them that it looked like something might be in the towel or that Melendez's hair had not been fixed. (PCR 147) He did not recall telling the officers at the Lakeland Police Department that night that Melendez usually carried a .38 caliber snub-nosed pistol. He did not recall telling the officers that when he took Melendez to Auburndale that he and Melendez were under the influence of marijuana and alcohol and that Melendez **was** also under the influence of cocaine. He remembered taking Melendez and George to Auburndale. (PCR 148)

Berrien testified that he went to polygraph examiners a week later for a second interview and then went to Auburndale Police Department for a third interview. The third interview was where he claims they threatened him and turned the recorder off and on. (PCR 150)

Berrien remembered testifying at trial and on cross he confirmed most of his trial testimony, except as to the type of gun, the existence of the towel and the jewelry, what he did while he waited and where he took them after he picked them up. (PCR 160-62, 163, 165-66, 167, 170-71) He now claims that he took them to his house and not to Melendez's as he stated previously. (PCR 170) He admitted that nobody told him what to say, but claims he said things because he 'just thought it would be good." (PCR 174-175) Berrien doesn't remember confirming his trial testimony to a probation officer after the trial. (PCR 176-77)

Assistant capital collateral representative, Harum Shabazz, testified that records concerning Janice Dawson and Sandra James were previously unavailable because they were part of the Vernon James' murder case file. (PCR 185) Once they received the files, they discovered Sandra James. The discovery of Sandra James pointed them to Deborah Ciotti. (PCR 188)

Dwight Wells testified that he represented John Berrien who consistently denied involvement. He doesn't remember John Berrien saying the police turned the tape on and off during his interview.

(PCR 191-192) Wells testified that he had previously represented Vernon James. During his representation of John Berrien, and before the Melendez trial, Wells visited Vernon James in jail. (PCR 197) Vernon James confessed to Wells that he was involved in the murder. (PCR 194) Wells doesn't know if he ever told anyone. (PCR 195, 203)

On cross examination, Wells stated that he would have advised John Berrien that he had to testify truthfully. (PCR 196) Wells claimed that he talked to Vernon James several times. (PCR 198) His memory is that Vernon James alone killed Mr. Del. There was no robbery or homosexual encounter. (PCR 201) Wells doesn't recall if he shared the confession, which he did not believe to be privileged, with Melendez's lawyer, Roger Alcott, or anyone else. (PCR 204)

Donna Harris, a former CCR investigator, testified that she had prepared Ch. 119 requests in 1988 to find John Berrien. (PCR 205-7) She interviewed Ginny Berrien and Ruby Collins to find John Berrien. (PCR 209) She also requested records for information about Vernon James' murder but the case was still open so was unable to obtain it. (PCR 210-212)

Florida Department of Law Enforcement agent, Tom Roper, testified for the state that a confidential informant led him to John Berrien and that he interviewed John Berrien for the first time on March 7, 1983. (PCR 213-4) Agent Roper denies that they

threatened Berrien or that he **was** made any promises. Agent Roper also denies that Berrien was told what to say. (PCR 216)

The state then played the first taped interview with Berrien (PCR 218-243) where Berrien admitted taking Melendez and another male to the beauty shop, picking them up later, noticing the towel and the absence of a haircut. In a subsequent interview John Berrien added that George Berrien was involved. (PCR 245)

On cross examination, Agent Roper explains that where there are clicks on the tape, it signifies that the tape was stopped to allow for thought gathering, not for discussions with Berrien. (PCR 248-49) Agent Roper denies ever telling Berrien that Melendez had made threats or providing him with any other information. (PCR 251-52)

Gary Glisson, formerly with the Auburndale Police Department, testified that he got a call from Roper about the confidential informant. Glisson then contacted Knapp. (PCR 253) On March 15, John Berrien was sent to a polygrapher. (PCR 256) Then Berrien said he wanted to tell the truth. (PCR 257) There were no threats; no promises. (PCR 258) During the March 15 interview the tape was left on, there were no stops. (PCR 259) The tape was played for the court over CCR's objection. (PCR 260-272)

Gary Glisson testified that John Knapp is now deceased. (PCR 272) After the March 15 interview John Berrien was arrested. Two days later Berrien called and asked to speak with them at the jail

He then gave them a fourth statement. (PCR 273) For the first time he said George Berrien was with them. (PCR 274)

Roger Alcott, Melendez's trial attorney, testified on behalf of Melendez that he may have known the first taped interview was turned on and off. (PCR 287-89) At trial, Melendez presented inmate Roger Mims who testified that Vernon James had confessed to him about the murder of Mr. Del. (PCR 290) On cross examination, Alcott remembered that Melendez had an alibi defense and that he argued to the jury that John Berrien was lying. (PCR 292) Alcott knew Sandra **Kay** James; he may have prosecuted her at one time. (PCR 294) Wells may have told him about Vernon James; maybe not. (PCR 295-96)

The court then inquired about defense witnesses. (PCR 297) Alcott informed the court that Terry Barber said Vernon James was there and that Roger Mims was a jailhouse snitch. (PCR 301)

Dr. Richard Ofshe testified as an expert for Melendez at the motion to vacate hearing. (PCR 304) Dr. Ofshe's opinion was that the confession was coerced. However, he admitted that he didn't talk to John, the police or listen to all of the tapes. (PCR 333) He admits he could have done a lot more work, but contends he had limited time. (PCR 342) He assumed coerciveness off tape because that's what John said. (PCR 338) Dr. Ofshe was sent one March 7 tape and two March 15 tapes. (PCR 339) The interviews were not unusual, (PCR 340) As to the original interview on March 7, the

doctor did not have an opinion as to whether it was coerced. The March 15 interview with Mr. Sandridge might have been coerced by what proceeded it. (PCR 345-347) His understanding was that John Berrien reconfirmed his repudiation of the defendant's involvement during the previous day's hearing. (PCR 349) Accordingly, he contends that yesterday's testimony was more reliable than prior testimony. (PCR 350) Dr. Ofshe said the March 17 interview, after John Berrien called police to come to the jail, was also coerced. (PCR 351-52) When confronted with fact that at a deposition prior to the original trial John Berrien repudiated testimony then changed again at trial, Dr. Ofshe opined that Berrien **was** again threatened. (PCR 355-56) He said he would believe John Berrien more than police because his claim is supported by disputed facts. (PCR 357)

At the close of the evidence the court asked for written closing arguments. After receiving same, the court entered an order setting forth, *in pertinent part,* the following factual findings:

> In support of the newly discovered evidence claim the defendant called five witnesses: Deborah Ciotti, Janice Dawson, Sandra Kay James, John Berrien and Dwight Wells. They all claimed that Vernon James had made incriminating statements to them about the murder. Four of the five were not credible witnesses and their testimony, either individually or cumulatively, falls short of the standard required to grant a retrail.[sic] Deborah Ciotti was, at the time of the murder, a street prostitute and drug addict. Her best

friend was Vernon James and they were constantly together. Everyone who knew Vernon James knew Deborah Ciotti, which of course raises the question of how she can be considered newly discovered. Regardless, she now says James told her a few days before the murder that he was going to rob the beauty shop. **Later she saw** James meet some other men and proceed in the direction of the murder scene. After she read about the murder she asked James if he did it and he responded by showing her some money and drugs. He never told her he killed the victim. Because she didn't wish to get involved, she purposely avoided further discussion about the murder with James. Her testimony fails both the second and third prong of the Jones test.

Janice Dawson met Vernon James at a first appearance hearing in the Polk County jail. Previously both had been charged with unrelated crimes. Their relationship continued while both of them spent time in separate Florida prison facilities and they lived together for a time after both got out of prison. On many occasions James told her that he had been involved in the murder. Indeed, he used to brag about it to the other people in the neighborhood, But he never said that he murdered the victim nor did he ever say who had committed the murder. she described James as a con man, a liar, and a person adept at making people believe what he wanted them to believe. Her testimony fails the third prong of the Jones test.

Sandra Kay James is Vernon James' sister who is presently serving a thirty year prison sentence. At the time of the murder, she was the girlfriend of Landrum, one of the initial suspects. She also knew Roger Alcott, Melendez' trial attorney. During the pertinent time period she was addicted to drugs. She claims her brother told her that he set up the robbery of the victim and was present when he was murdered but did not actually commit the murder. She admits that when the prosecutor attempted to speak with

her concerning the affidavit she filed in this matter, she refused to talk to him. Her testimony fails both the second and third prong of the Jones test.

At the trial, John Berrien testified against Melendez after securing for himself a negotiated plea agreement. Attacking his credibility was a major part of the Melendez defense. His numerous and frequently contradictory statements were brought to the attention of the jury. Yet the jury apparently believed him. He now claims that parts of his testimony were false. He is vague about which parts of his trial testimony he is recanting. Some of it he claims he simply made up for no particular reason. Other parts were the result of police intimidation and coercion. The remainder, he stated, was true. This inmate of the New Mexico prison system was completely unbelievable. His transparent motive for recanting is to help a former partner in a robbery/murder plot. His testimony fails the third prong of the Jones test.

Dwight Wells is a criminal defense attorney who, at the time of the trial, was an assistant public defender appointed by the court to represent Melendez' co-defendant, John Barrien. Sometime during his representation of Barrien, he received a call from Vernon James asking him to come to the jail for a visit. He made several visits to the jail to visit his friend, Vernon James. He did not represent James and did not consider any of these conversations privileged. During these visits, Wells claims that James confessed to the murder for which Melendez and Barrien were charged. Wells' memory of these confessions is extremely sketchy. He made no notes and did not tape any of the confessions. He is not sure of any of the dates when these confessions were given but does remember that they occurred during the time he was representing Barrien. He doesn't recall if he ever mentioned these confessions to Roger Alcott, Melendez'

attorney. He doesn't remember if he contacted the State Attorney to inform him that innocent men, including his client, had been indicted. He thinks he might **have** mentioned the confessions to his client but is not sure. In any case, he did proceed to plead his client to certain lesser charges in exchange for his client's testimony against Melendez. I'm not sure what to make of Mr. Wells' testimony. It is inconceivable that he would strike a deal to have his client, Barrien, testify against Melendez in a death penalty case if he believed that both Barrien and Melendez were innocent. Yet now, twelve years after the conviction, he claims that Vernon James confessed that he and the victim were homosexual lovers who had a fight about aggressive sexual **advances** which resulted in James killing the victim. Never mind that the physical evidence of stabbing and shooting and robbery **are** inconsistent with this story. Suffice to say that this Mr. Wells' testimony fails both the second and third prong of the Jones test.

In summary, the newly discovered evidence claim rests on the testimony of three convicted felons who say Vernon James made incriminating statements about the murder, the partial recanting of a co-defendant's testimony, and **a lawyer's** vague memories of Vernon James' several confessions. The original defense was that Vernon **James** did it. The jury rejected that defense and none of the above would likely have been credible enough to change that verdict in my opinion.

* * *

In his affidavit attached to the motion to vacate, John Berrien swears that "Back in April, 1984" he was threatened and coerced by Auburndale police officers Glisson and Knapp to make statements inculpating Melendez in the murder. The officers had a written outline of the statement they wanted Berrien to make and they coached him through his statement with frequent references to the outline. They had a tape recorder but they turned it on only after Berrien had mastered a portion of their statement. While the police were coaching and

threatening him, they turned it off. They threatened his life if he did not say what they told him to say so "I just repeated what they told me to say." Oddly, he concludes his affidavit with this: "If Juan Melendez' trial attorney had asked me about the facts stated above, I would have told him and would have testified about it during Juan Melendez' trial."

The major problem with this so-called Brady violation is that in order to sustain it one has to believe John Berrien. I do not believe John Berrien. Berrien had at least three interviews with law enforcement regarding this murder. The first occurred on March 7, 1984 at the Lakeland Police Department. The interview was conducted by Florida Department of Law Enforcement Agent Tom Roper. Glisson and Knapp were there as was a Lakeland Police detective. The second occurred March 15, 1984 at the Auburndale Police Department. Presumably, this is the interview Berrien complains of in his affidavit and testimony. He was arrested after this interview and taken to the Polk County Jail. Two days later Berrien called Det. Glisson and asked him to come to the jail because Berrien had more to say, Glisson, and eventually Roper, took a third confession at the jail. While the three statements differ in detail, they are basically the same. It is difficult to understand how Berrien's allegedly coerced statement on March 15th vitiates the statement he made on March 7th. Moreover, the police obtained the March 17th statement at the behest of Berrien himself. It seems unlikely that Berrien would summon his tormentors from Auburndale only to subject himself to further threats and coercion. One may certainly question Berrien's motives for giving these statements, but there is no credible evidence of police misconduct.

(R 425-428)

SUMMARY OF THE ARGUMENT

Appellant's first claim is that newly discovered evidence establishes his innocence. This evidence not qualify as newly discovered because it was already known and/or it could have been obtained with the exercise of reasonable diligence. Further, it is cumulative to evidence that was actually presented at trial. As the jury has already heard this evidence and, nevertheless, found Melendez guilty as charged, there is little to support a claim that there is a "probability" that it would produce an acquittal on retrial. This is especially true in light of the fact that none of the witnesses produced at the evidentiary hearing could testify that Melendez was not guilty of the murder; the witnesses only testified that Vernon James said he was responsible for setting up the murder and that he was present for the murder.

In his previous Rule 3.850 motion, Melendez had a full and fair hearing on his claims of ineffective assistance of trial counsel and on an alleged Brady violation. As appellant has failed to show why this claim should not be barred as untimely and successive, it is the state's position that he is not entitled to relief. Assuming, arsuendo, Melendez can overcome the procedural bars, he is not entitled to relief on the merits of either the Brady or the ineffective assistance of counsel claim.

ARGUMENT

ISSUE I

THE CIRCUIT COURT CORRECTLY REJECTED MELENDEZ'S CLAIM OF NEWLY DISCOVERED EVIDENCE.

Melendez's first claim is that he has newly discovered evidence that establishes his innocence of the instant murder. He claims that previously unknown or unavailable witnesses now establish that Vernon James, not appellant, is guilty of the murder of Mr. Del. An evidentiary hearing was held on this claim by the court below. After hearing all the evidence and argument on the motion, the circuit court rejected Melendez's claim of newly discovered evidence, finding that the evidence did not satisfy the standard set forth by this Court in Jones v. State, **591** So.2d 911 (Fla. 1991). It is the state's position that this claim was properly denied by the trial court.

In Jones v. State, 591 So.2d. 911, 915 (Fla. 1991), this Court set forth the standard for reviewing claims of newly discovered evidence. To establish a newly discovered evidence claim, a defendant must prove the following:

> 1) The facts must have been unknown by trial counsel at the time of trial.
>
> 2) Defendant or his counsel could not have known them by the use of due diligence.
>
> 3) The evidence would probably produce an acquittal on retrial.

Appellant's claim of newly discovered evidence rests on his claim that he now has evidence that Vernon James committed the murder of the victim in the instant case, Mr. Del. This evidence consists of friends of the now deceased Vernon James who claim that James told them he was responsible for the crime, as well as testimony from state witness, John Berrien, that his statement to law enforcement was coerced.

As the court below noted in his Order denying the motion to vacate 'in considering the newly discovered evidence claim it is important to keep in mind the defense which was actually presented to the jury." (PCR 425) A review of the initial trial transcript shows that defense counsel was aware that Vernon James had originally been picked up as a suspect in the instant case and that he actually called Vernon James as a witness for the defense. Vernon James did not testify at trial because after being read his rights and given a public defender to confer with he refused to testify on the grounds that his testimony may tend to incriminate him. (R 595) Subsequently, defense counsel represented to the Court that James had again agreed to testify, but that "Mr. James' fear was that there was a man who was going to testify against him and say he confessed to committing the actual cutting itself, and as that person was not going to be testifying against him and creating evidence for the State against him, he'd be willing to tell about what he knew about the crime, but he was not there. If

this witness does not testify against Mr. James, Mr. James is going to be testifying for us tomorrow." (R 625-26)

Defense counsel apparently decided against putting Vernon James on the stand because 'the man who was going to testify against him,' inmate Roger Mims, testified the next day for the defense. Mims testified that Vernon James had told him that Melendez was not responsible for the death of Mr. Del, that he (James) and his partners were the ones who had something to do with it. James told him that "one of the dudes shot him in the head and one shot him in the chest and he fell down, and he (James) took the knife and cut him across the throat." (R 635)

Accordingly, not only does this evidence not qualify as newly discovered because it was already known and/or it could have been obtained with the exercise of reasonable diligence, it is cumulative to evidence that was actually presented at trial. As the jury has already heard this evidence and, nevertheless, found Melendez guilty as charged, there is little to support a claim that there is a "probability" that it would produce an acquittal on retrial. This is especially true in light of the fact that none of the witnesses produced at the evidentiary hearing testified that James actually committed the murder. Rather, the evidence showed that James emphatically denied that he (James) actually killed Mr. Del. Likewise, none of the witnesses produced at the evidentiary hearing could testify that Melendez was not guilty of the murder;

the witnesses only testified that James said he was responsible for setting up the murder and that he was present for the murder.

In support of the newly discovered evidence claim appellant called five witnesses: Deborah Ciotti, Janice Dawson, Sandra Kay James, John Berrien and Dwight Wells. They all claimed that Vernon James had made incriminating statements to them about the murder. The court below specifically found that four of the five were not credible witnesses and their testimony, either individually or cumulatively, falls short of the standard required to grant a retrial. (PCR 426)

Deborah Ciotti, an admitted street prostitute and drug addict testified that she was Vernon James' best friend and they were constantly together. (PCR 91, 97) She described Vernon James as like a brother, "Where he went, I went. Where I went, he went." (PCR 111) It was common knowledge they hung out together. She therefore fails the second prong of Jones. She could have been discovered with due diligence. Her testimony also fails the third prong, that it would have probably produced an acquittal. Ciotti was not a credible witness; whenever she is questioned she adds new facts not previously disclosed and she is an admitted felon, drug abuser and street prostitute. Further, while her testimony may tend to indicate Vernon James in some type of criminal activity, it does not exculpate Melendez. Vernon James never told her he killed Mr. Del. He allegedly showed her a wad of cash and some

narcotics, but nothing was mentioned about the stolen jewelry. She does not know when Mr. Del was killed or if he was killed before, during, or after Vernon James' alleged visit. In addition, she does not know how many people were involved in the homicide. She claimed that "everyone who knew Vernon James knew Deborah Ciotti," which of course raises the question of how she can be considered newly discovered. Regardless, she now says James told her a few days before the murder that he was going to rob the beauty shop. Later she saw James meet some other men and proceed in the direction of the murder scene. After she read about the murder she asked James if he did it and he responded by showing her some money and drugs. He never told her he killed the victim. Because she didn't wish to get involved, she purposely avoided further discussion about the murder with James. As the court below found, her testimony fails both the second and third prong of the Jones test. (PCR 426)

Janice Dawson's testimony likewise lacked credibility and did not exculpate Melendez. Dawson testified that she met Vernon James in prison. Mr. James gave her few details. He never said who committed the murder or how it was done'. She described Mr. James as a con man, a liar, and a person of whom you cannot determine if he is telling the truth. The court below found that her testimony failed prong 3, i.e. that the evidence would probably produce an acquittal on retrial.

Sandra Kay James is Vernon James' sister. She was known to Roger Alcott. Her testimony fails prong 2 in that she could have been discovered with due diligence. She also fails prong 3 in that her testimony does not exculpate Melendez. Vernon James told her he was there but did not commit the murder. He did not tell her who did it, how it was done, how many people were involved, or what was taken. Sandra Kay James is currently serving a 30 year prison sentence. (PCR 375)

Taken together, all three (3) of these individuals are convicted felons with little or no credibility and all were known or could have been discovered at the time of trial. While their testimony incriminates Vernon James in some illegal activity, it does not even address appellant's culpability. They do not know whether Melendez was involved. This type of testimony would not "probably produce an acquittal on retrial." Even if Vernon James was somehow involved, that does not negate Melendez's participation in the murder; they are not mutually exclusive. The state has never maintained that Melendez was the sole participant in this crime.

In fact, at Melendez's trial, the state presented the testimony of confidential informant, David Luna Falcon. Falcon testified that Melendez told him that the black male that was with him had a contact in the school who set up the alleged sexual encounter. Ciotti testified at the evidentiary hearing that she

saw James pick up two black men on the same block and at approximately the same time that Berrien said he dropped off Melendez and George Berrien.

As previously noted, this evidence does not rise to the level required in Jones because it is cumulative to what Mr. Alcott produced at trial. His trial defense involved trying to lay the blame on Vernon James and claiming an alibi for his client, Any evidence concerning Vernon James is not newly discovered as counsel was aware of the defense and with due diligence could have found all of these witnesses.

Regarding the testimony of Dwight Wells, neither Mr. Wells or Mr. Alcott seem to recall if Mr. Wells ever relayed his information concerning Vernon James. If he did, it is not newly discovered. If he didn't, it fails the second prong of Jones because it certainly could have been discovered with due diligence by Mr. Alcott. Wells claims he would have told him if he asked. It is inconceivable that two attorneys representing codefendants would not have discussed such evidence. This argument is especially troublesome considering Wells obviously knew that this was the defense presented at Melendez's trial. As the court below stated with regard to Mr. Wells claim that James had confessed to him:

> . . . I'm not sure what to make of Mr. Well's testimony. It is inconceivable that he would strike a deal to have his client, Barrien, testify against Melendez in a death penalty case if he believed that both Barrien and Melendez were innocent. Yet now, twelve years

> after the conviction, he claims that Vernon James confessed that he and the victim were homosexual lovers who had a fight about aggressive sexual advances which resulted in James killing the victim. Never mind that the physical evidence of stabbing and shooting and robbery are inconsistent with this story. Suffice to say that this Mr. Wells' testimony fails both the second and third prong of the Jones test.

(PCR 427)

Regardless, none of these witnesses exculpate Mr. Melendez or in any way relieves him of responsibility for the murder. Thus, not only does this evidence not qualify as newly discovered because it could have been discovered with due diligence; when considered in light of the evidence that was presented at the case, it is cumulative and insubstantial and, therefore, fails the third prong of Jones. Accordingly, the trial court properly denied the claim of newly discovered evidence.

ISSUE II

THE CIRCUIT COURT CORRECTLY REJECTED MELENDEZ'S CLAIM THAT THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE AND PRESENTED FALSE EVIDENCE IN VIOLATION OF MR. MELENDEZ'S CONSTITUTIONAL RIGHTS AND HIS CLAIM THAT DEFENSE COUNSEL'S REPRESENTATION WAS INEFFECTIVE IN VIOLATION OF FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The basis of this claim is appellant's contention that Berrien's testimony was a result of threats on Berrien's life made by law enforcement officers. Appellant contends that this claim has never been presented before because of State misconduct and/or trial counsel's ineffectiveness.

Melendez is not entitled to relief on either claim. Melendez has already had a full and fair hearing on his previous Rule 3.850 motion, including his claim of ineffectiveness of trial counsel and an alleged violation of Bradv v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Melendez v. State, 612 So.2d 1366 (Fla. 1992). This Court has repeatedly held that a defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis. Jones v. state, 591 So.2d 913 (1993); Francis v. Barton, 581 So.2d 583 (Fla.), cert. denied, 501 U.S. 1245, 111 S.Ct. 2879, 115 L.Ed.2d 1045 (1991); Squires v. State, 565 So.2d 318 (Fla. 1990). Similarly, unless a defendant can establish that the basis of his Brady claim could not have been discovered, the claim is also barred in a successive motion. Medina v. State, 690

So.2d 1241 (Fla. 1997) (Defendant's Brady claim is barred where the information upon which it is based is not newly discovered) Moreover, as in Jones, Melendez's current motion was filed beyond the two year time limit of Florida Rule of Criminal Procedure 3.850. Spaziano v. State, 570 So.2d 289 (Fla. 1990); Lightbourne v. State, 549 So.2d 1364 (Fla. 1989). As appellant has failed to show why this claim should not be barred as untimely and successive, it is the state's position that he is not entitled to relief.

Assuming, arguendo, Melendez can overcome the procedural bars, he is not entitled to relief on the merits of either the Brady or the ineffective assistance of counsel claim.

A. Brady

In order to establish a Brady violation, a defendant must establish the following:

> (1) That the government possessed evidence favorable to the defendant (including impeachment evidence);
>
> (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence;
>
> (3) that the prosecution suppressed the favorable evidence; and
>
> (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hedgwood v. State, 575 So.2d 170, 172 (Fla. 1991), quoting United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 322, 107 L.Ed.2d 312 (1989) (citations omitted).

A review of Melendez's allegation that John Berrien that he was threatened and coerced by law enforcement into making his statements in the context of the 4-prong Brady test shows that Melendez is not entitled to relief,

1) **That the government possessed evidence favorable to the defendant:**

Recently, this Court, in Haliburton v. Singletary, 691 So.2d 466 (Fla. 1997), rejected Haliburton's claim that the state suppressed certain exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Quoting, Cruse v. State, 588 So.2d 983 (Fla. 1991), this Court in Haliburton noted that "not all evidence in the possession of the State must be disclosed to the defense under Brady. Evidence is only required to be disclosed if it is material and exculpatory. Evidence is material only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. In making this determination, the evidence must be considered in the context of the entire record. Id. at 987

{quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985))." Id. at 470. Based on the foregoing, this Court found that Haliburton had not established a Bradv violation where the record showed that all documentation had been turned over, that no evidence was presented to establish that alleged documents ever existed and that other evidence was equally accessible to defendant.

In the instant case, the only evidence raised in support of the allegation that the government possessed evidence favorable to Melendez is Berrien's uncorroborated claim that his last taped statement was coerced. This claim was refuted by Detective Glisson and FDLE Agent Roper, the taped statements, Berrien's pretrial deposition, Berrien's trial testimony and Berrien's testimony on cross-examination at the evidentiary hearing. Based on the foregoing, Berrien's claim of coercion was rejected by the court below. Specifically, the court stated:

> The major problem with this so-called Brady violation is that in order to sustain it one has to believe John Berrien. I do not believe John Berrien. Berrien had at least three interviews with law enforcement regarding this murder. The first occurred on March 7, 1984 at the Lakeland Police Department. The interview was conducted by Florida Department of Law Enforcement Agent Tom Roper. Glisson and Knapp were there **as was** a Lakeland Police detective. The second occurred March 15, 1984 at the Auburndale Police Department. Presumably, this is the interview Berrien complains of in his affidavit and testimony. He was arrested after this interview and taken to the Polk County Jail. Two days later

> Berrien called Det. Glisson and asked him to come to the jail because Berrien had more to say. Glisson, and eventually Roper, took a third confession at the jail. While the three statements differ in detail, they are basically the same. It is difficult to understand how Berrien's allegedly coerced statement on March 15th vitiates the statement he made on March 7th. Moreover, the police obtained the March 17th statement at the behest of Berrien himself. It seems unlikely that Berrien would summon his tormentors from Auburndale only to subject himself to further threats and coercion. One may certainly question Berrien's motives for giving these statements, but there is no credible evidence of police misconduct. None of the four elements of a Brady violation were proved.
>
> (PCR 425-28) (emphasis added)

This Court has stated many times that deference should be paid to the trial judge who can hear and see the witnesses and make determinations based on credibility. Green v. State, 538 So.2d 647 (Fla. 1991). This trial judge had all of the parties and the evidence before him to make an accurate factual finding. The trial court's factual finding is entitled to a presumption of correctness, Henry v. State, 586 So.2d 1033 (Fla. 1991); Medina v. State, 466 So.2d 1046 (Fla. 1985); Johnson v. State, 438 So.2d 774 (Fla.), Cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984), and should not be overturned unless clearly erroneous. This Court has held that the clearly erroneous standard applies with "full force" where the trial court's determination turns upon live testimony as opposed to transcripts, depositions or other

documents. Thompson v. State, 548 So.2d 198, 204, n. 5 (Fla. 1989). Acting as a fact finder, the court below rejected Berrien's claim of coercion. As appellant has failed to establish that the alleged coercion ever happened, he has also failed to establish that the state did possessed any evidence favorable to Melendez that was withheld. Accordingly, appellant has failed to establish the first prong of **Brady.**

(2) **That the defendant does not possess the evidence nor could he obtain it himself with** any **reasonable diligence;**

There is no Bradv violation where alleged exculpatory evidence is available to the defense and the prosecution. Roberts v. State, 568 So.2d 1255 (1990); James v. State, 453 So.2d 786 (Fla. 1984). John Berrien testified at trial and was deposed by defense counsel. In that deposition, Berrien claimed **as** he did at the most recent evidentiary hearing, that his statements to law enforcement were false. Berrien then, as he did at the evidentiary hearing, proceeded to reconfirm most of the evidence provided in his original statement to law enforcement. As Berrien's claim that most of his statements to law enforcement was false was equally accessible to the defense at the time of trial, it does not qualify **as** Brady material-l

[1] The availability of Berrien's statement at the time of trial, operates as a procedural bar to this latest claim.

(3) **That the prosecution suppressed the favorable evidence:**

As the court below found that Berrien's testimony was not coerced, there was no evidence, favorable or otherwise, for the state to suppress.

(4) **Had the evidence been disclosed to the defense, a reasonable probabilitv exists that the outcome of the proceedings would have been different:**

There is no reasonable probability that "had the evidence been disclosed to the defense, the result of the proceeding would have been different". **See,** Duest v. Dugger, **555** So.2d 849 (Fla. 1990); citing Medina v. State, 573 So.2d 293 (Fla. 1990). Berrien's statements were thoroughly challenged at trial and in Appellant's initial post-conviction proceeding. Even if Berrien's claim of coercion was presented to impeach his testimony at trial, the addition of this clearly unsupported claim does not lead one to conclude that the outcome of the proceeding would have been different.

In the instant **case,** a review of John Berrien's testimony, in the context of the entire record, reveals that there are only a few statements made at trial which he now claims are false and that none of those statements were material:

a) Berrien's testimony that he had seen Melendez with **a** gun in the past. However, this statement was **also** made during the March **7,** 1984 interview.

b) His testimony that he went to a gas station, then to David Files' home, then to Food World. Berrien now claims he simply made up that - it was not a result of police threats, Regardless, it is not relevant to the question of appellant's guilt.

c) His testimony that Melendez came out of Mr. Del's with a towel in his hand with something apparently wrapped up in it. This statement was also made during the first statement he gave on March 7, 1984 - prior to any alleged coercion. Additionally, the absence of the towel does not exculpate Melendez and, therefore, is not material,

d) Berrien's testimony that he took appellant to his home after leaving Mr. Del's. Berrien now claims this was not the result of police coercion, but was simply made up by him. Again, it is not relevant or material to the question of appellant's guilt.

e) His testimony that George Berrien gave appellant some jewelry and a gun to take to Delaware. Berrien claims now that he testified to this because he assumed that is what the police wanted him to say. He did not claim it was a result of any police coercion. As such it does not qualify as withheld evidence.

More importantly, John Berrien, as he did in his 1984 deposition after he first claimed his statements were false, stated that the remainder of his testimony, including taking Melendez and George Berrien to Mr. Del's, was true.

Given the foregoing, it is the state's position that Melendez has not proven a Brady violation occurred. The trial court's denial of the motion should therefore be affirmed.

B. Ineffective Assistance of Counsel

In Haliburton v. Sinsletary, 691 So.2d 466 (Fla. 1997), this Court rejected Haliburton's claim that either the state suppressed certain exculpatory evidence in violation of Brady v. Marvland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), or his counsel was ineffective under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in failing to investigate, prepare, and present the evidence. Haliburton claimed that the jury did not hear certain impeachment evidence. In rejecting this claim, this Court noted that "Haliburton failed to demonstrate that counsel's performance was deficient and that there is a reasonable probability that the outcome of the proceeding would have been different absent the deficient performance. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; Bertolotti v. State, 534 So.2d 386, 390 (Fla. 1988). Thus, where defense counsel was aware of the proposed impeachment testimony, but for tactical reasons chose not to use it was not "so patently unreasonable that no competent attorney would

have chosen it," Palmes v. Wainwriaht, 725 F.2d 1511, 1521 (11th Cir . 1984) (quoting Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983)), nor can we say that the outcome of the proceeding would have been different if counsel had presented her."

In the instant case, not only is this claim barred as it was raised and rejected in the prior collateral proceeding, appellant has likewise failed to establish that counsel's failure to discover and present the testimony present counsel now urges, constitutes deficient performance and would have changed the outcome of the proceeding.

CONCLUSION

Based on the foregoing arguments and authorities, the Order Denying Motion to Vacate Judgment and Sentence issued by the lower court should be affirmed and Appellant's request for relief denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Gail E. Anderson, Assistant CCR, Office of the Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this 29 day of September, 1997.

CM Sabella

COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

JUAN ROBERTO MELENDEZ,

Appellant,

vs. CASE NO. 88,961

STATE OF FLORIDA,

Appellee.

_____/

INDEX TO APPENDIX

***1258 498 So.2d 1258**

Juan Roberto MELENDEZ, Appellant,
v.
STATE of Florida, Appellee.

No. 66244.

498 So.2d 1258, 11 Fla. L. Week. 639
Supreme Court of Florida.
Dec. 11, 1986.

Defendant was convicted of first-degree murder and armed robbery in the Circuit Court, Polk County, Edward F. Threadgill, Jr., J., by jury verdict. Defendant appealed. The Supreme Court, Shaw, J., held that: (1) defendant's due process rights were not violated by failure of police investigators to collect and preserve certain physical evidence; (2) defendant was not entitled to mistrial on grounds that two nonsubpoenaed defense witnesses refused to appear to testily; (3) record supported finding of aggravating factors for purposes of imposition of death penalty; and (4) fact that defendant's conviction could have rested upon felony-murder did not preclude conviction for first-degree murder,

Affirmed.

Barkett, J., concurred specially and filed opinion

Adkins, J., concurred in conviction but concurred in result only with the sentence.

1 . CONSTITUTIONAL LAW ⚿268(5)
92 ----
92XII Due Process of Law
92k256 Criminal Prosecutions
92k268 Trial in General
92k268(2) Particular Cases and Problems
92k268(5) Disclosure and discovery; notice of defense.
Fla. 1986.

Defendant's due process rights were not violated by failure of police investigators to collect and preserve certain physical evidence, which might have been beneficial to defendant's case, where police did not make conscious effort to suppress exculpatory evidence and where there was no showing that evidence rejected by the investigators possessed apparent exculpatory value. U.S.C.A. Const.Amends. 5.14.

2. CRIMINAL LAW ⚿867
110 ----
110XX Trial
110XX(J) Issues Relating to Jury Trial
11 Ok867 Discharge of jury before verdict.
Fla. 1986.

Trial court was not required to grant motion for mistrial, based on failure of two nonsubpoenaed defense witnesses to appear to testify.

3. HOMICIDE ⚿253(1)
203 ----
203VII Evidence
203VII(E) Weight and Sufficiency
203k251 Degree of Murder
203k253 First Degree
203k253(1) In general.

[See headnote text below]

3. ROBBERY ⚿24.1(3)
342 ----
342k24 Weight and Sufficiency of Evidence
342k24.1 In General
342k24.1(2) Degree or Classification of Offense
342k24.1(3) First degree; armed robbery.
Fla. 1986.

Competent substantial evidence supported jury's determination that defendant was guilty of first-degree murder and armed robbery, even though conflicting evidence existed.

4. CRIMINAL LAW ⚿1208.1(5)
110 ----
110XXVI Punishment of Crime
110k1208 Extent of Punishment in General
110k1208.1 In General
110k1208.1(4) Death Sentence
110k1208.1(5) Aggravating or mitigating circumstances.
Fla. 1986.

For purposes of imposition of death penalty, defendant's prior robbery conviction could be used to support aggravating factor of previous conviction for felony involving use or threat of violence to person, even though robbery conviction was ten years old. West's F.S.A. Sec. 921.141(5)(b).

5. HOMICIDE ⚿357(7)
203 ----
203XI Sentence and Punishment
203k355 Death Penalty
203k357 Considerations Determining Propriety of Death Sentence
203k357(7) Commission of other offense.

Formerly 203k354
Fla. 1986.
For purposes of imposition of death penalty, aggravated factor of murder being committed while defendant was engaged in the commission of robbery existed, where competent substantial evidence supported jury's determination that defendant committed robbery and first-degree murder. West's F.S.A. Sec. 921.141(5)(d).

6. HOMICIDE ⚿3 11
203 ----
203VIII Trial
203VIII(C) Instructions
203k311 Punishment.
Fla. 1986.
It was not reversible error for trial court to substitute "wicked, evil" for "heinous" in court's instruction on aggravating factor, for purposes of imposition of death penalty, of murder being heinous, atrocious and cruel. West's F.S.A. Sec. 921.141(5)(h).

7. HOMICIDE ⚿357(11)
203 ----
203XI Sentence and Punishment
203k355 Death Penalty
203k357 Considerations Determining Propriety of Death Sentence
203k357(11) Depravity, atrocity, heinousness, etc.; cruelty or torture.

Formerly 203k354
Fla. 1986.
Aggravating factor of murder being heinous, atrocious and cruel, for purposes of imposition of death penalty, was supported by the record, even if defendant only fired gunshot to victim's head and his accomplice slit victim's throat; defendant ignored victim's pleas for mercy, and victim had knowledge of his impending doom. West's F.S.A. Sec. 921.141(5)(h).

8. HOMICIDE ⚿357(11)
203 ----
203XI Sentence and Punishment
203k355 Death Penalty
203k357 Considerations Determining Propriety of Death Sentence
203k357(11) Depravity, atrocity, heinousness, etc.; cruelty or torture.

Formerly 203k354
Fla. 1986.
Aggravating factor of murder being cold, calculated and premeditated, for purposes of imposition of death penalty, was supported by the record, where defendant planned crime well in advance, where defendant went to victim's beauty school for purpose of getting victim's jewelry and money, and where defendant knew he would have to encounter victim to take jewelry from him. West's F.S.A. Sec. 921.141(5)(i).

9. HOMICIDE ⚿253(3)
203 ----
203VII Evidence
203VII(E) Weight and Sufficiency
203k251 Degree of Murder
203k253 First Degree
203k253(3) Circumstances of cool blood, deliberation, and premeditation.
Fla. 1986.
Fact that defendant's first-degree murder conviction could have rested upon felony-murder, did not preclude conviction for first-degree murder; evidence supported premeditated murder.

***1259** Marshall G. Slaughter, Bartow, for appellant.

Jim Smith, Atty. Gen., and Candance M. Sunderland, Asst. Atty. Gen., Tampa, for appellee.

SHAW, Justice.

Appellant, Juan Roberto Melendez, was found guilty as charged of first-degree murder and armed robbery. The trial court imposed the death sentence for the murder and a life sentence for the robbery. Melendez now appeals his convictions and sentences. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution, and we affirm.

Police responded to a call from the victim's sister on the evening of September 13, 1983, and found the body of Delbert Baker on the floor in a back room of his beauty school in Auburndale. His throat had been slashed, and he had been shot in the head and shoulders. No jewelry was found on his body.

John Berrien testified at trial that there was an occasion around the time of September 12, 1983, on a rainy day that he, his cousin George Berrien, and appellant were together and appellant asked him to drive him to Aubumdale so he could get his hair done and pick up some money. The three of them left at about 4 p.m. Appellant had a bulge in the back of his pants that John suspected was a gun. George and appellant said to pick them up from Mr. Del's, the beauty school, in about one and one-half to two hours, and he did so. The next day George asked John to

drive him to the train station so that he could go to Delaware to see his children. Appellant went with them to the station and gave George two rings, a watch and a gun to sell in Wilmington. John had seen appellant with watches and rings before, but could not say if they were the same ones. The watch looked like one appellant previously had tried to sell him. Amtrak records reflecting that a Mr. G. Berrien made a reservation on September 14, 1983, to go from Lakeland to Wilmington, Delaware, and a ticket lift indicating that the train was actually boarded were introduced into evidence. There was testimony that the victim had worn his missing wrist watch, gold bracelet and four diamond rings for years and that he had been wearing them the day of the murder. A bank bag containing $50 in petty cash was missing from the victim's desk drawer.

David Falcon, a convicted felon, testified that several months after the murder appellant told him of having participated in the crimes. According to Falcon's rendition, appellant and another had made an appointment with the victim because he was supposed to have money and jewelry. The driver, John, stayed in the car. Appellant and his accomplice went inside, and the latter cut the victims throat. The victim begged them to take him to a hospital, but appellant said that that could not be done because the victim would tell the police. Appellant then shot him in the head. The perpetrators cleaned up any fingerprints and took jewelry and money.

***1260** George Berrien testified for the defense and denied riding with appellant in the car to Auburndale and said he had seen him only once before at his cousin Johns house. Appellant testified and denied culpability. A prisoner named Roger Mims testified that his cellmate, Vernon James, told him that he, his partner and a homosexual killed Baker. There was police testimony that Harold Landrum was a close friend of James's and that James and Landrum were initially suspects in the case, but that Landrum was eliminated as a suspect based on an interview with Landrum's employer

Appellant's lover testified that Falcon had told her he was going to testify falsely against appellant. She also stated that she had been with appellant the evening of the murder, and this was corroborated by her sister's testimony. There was additional testimony that Falcon did not like appellant and said he was going to have him killed.

The jury convicted appellant of first-degree murder and armed robbery and recommended the death penalty for the murder. The trial court sentenced him to death in accordance with the jury's recommendation, finding four aggravating and no mitigating factors.

[1] Appellant argues that he was denied due process because the police investigators failed to collect and preserve certain physical evidence that might have been beneficial to him: a blood sample from the scene, a stain on the victim's car seat, clothes or shoes of Vernon James, shoes of Harold Landrum, shoes found beside the body, David Falcon's gun, and a hunting knife found in the victim's desk drawer. This claim, relating to the opportunity to present a defense, involves "what might loosely be called the area of constitutionally guaranteed access to evidence." United States v. Valenzuela-Bemal, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982). "Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984). The concern is that the accused have access to exculpatory evidence, not all possible pieces of evidence that the police have rejected as worthless. The duty on the state is "limited to evidence that might be expected to play a significant role in the suspect's defense." Id. at 488, 104 S.Ct. at 2534 (footnote omitted). The evidence must "possess an exculpatory value that was apparent before the evidence was destroyed." Id. at 489, 104 S.Ct. at 2534. There is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972). Most of the alleged negligent nonpreservation of evidence in this case occurred prior to the time appellant became a suspect. We find neither evidence of a conscious effort by the police to suppress exculpatory evidence in this case nor a showing that rejected evidence possessed an apparent exculpatory value, We affirm this point relating to the collection and preservation of evidence.

[2] Appellant next contends that the trial court erred in denying the motion for mistrial when two non-subpoenaed defense witnesses, the Reagans, refused to appear to testify. Defense counsel sought to introduce testimony of Falcon's forcing his way into the Reagans' home, threatening to kill Mr. Reagan, and shooting into the Reagan vehicle several times. Appellant argues that the Reagan testimony would have hurt Falcon's

credibility and might have caused the jury to believe that he was the perpetrator. We cannot fault the trial court for refusing to declare a mistrial when non-subpoenaed witnesses failed to appear. Moreover, inasmuch as the prosecutor agreed to a stipulation as to what their testimony would be and the stipulation was read to the jury, appellant suffered no prejudice. We affirm on this point.

[3] Appellant has not specifically challenged the sufficiency of the evidence by *1261 which he was convicted, but this is a matter we consider nonetheless. We have carefully considered the record in this case, and we have concluded that the jury's verdict is supported by competent substantial evidence. That is, a rational trier of fact could have found proof of guilt beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). It is not the province of this Court to reweigh conflicting testimony. Tibbs v. State, 397 So.2d 1120 (Fla.1981), aff'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Rather it is within the province of the jury to determine the credibility of witnesses and to resolve factual conflicts. Jent v. State, 408 So.2d 1024 (Fla.), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). Absent a clear showing of error, its findings will not be disturbed. Id.

[4] Regarding the penalty phase of the trial, appellant argues that the aggravating factors found by the trial court were not proved beyond a reasonable doubt. He first challenges the factor that the defendant has previously been convicted of a felony involving the use or threat of violence to a person, section 92 1.14 1(5)(b), Florida Statutes (1983), contending that the record of conviction for a robbery that occurred ten years previously cannot support this circumstance. This argument is without merit. (FN1)

[5] Appellant argues that it was error for the trial court to fmd that the murder was committed while the defendant was engaged in the commission of a robbery, section 92 1.14 1(5)(d), in that there was no proof of a robbery in this case. We disagree with appellant. The jury found appellant guilty of robbery, and its verdict is supported by competent substantial evidence. Jent.

[6] [7] [8] Appellant contends that the murder was not "especially wicked, evil, atrocious and cruel" because the gunshot to the head would have caused instantaneous death according to the medical examiner. (FN2) This contention ignores the slitting of the victims throat and his pleas for mercy and knowledge of his impending doom. Whether appellant only fired the shot and his accomplice slit the throat is immaterial. James v. State, 453 So.2d 786 (Fla.), cert. denied, 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984). The heinous, atrocious and cruel factor is supported by the record in this case. Appellant also challenges the cold, calculated and premeditated factor, Sec. 921.141(5)(i). We reject his contention that it is unsupported. Appellant requested to be driven to the victim's beauty school and to be left there for one and one-half to two hours. He went there for the purpose of getting the victims jewelry and money, and he knew he would have to encounter the victim to take his jewelry from him. The record supports his planning this terrible crime well in advance.

Appellant also complains that the trial court read the list of aggravating circumstances to the jury without defining or illustrating the technical meaning of any of the words. Our review of this issue is foreclosed, not having been preserved at trial.

[9] Appellant's last argument is that the jury conviction could have rested upon felony murder, so that he should not have been sentenced for both the robbery and the murder. This point is meritless, as a defendant can be convicted and sentenced for both felony murder and the underlying felony. State v. Enmund, 476 So.2d 165 (Fla.1985). Moreover it is not error to convict and sentence for both crimes when appellant was indicted for premeditated murder, the jury was instructed on premeditated murder, and the evidence supports premeditated murder. Blanco v. State, 452 So.2d 520 (Fla.1984), cert. denied, 469 US. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985).

*1262 Having found no reversible error at either the guilt or penalty stages of the trial and having determined that the imposition of the death sentence upon the defendant for the murder in this case is in line proportionally with other cases in which the death penalty has been imposed, as we do in affirming sentences in these cases, Williams v. State, 437 So.2d 133 (Fla.), cert. denied,466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984), we affirm appellant's convictions and sentences.

It is so ordered.

MCDONALD, C.J., and BOYD, OVERTON and EHRLICH, JJ., concur.

BARKETT, J., concurs specially with an opinion.

ADKINS, J., concurs in the conviction, but concurs in

the result only with the sentence.

BARKETT, Justice, concurring specially.

1 agree with the majority that the evidence in this case which is delineated with care in the majority opinion is sufficient to support Melendez's conviction There was competent substantial evidence upon which the jury could have found that Melendez committed this robbery-murder. See Jent v. State, 408 So.2d 1024, 1028 (1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). I do not, however, believe that the quality of that evidence is sufficient to support imposition of the death penalty.

Under our constitution, this Court hears appeals from all final judgments imposing the death penalty. Art. V, Sec. 3(b)(1), Fla. Const. It is our duty to indeoendentlv determine whether imposition of the death penalty is warranted. See Sec. 921.141(4), Fla.Stat. (1985). See also Aldridge v. State, 351 So.2d 942, 944 n. 4 (Fla.1977) (we have a duty to review the record in every case where the death penalty is imposed), cert. denied, 439 U.S. 882, 99 S.Ct. 220, 58 L.Ed.2d 194 (1978); Swan v. State, 322 So.2d 485, 489 (Fla.1975) (this Court has a duty to consider record to assure death penalty is justified). The United States Supreme Court has noted that "the penalty of death is qualitatively different from a sentence of imprisonment., , , [and] there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). See also Gardner v. Florida, 430 U.S. 349, 357, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) (death is a different kind of punishment from any other). In light of this, I believe that our responsibility to independently review death sentences includes an evaluation of the evidence supporting guilt to determine whether a death sentence is appropriate.

While a jury verdict of guilt based on competent substantial evidence is sufficient for upholding convictions and prison sentences, I do not believe it is always enough for upholding a death sentence. There are cases, albeit not many, when a review of the evidence in the record leaves one with the fear that an execution would perhaps be terminating the life of an innocent person,

In Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), Justice Stevens wrote an opinion concurring in part and dissenting in part, which better expresses the thought:

> While the crime for which petitioner was convicted was quite horrible, the case against him was rather weak, resting as it did on the largely uncorroborated testimony of a drug addict who said that petitioner had bragged to him of having killed a number of women, and had led him to the victims body. It may well be that the jury was sufficiently convinced of petitioner's guilt to convict him, but nevertheless also sufficiently troubled by the possibility that an irrevocable mistake might be made, coupled with evidence indicating that petitioner had suffered serious head injuries when he was 20 years old which had induced a personality change, App. 35, see also [Spaziano v. State] 433 So.2d [508] at 512 [Fla.1983] (McDonald, J., dissenting), that the jury concluded that a sentence of death *1263. could not be morally justified in this case.

Id. at 488 n. 34, 104 S.Ct. at 3178 n. 34.

Similarly, the case against Melendez rests solely on the uncorroborated testimony of a convicted felon who, according to one witness, had pledged to destroy the defendant. The jury is clearly entitled to believe the convict's testimony, and a verdict based on this evidence cannot and should not be disturbed. However, the law must provide for the situation where the quantum of proof does not foreclose doubts as to guilt, I am persuaded by Justice Marshall's view that:

> [T]he "reasonable doubt" foundation of the adversary method attains neither certainty on the part of the factfinders nor infallibility, and accommodations to that failing are well established in our society. See also Jackson v. Virginia, 443 U.S. 307, 317-318, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979) (reversal of jury verdict supported by insufficient evidence). In the capital sentencing context, the consideration of possible innocence as a mitigating factor is just such an essential accommodation.

Burr v. Florida, --- U.S. ----, 106 S.Ct. 201, 203, 88 L.Ed.2d 170 (1985) (Marshall, J., dissenting from denial of certiorari).

As Justice Marshall points out in his dissent from denial of certiorari in Heiney v. Florida, 469 U.S. 920, 921-22, 105 S.Ct. 303, 303-05, 83 L.Ed.2d 237 (1984):

> This Court, in Lockett [v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)], and then more

decisively in Eddings [v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)], held that any aspect of the case that could rationally support mitigation must be deemed a legally valid basis for mitigation. There is certainly nothing irrational--indeed, there is nothing novel--about the idea of mitigating a death sentence because of lingering doubts as to guilt. It has often been noted that one of the most fearful aspects of the death penalty is its finality. There is simply no possibility of correcting a mistake, The horror of sending an innocent defendant to death is thus qualitatively different from the horror of falsely imprisoning that defendant. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice. As such it has been raised as a valid basis for mitigation by a variety of authorities.

The wisdom behind mitigating death sentences in the face of doubts as to guilt led the drafters of the Model Penal Code to include that factor in their model death penalty statute as a mitigating factor so strong that its presence would exclude the possibility of death as a matter of law.

> Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree [i.e., a non-capital offense] if it is satisfied that:
>
> ....
>
> (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt. ALI, Model Penal Code Sec. 210.6(1), p. 107 (Off.Draft, 1980).

See also Smith v. Wainwright, 741 F.2d 1248, 1255 (11 th Cir. 1984) (quoting Smith v. Balkcom, 660 F.2d 573, 580 (5th Cir.1981), modified, 671 F.2d 858 (1982), cert. denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982)) (jurors may hold a genuine, if not a reasonable, doubt of guilt), cert. denied, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 151 (1985).

In summary, I believe that the nature and strength of the evidence of guilt should be considered in upholding a death sentence. After careful review of the record in this case, I believe that the evidence does not rise to the level of certainty that should support imposition of the death penalty,

FN1. Just as the robbery supports this aggravating factor, it also negates the existence of the mitigating factor of lack of significant history of criminal activity. Sec. 921.141(6)(a).

FN2. The issue was not raised below or on this appeal, but we note that the trial court's instruction on the Sec. 92 1.14 1(5)(h) factor substituted "wicked, evil" for "heinous," We find no reversible error.

*1366 612 So.2d 1366

17 Fla. L. Week. S699

Juan Roberto MELENDEZ, Appellant,
v.
STATE of Florida, Appellee.

No. 75081.
Supreme Court of Florida.
Nov. 12, 1992.
Rehearing Denied Feb. 17, 1993.

Defendant was convicted of first-degree murder and armed robbery. The Supreme Court, 498 So.2d 1258, affirmed. Defendant moved for postconviction relief. The Circuit Court, Polk County, Charles A. Davis, Jr., J., summarily denied motion. Defendant appealed, The Supreme Court held that: (1) issues that related to alleged errors which, even if meritorious, had to be raised on direct appeal were procedurally barred and would not be further addressed; (2) record did not support claimed Brady violations or defendant's claim that trial counsel was ineffective during both guilt and penalty stages; and (3) defendant's argument that his death sentence was disproportionate and in disparity with treatment of his alleged accomplice was misplaced, as that accomplice was never charged with a capital offense.

Affirmed.

Barkett, C.J., concurred in result only.

1. CRIMINAL LAW ⚿998(3)
110 ----
11 0XXIII Judgment, Sentence, and Final Commitment
11 Ok998 Post-Conviction Relief; Setting Aside Judgment
110k998(3) Presentation of question in prior proceedings.
Fla. 1992.
Issues relating to alleged errors which, even if meritorious, had to be raised on direct appeal if they were to be raised at all were procedurally barred and would not be further addressed on appeal from denial of defendant's motion for postconviction relief.

2. CRIMINAL LAW ⚿700(2.1)
110 ----
110xX Trial
11 0XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
110k700(2) Disclosure or Suppression of Information
110k700(2.1) In general,
Formerly 110k700(2)
Fla. 1992.
In order to prove Brady violation, defendant must show that government possessed evidence favorable to defendant (including impeachment evidence), that defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence, that prosecution suppressed the favorable evidence, and that, had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

3. CRIMINAL LAW ⚿641.13(7)
110 ----
110XX Trial
11 0XX(B) Course and Conduct of Trial in General
11 Ok64 1 Counsel for Accused
110k64 1.13 Adequacy of Representation
11 Ok64 1.13 (2) Particular Cases and Problems
110k64 1.13 (7) Post-trial procedure and review.
Fla. 1992.
Effectiveness of counsel's performance during penalty stage of first-degree murder and armed robbery prosecution had to be viewed in light of defendant's desire for death penalty and wish not to present mitigating evidence. U.S.C.A. Const.Amend. 6.

4. CRIMINAL LAW ⚿1134(3)
110 ----
11 0XXIV Review
11 0XXIV(L) Scope of Review in General
110kl134 Scope and Extent in General
110k1134(3) Questions considered in general.
Fla. 1992.
Proportionality is used to compare death sentence to other cases approving or disapproving a sentence of death, and arguments relating to proportionality and disparate treatment are not appropriate where prosecutor has not charged the alleged accomplice with a capital offense.

*1367 Larry Helm Spalding, Capital Collateral Representative; Gail E. Anderson, Asst. CCR and Harun Shabazz, Staff Atty., Office of the Capital Collateral Representative, Tallahassee, for appellant,

Robert A. Butterworth, Atty. Gen., and Candance M. Sunderland, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

The appellant, Juan Roberto Melendez, was convicted of first-degree murder and armed robbery for which he received a death sentence and a life sentence respectively. This Court affirmed both the convictions and sentences. Melendez v. State, 498 So.2d 1258 (Fla. 1986). Melendez appeals the summary denial of his motion for postconviction relief filed pursuant to rule 3.850, Florida Rules of Criminal Procedure. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution.

[1] Melendez raises eleven issues in his motion for postconviction relief. Issues 6, 8, and 10 do not involve ineffective assistance of counsel or call into question the fundamental fairness of the trial. These issues relate to alleged errors which even if meritorious must be raised on direct appeal if they are to be raised at all, Blanco v. Wainwright, SO7 So.2d 1377 (Fla. 1987). We find these issues to be procedurally barred and decline to further address the claims. (FN1)

[2] Issues (1) and (2) assert violations under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Melendez argues that the State withheld background information relative to State's witness David Luna Falcon and failed to correct falsehoods in the testimony of Detective Glisson regarding Falcon's background. The record does not support such a claim. Trial counsel cross-examined Falcon relative to his prior record, his drug use, his cooperation with law enforcement authorities, and his payment for furnishing information to the police. Detective Glisson testified for the defense and corroborated the fact that Falcon had worked as a drug informant. Defense witnesses testified * 1368 relative to Falcon's reasons for testifying against Melendez and his close relationship with Detective Glisson. Additional details regarding Falcon's prior criminal record, his location at the time of the offense, and his history of mental illness and drug addiction was either known by defense counsel or was as accessible to the defense as it was to the State. In order to prove a Brady violation, a defendant must show:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence: (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So.2d 170, 172 (Fla.1991) (quoting United States v. Meros, 866 F.2d 1304, 1308 (11th Cir.) cert. denied, 493 U.S. 932, 110 S.Ct. 322, 107 L.Ed.2d 3 12 (1989) (citations omitted)). It is clear from the record that Melendez's claim does not meet this standard of proof.

Issues (3) and (4) argue trial counsel's ineffectiveness during both the guilt and penalty phase in that counsel failed to investigate and prepare for cross-examination of key State witnesses, failed to subpoena defense witnesses, failed to present the complete testimony of defense witnesses, failed to present available mitigating evidence, failed to properly argue disparate treatment of Melendez's accomplice, failed to advise Melendez of the consequences of not presenting mitigating circumstances, and failed to secure mental health experts.

The record does not support appellant's claim. Counsel impeached John Berrien's testimony by revealing that he was a convicted felon, had falsified information on his workers' compensation insurance, and had his first-degree murder charge in this case reduced to accessory-alter-the-fact. We have no reason to believe that the decision to forego further cross-examination was not a tactical decision, In addition to impeaching Falcon's testimony relative to his criminal record and his work as a paid informant, counsel presented eight witnesses to refute Falcon's testimony. When the Reagans failed to appear as defense witnesses, trial counsel was able to get their testimony before the jury by way of stipulation and presented Melendez's girlfriend and mother as alibi witnesses. We do not find counsel's performance during the guilt phase outside the wide range of professional competent assistance guaranteed under the Sixth Amendment of the U.S. Constitution. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

[3] In assessing counsel's performance during the penalty stage, it must be viewed in light of Melendez's statement that he wanted the death penalty because it would allow him to receive a speedy trial and more publicity to prove his innocence and that he would rather take that gamble than go to prison for a long time for something he didn't do. He informed the court that he did not want to present mitigating evidence and that he would rather receive the death sentence than a life sentence. In spite of Melendez's attempted rush to judgment, his lawyer argued and the trial judge

instructed that the jury could consider in mitigation: (1) whether Melendez had a significant prior criminal history; (2) whether he was an accomplice to the crime which was committed by another person and that his participation was relatively minor; (3) his age at the time of the crime; (4) any other aspect of his character or circumstances of the offense. We find nothing in the record calling Melendez's sanity or mental health into question or alerting counsel or the court of the need for a mental health evaluation; accordingly, we do not find that counsel was ineffective in failing to investigate further and present additional evidence.

[4] Issue (5) alleges that Melendez's death sentence is disproportionate and in disparity with the treatment of his alleged accomplice, George Berrien, who was never charged in this crime. Melendez's argument on this point is misplaced. Proportionality is used to compare a death sentence to other cases approving or disapproving a sentence of death. Arguments *1369. relating to proportionality and disparate treatment are not appropriate here where the prosecutor has not charged the alleged accomplice with a capital offense. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984).

During the penalty phase, the jury was given the following instruction:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> And three, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

Melendez claims as issue (7) that this instruction "provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion." This claim, however, was already addressed on direct appeal, wherein we stated:

> Appellant also complains that the trial court read the list of aggravating circumstances to the jury without defining or illustrating the technical meaning of any of the words. Our review of this issue is foreclosed, not having been preserved at trial.

Melendez, 498 So.2d at 1261. The issue is thus procedurally barred.

We note that although a similar instruction on this aggravating circumstance was recently ruled invalid by the United States Supreme Court in Espinosa v. Florida, --- U.S. ----, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), this Court's finding on direct appeal in the present case that the matter was not preserved is dispositive. See Sochor v. Florida, --- U.S. ----, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) (claim of unconstitutional vagueness of "heinous, atrocious, or cruel" instruction will not be heard by United States Supreme Court where Florida Supreme Court finds it unpreserved). Even if it had been preserved, we find the error harmless beyond a reasonable doubt since there is no reasonable possibility that the erroneous instruction contributed to the jury recommendation. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986).

In issue (9), Melendez asserts that the jurors were misled by instructions and arguments which diluted their sense of responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This argument is without merit because Caldwell does not control Florida law on capital sentencing. We find that the instructions as given adequately advised the jury of its responsibility and that the prosecutor's comments were not improper, Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990); Combs v. State, 525 So.2d 853 (Fla. 1988).

Issue (11) alleges that counsel was ineffective for failing to argue that the death sentence rests upon an unconstitutional automatic aggravating circumstance (committed in the course of a felony) in violation of Maynard v. Cartwright, 486 U.S. 356,108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). We have repeatedly rejected this argument on the merits. Squires v. State, 450 So.2d 208, 212 (Fla.), cert. denied, 469 U.S. 892, 105 S.Ct. 268, 83 L.Ed.2d 204 (1984). Counsel cannot be deemed ineffective for failing to make this meritless argument.

The denial of the motion for postconviction relief is affirmed.

It is so ordered.

OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

BARKETT, C.J., concurs in result only.

FN1. Issue 6 is whether the trial court failed to provide

a factual basis in support of the death penalty. Issue 8 relates to the aggravating circumstance of "cold, calculated, and premeditated." Issue 10 is whether the jury instructions unconstitutionally shifted to Melendez the burden of proving that a life sentence was warranted.

CASE NO: CF84-1016A2

In support of the newly discovered evidence claim the defendant called five witnesses: Deborah Ciotti, Janice Dawson, Sandra Kay James, John Berrien and Dwight Wells. They all claimed that Vernon James had made incriminating statements to them about the murder. Four of the five were not credible witnesses and their testimony, either individually or cumulatively, falls short of the standard required to grant a rctrail. Deborah Ciotti was, at the time of the murder, a street prostitute and drug addict. Her best friend was Vernon James and they were constantly together. Everyone who knew Vernon James knew Deborah Ciotti, which of course raises the question of how she can be considered newly discovered, Regardless, she now says James told her a few days before the murder that he was going to rob the beauty shop. Later she saw James meet some other men and proceed in the direction of the murder sccnc. After she read about the murder she asked James if he did it and he responded by showing her some money and drugs. I-lc never told her he killed the victim. Because she didn't wish to get involved, she purposely avoided further discussion about the murder with James, Her testimony fails both the second and third prong of the Jones test.

Janice Dawson met Vernon James at a first appearance hearing in the Polk County jail. Previously both had been charged with unrelated crimes. Their relationship continued while both of them spent time in separate Florida prison facilities and they lived togcthcr for a time after both got out of prison. On many occasions James told her that he had been involved in the murder, Indeed, he used to brag about it to the other people in the neighborhood. But hc never said that he murdered the victitn nor did he ever say who had commited the murder. She described James as a con man, a liar, and a person adept at making people believe what he wanted them to bclievc. Her testimony fails the third prong of the Jones test,

Sandra Kay James is Vernon James' sister who is presently serving a thirty year prison sentence At the time of the murder, she was the girlfriend of Landrum, one of the initial suspects. Shealso knew Roger Alcott, Melendez' trial attorney, During the pertinent time period she was addicted to drugs. She claims her brother told her that he set up the robbery of the victim and was present when he was murdered but did not actually commit the murder. She admits that when the prosecutor attempted to speak with her concerning the affidavit she filed in this matter, she refused to talk to him. Her testimony fails both the second and third prong of the Jones test.

At the trial, John Berrien testified against Melendet after securing for himself a negotiated plea agreement. Attacking his credibility was a major part of the Melendez defense. His numerous and frequently contradictory statements were brought to the attention of the jury. Yet the jury apparently believed him. He now claims that parts of his testimony were false. He is vague about which parts of his trial testimony he is recanting. Some of it hc claims hc simply made up for no particular reason. Other parts were the result of police intimidation and coercion. The remainder, he stated, was true. This inmate of the New Mexico prison system was completely unbelievable. His transparent motive for recanting is to help a former partner in a robbery/murder plot. His testimony fails the third prong of the Jones test.

Dwight Wells is a criminal defense attorney who, at the time of the trial, was an assistant public defender appointed by the court to represent Melendez' co-dcfcndant, John Barrien. Sometime during his representation of Barrien, he received a call from Vernon James asking him to come to

the jail for a visit. He made several visits to the jail to visit his friend, Vernon James. He did not rcprcscnt James and did not consider any of these conversations privilcgcd. During these visits, Wells claims that James confessed to the murder for which Melendez and Barrien were charged. Wells' memory of these confessions is extremely sketchy. I-le made no notes and did not tape any of the confessions. He is not sure of any of the dates when these confessions were given but does remember that they occurred during the time he was representing Barrien. He doesn't recall if he ever mentioned these confessions to Roger Alcott, Melendez' attorney. He doesn't remember if he contacted the State Attorney to inform him that innocent men, including his client, had been indicted. He thinks he might have mentioned the confessions to his client but is not sure. In any case, he did proceed to plead his client to certain lesser charges in exchange for his client's testimony against Melendez. I'm not sure what to make of Mr. Wells' testimony. It is inconceivable that he would strike a deal to have his client, Barrien, testify against Melendez in a death penalty case if he believed that both Barrien and Melendez were innocent. Yet now, twelve years after the conviction, he claims that Vernon James confessed that hc and the victim were homosexual lovers who had a light about aggressive sexual advances which resulted in James killing the victim. Never mind that the physical evidence of stabbing and shooting and robbery are inconsistent with this story. Suffice it to say that this Mr. Wells' testimony fails both the second and third prong of the Jones test.

In summary, the newly discovered evidence claim rests on the testimony of three convicted felons who say Vernon James made incriminating statements about the murder, the partial recanting of a co-defendant's testimony, and a lawyer's vague memories of Vernon James' several confessions. The original defense was that Vernon James did it. The jury rejected that defense and none of the above would likely have been credible enough to change that verdict in my opinion.

The next claim is that the state violated the holding of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, IO L.Ed.2d 215 (1963), when it withheld material exculpatory cvidcncc and knowingly presented false testimony. In order to prove a Brady violation the defendant must prove the following:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

United States v. Meros 866 F.2d 1304, 1308 (1 lth Cir.), cert.denied, 110 S.Ct. 322, 107 L.Ed.2d 312 (1989); &wood v. State, 575 So.2d 170 (Fla. 1991).

In his affidavit attached to the motion to vacate, John Bcrricn swears that "Back in April, 1984" he was threatened and coerced by Auburndale police officers Glisson and Knapp to make statements inculpating Melendez in the murder. The officers had a written outline of the statement they wanted Berrien to make and they coached him through his statement with frequent references to the outline. They had a tape recorder but they turned it on only after Berrien had mastered a portion of their statement. While the police were coaching and threatening him, they turned it off. They threatened his life if he did not say what they told him to say so "I just

repeated what they told me to say." Oddly, he concludes his affidavit with this: "If Juan Melendez' trial attorney had asked me about the facts stated above, I would have told him and would have testified about it during Juan Melendcz' trial."

The major problem with this so-called Brady violation is that in order to sustain it one has to believe John Berrien. I do not believe John Berrien. Berrien had at least three interviews with law enforcement regarding this murder. The first occurred on March 7, 1984 at the Lakeland Police Department. The interview was conducted by Florida Department of Law Enforcement Agent Tom Roper. Glisson and Knapp were there as was a Lakeland Police detective. The second occurred March 15, 1984 at the Auburndale Police Department. Presumably, this is the interview Berrien complains of in his affidavit and testimony. He was arrested after this interview and tnkcn to the Polk County Jail, Two days later Berrien called Det. Glisson and asked him to come to the jail because Berrien had more to say. Glisson, and eventually Roper, took a third confession at the jail. While the three statements differ in detail, they are basically the same. It is difficult to understand how Berrien's allegedly coerced statement on March 15th vitiates the statement he made on March 7th. Moreover, the police obtained the March 17th statement at the behest of Berrien himself. It seems unlikely that Berrien would summon his tormentors from Auburndale only to subject himself to further threats and coersion. One may certainly question Berrien's motives for giving these statements, but there is no credible evidence of police misconduct. None of the four elements of a Brady violation were proved. Therefore, it is adjudged:

1. That the motion to vacate judgment and sentence is denied.

DONE AND ORDERED this 17 day of July, 1996.

Dennis P. Maloney
Circuit Judge