IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,961

JUAN ROBERTO MELENDEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT I

The State's position regarding this claims relies upon three arguments: (1) that the evidence presented by Mr. Melendez in support of this claim is cumulative to the evidence at trial, (2) that the evidence presented by Mr. Melendez in support of this claim would not probably produce an acquittal and (3) that the evidence presented by Mr. Melendez in support of this claim was either previously known to trial counsel or could have been discovered by trial counsel. Each of these arguments will be addressed in turn.

A. THE STATE'S ARGUMENT THAT MR. MELENDEZ'S NEW EVIDENCE IS CUMULATIVE TO THE EVIDENCE PRESENTED AT TRIAL IS LOGICALLY AND FACTUALLY ERRONEOUS

The State argues that Mr. Melendez's new evidence is cumulative to that presented at trial because at trial the defense argued and presented some evidence that the murder was committed by Vernon James (Answer Brief at 33-35, 38) (hereinafter "AB"). According to the State, since defense counsel presented Roger Mims to testify that Mr. James confessed to committing the murder, other evidence implicating Mr. James is cumulative. The State's argument parrots one of the reasons the circuit court provided for denying relief (See PC-R2. 427 (denying relief in part because the trial jury rejected the defense theory that Vernon James committed the murder)). Mr. Melendez's Initial Brief addresses the errors in this part of the

circuit court's reasoning (Initial Brief at 51-53), but the State's brief does not address Mr. Melendez's arguments in this regard. The State fails to address the closeness of the State and defense cases at Mr. Melendez's trial, and the resulting fact that adding more weight to the defense side of the case could very well have changed the jury's view of the case. The State fails to address the concept that new evidence supporting an old fact or theory adds weight to an old fact or theory and makes it more likely that the fact or theory is true. The State's position is illogical.

The State's position is also factually erroneous. While trial counsel presented Roger Mims to testify that Mr. James confessed to the murder, the witnesses presented in post-conviction added additional details inculpating Mr. James and added credibility to Mr. Mims' testimony. Deborah Ciotti's testimony explained Mr. James' plan to rob the victim, described him going to the victim's shop on the day of the murder and described her encounter with Mr. James the day after the murder when he responded to her question regarding whether he got what he went for at the victim's by pulling money and cocaine out of his pocket (PC-R2. 91-93). Ms. Ciotti also categorically stated that Mr. Melendez was not one of the men who went into the victim's shop with Mr. James (PC-R2. 106-07). This testimony certainly does not repeat Mr. Mims' testimony, but provides additional details inculpating Mr. James and exculpating Mr. Melendez. Sandra James testified that Mr. James admitted setting

up the robbery of the victim and being present during the murder (PC-R2. 127). This testimony, too, does not repeat Mr. Mims' testimony, but provides additional details inculpating Mr. James. Janice Dawson testified that Mr. James feared that he would get life or the electric chair for his part in the murder and gave her some jewelry which he said belonged to the victim (PC-R2. 114, 115-16). This testimony also does not repeat Mr. Mims' testimony, but provides additional details inculpating Mr. James.

Finally, the State's cumulativeness argument fails to take any account of the testimony of Dwight Wells and trial counsel's comments about that testimony. Mr. Wells testified that Mr. James confessed to participating in the murder (PC-R2. 194-95). Trial counsel testified that evidence from a person such as Mr. Wells would have been significant "because certainly he carried more credibility than the inmate who was in the cell with Mr. James" (PC-R2. 297). Thus, Mr. Wells' testimony would not have been cumulative to that of Mr. Mims, but would have carried greater credibility and would have corroborated Mr. Mims' testimony. The State's cumulativeness argument ignores the facts.

B. THE STATE'S ARGUMENT THAT MR. MELENDEZ'S NEW EVIDENCE WOULD NOT PROBABLY PRODUCE AN ACQUITTAL IS LEGALLY AND FACTUALLY ERRONEOUS

The State's argument that Mr. Melendez's new evidence would not probably produce an acquittal rests upon its contentions that the testimony presented below did not exculpate Mr. Melendez (AB

at 35, 36, 37-38) and that the lower court found some of the witnesses not to be credible (AB at 35, 36, 37).

As to the State's argument that the testimony below did not exculpate Mr. Melendez, the State has ignored the trial record. The State argues:

> While [the] testimony [of Deborah Ciotti, Sandra James and Janice Dawson] incriminates Vernon James in some illegal activity, it does not even address appellant's culpability. . . . 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.

(AB at 37). The State's argument is a blatant evasion of what the trial record reflects.

The State's position at trial was that Mr. Melendez, George Berrien and John Berrien committed the crime, and the State's evidence at trial was intended to prove this. In fact, the State's closing argument urged the jury to disbelieve the evidence about Vernon James. The State argued that the jury should not believe Roger Mims's testimony about Vernon James' confession (R. 735). The State argued that trial counsel's contention that Vernon James committed the crime was "a smoke screen" (R. 736). The State then concluded by arguing that the testimony of John Berrien and David Falcon established that Mr. Melendez committed the murder (R. 738).

Evidence contrary to the State's case at trial and its closing argument exculpates Mr. Melendez. For the State to now argue that it "has never maintained the Melendez was the sole

participant in this crime" is disingenuous at best. The State did not maintain that Mr. Melendez was the "sole" participant, but certainly did maintain that Mr. Melendez and the two Berriens committed the crime and that Vernon James did not. Evidence contradicting this position is exculpatory.

In support of its argument that the new evidence does not exculpate Mr. Melendez, the State also attempts to argue that the two men Deborah Ciotti saw Vernon James pick up before going to the victim's shop might have been Mr. Melendez and George Berrien (AB at 37-38). However, the State ignores Ms. Ciotti's categorical testimony that Mr. Melendez was not one of the two men (PC-R2. 106-07). If the State wishes to accept part of Ms. Ciotti's testimony--that she saw Vernon James pick up two men and go to the victim's shop--the State should accept the other part--that neither of the two men was Mr. Melendez.

In arguing that the new evidence does not exculpate Mr. Melendez, the State has failed to consider the record as a whole and the cumulative effect of all the evidence the jury did not hear. Rather, the State wishes to take each bit of evidence piecemeal, an analysis which is contrary to the law. Mr. Melendez's initial brief sets out the law requiring consideration of the record as a whole for the three kinds of issues involved in this appeal--newly discovered evidence, Brady and ineffective assistance of counsel--but the State's brief does not even acknowledge, much less discuss, this authority (See Initial Brief at 45-47).

This authority requires that analysis of such claims includes an examination of the totality of the circumstances. Here, the totality of the circumstances includes the fact that the State's case at trial against Mr. Melendez was very weak. In such circumstances, the United States Supreme Court has recognized, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland v. Washington, 466 U.S. 668, 695-96 (1984). The State's argument that the new evidence does not exculpate Mr. Melendez has failed to take into account the totality of the circumstances, including the weakness of the State's case against Mr. Melendez.

The State argues that some of the witnesses presented below were not credible and therefore that their testimony would not probably produce an acquittal (AB at 35, 36, 37). The State argues that the witnesses who were not credible were Deborah Ciotti, Janice Dawson and Sandra James (Id.). The State does not argue that Dwight Wells was not credible (See AB at 38).

The circuit court's order was less than clear regarding which witnesses the court found not to be credible. As the State's brief notes, the court stated that "four of the five" witnesses Mr. Melendez presented were not credible (PC-R2. 426). The five witnesses the court was referring to were Deborah Ciotti, Janice Dawson, Sandra James, John Berrien and Dwight Wells (Id.). The order then discussed each witness individually, but did not identify which four the court concluded were not

credible, except John Berrien, whom the court stated "was completely unbelievable" (Id.). The vagueness of the court's order renders it an unreliable basis for denying relief.

Further, Mr. Melendez has argued that the court's credibility determinations are not supported by any legitimate reasons nor by the evidence (See Initial Brief at 55-62). As stated, any basis for these determinations is difficult to discern because of the order's lack of clarity. The State does not attempt to provide a legitimate basis in the record for the court's credibility determinations.

Moreover, in saying that "four of the five" witnesses were not credible, the court found at least one of Mr. Melendez's witnesses to be credible. The State assumes that this witness was Dwight Wells. The State then does not address the effect on Mr. Melendez's jury of the testimony from a witness whom the court found credible and who trial counsel said would be more credible to the jury than a jail inmate that Mr. James had confessed to committing the murder.

Finally, the State argues that the new evidence does not "relieve[Mr. Melendez] of responsibility for the murder" (AB at 39). This is not the test under JG Cannady. Further, the State does not address the fact that Mr. Berrien was previously unavailable to post-conviction counsel. Mr. Melendez's first Rule 3.850 motion alleged trial counsel was ineffective in failing to impeach Mr. Berrien with his deposition testimony, but

Mr. Berrien could not be found at that time to provide the additional information to which he testified below.

The State contends that there is no reasonable probability of a different outcome based upon John Berrien's testimony (AB at 46-48). First, the State contends that Mr. Berrien's testimony was "thoroughly challenged at trial" (AB at 46). This is incorrect. As Mr. Melendez's Initial Brief explains, the jury was never informed about Mr. Berrien's frequently contradictory pretrial statements to police or about his pretrial deposition.

Next, the State argues that none of the matters about which Mr. Berrien said he testified falsely at trial is material (AB at 46-47). However, on direct examination, Mr. Berrien testified that the police gave him the following information that they wanted to use against Mr. Melendez: that Mr. Berrien and Mr. Melendez had planned the robbery and that Mr. Berrien expected to get a share of whatever was stolen (PC-R2. 137); the time and date on which he took Mr. Melendez to Mr. Baker's beauty school (PC-R2. 138); and that he saw Mr. Melendez give George Berrien two rings, a watch, and a gun (PC-R2. 139). On cross-examination, the State Attorney reviewed Mr. Berrien's trial testimony to clarify what information was given to Mr. Berrien by the police (PC-R2. 160-73) . As on direct, Mr. Berrien repeated what parts of his trial testimony were false: that he had seen Mr. Melendez with .38 caliber pistols in the past (PC-R2. 163); that he saw Mr. Melendez carrying a towel when he picked him up at the beauty school (PC-R2. 167); and that Mr. Melendez gave

George Berrien jewelry and .38 caliber pistol at the train station to be sold in Delaware (PC-R2. 171-73). Mr. Berrien repeatedly testified that the police had told him what he should say and that they were the source of the information he offered against Mr. Melendez his trial (PC-R2. 137, 140, 151, 171-72, 174, 183-84).

In light of the weakness of the State's case at trial and the emphasis both sides put on assessing the credibility of the State's witnesses--matters which the State's brief does not acknowledge, much less discuss--this evidence is material. Mr. Melendez's conviction and death sentence rest on the credibility of Mr. Berrien. Thus, any information revealing that his trial testimony was false and the result of police coercion would be material to Mr. Melendez's defense. The jury that convicted Mr. Melendez never heard the evidence discussed above. Evidence relevant to evaluating a witness's credibility is material. Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 473 U.S. 667 (1985); Jean v. Rice, 945 F.2d 82 (4th Cir. 1991). Because Mr. Berrien was a key State witness who could have been impeached with this evidence, confidence in the outcome of Mr. Melendez's trial is undermined.

The only evidence offered against Mr. Melendez was the testimony of David Luna Falcon and Mr. Berrien. There was absolutely no physical evidence connecting Mr. Melendez to the crime. The State knew that Mr. Falcon was not a credible witness and effectively used Mr. Berrien to corroborate his testimony.

Therefore, the impeachment of Mr. Berrien would not only have affected the persuasiveness of his own testimony, but would have undermined the State's entire case. In addition, in the absence of physical evidence, credibility of the witnesses was the central issue at Mr. Melendez's trial.

Attorneys for both sides admitted that the credibility of their witnesses was a fundamental issue for the jury that would determine their verdict. Defense counsel's opening statement encouraged the jury to evaluate the credibility of Mr. Falcon and Mr. Berrien (R. 241, 243). The State Attorney's closing also invited the jury to evaluate the witnesses' credibility (R. 690-91). The State Attorney bolstered his key witness's credibility by telling the jury that Mr. Berrien would not tell a lie that implicated himself in the crime (R. 704). If defense counsel had known how the State secured Mr. Berrien's self-incriminating statements, he could have effectively countered the State's bolstering of its witness. The fact that Mr. Berrien's trial testimony was coerced and that he testified falsely as to certain matters was material in the context of Mr. Melendez's trial.

ARGUMENT III

As to Argument III, the State argues that an ineffective assistance of counsel claim is barred because ineffective assistance of counsel was raised in Mr. Melendez's first Rule 3.850 motion (AB at 49). The State does not discuss the facts presented below which showed that the particular grounds for the ineffective assistance of counsel claim raised in Mr. Melendez's

second Rule 3.850 motion were not available at the time the first motion was filed (See Initial Brief at 38-40). Nor does the State discuss the law holding that when evidence supporting an ineffective assistance of counsel claim was unavailable for an initial Rule 3.850 motion but later becomes available, it is proper to present an ineffective assistance of counsel claim in a second Rule 3.850 motion (See Initial Brief at 73).

The State also baldly asserts that Mr. Melendez's ineffective assistance of counsel claim is without merit (AB at 49). The State offers no discussion of the particular facts of Mr. Melendez's claim to support this assertion. When the particular facts of Mr. Melendez's claim and the trial record are properly considered, it is clear that Mr. Melendez was deprived of the effective assistance of counsel (See Initial Brief at 73-79).

ARGUMENT IV

The State's brief does not address Mr. Melendez's Argument IV. Mr. Melendez relies on his Initial Brief.

CONCLUSION

Based upon the trial and postconviction records, his Initial Brief and the discussion herein, Mr. Melendez respectfully urges the Court to reverse the lower court's order and grant Mr. Melendez a new trial and sentencing.

I HEREBY CERTIFY that a true copy of the foregoing reply brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on November 3, 1997.

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