No.: 24-6822

Appeal No.: 24-11318

District No.: 0:21-CV-62447

IN THE

SUPREME COURT OF THE UNITED STATES

Jorge Almeida—Petitioner

vs.

Ricky Dixon, Sec., FDOC—Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeal—Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Jorge Almeida

52 West Unit Drive

Sneads, Florida 32460

QUESTIONS PRESENTED

I. Almeida received Ineffective Assistance of Counsel as a result of his trial counsel's strategy of conceding guilt to lesser included offenses instead of presenting the only viable defense, "not guilty by reason of insanity."

II. Almeida was denied due process of law as a result of the Florida Supreme Court precedent which barred his use of psychiatric evidence of mental disease or defect and medical evidence of traumatic brain injury to rebut an element of each charged offense that is, specific intent or mens rea and as a corollary his trial counsel was ineffective for failing to preserve this issue for direct appeal by proffering a defense of lack of specific intent or mens rea resulting from his mental condition and traumatic brain injury.

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

TABLE OF AUTHORITIES CITED

CASES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts:**

G

The opinion of the United States court of appeals appears at Appendix  to the petition and is

[ ] reported at _____; or,
[✓] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

D

The opinion of the United States district court appears at Appendix  to the petition and is

[ ] reported at _____; or,
[✓] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was November 1, 2024.

[✓] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT

FOURTEENTH AMENDMENT

TILTE 28, UNITED STATES CODE § 2253(c)(1)(a)

RULE 22(b) FEDERAL RULES OF APPELLATE PROCEDURE

TITLE 28, UNITED STATES CODE § 2253(c)(2)

GROUND ONE STATEMENT OF THE ISSUE AND SUPPORTING FACTS

1. ALMEIDA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL[1] AS A RESULT OF HIS TRIAL COUNSEL'S STRATEGY OF CONCEDING GUILT TO LESSER INCLUDED OFFENSES, WHEN THE CONCESSION OF GUILT HAD NO CHANCE OF SUCCESS, INSTEAD THE ONLY VIABLE DEFENSE WAS A DEFENSE OF NOT GUILTY BY REASON OF INSANITY, AND THAT WAS THE DEFENSE WHICH SHOULD HAVE BEEN ARGUED.[2]

SUPPORTING FACTS

This case arises from convictions for one count of attempted first degree murder of Brandon Haynes, two counts of armed kidnapping of Haynes and Janette Lackore, his mother, and two counts of attempted armed robbery of Haynes and Lackore.

The trial record shows that the defendant accosted a college student (Haynes) and his mother (Lackore) with a gun while Lackore was showing Haynes how to drive a stick shift, and he took them to a rest stop and boat ramp where his gun discharged in a struggle, hitting Haynes in the knee. The gun then jammed, thwarting

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[1] As used herein references to ineffective assistance of counsel refer to the right to effective assistance of counsel guaranteed Almeida under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 16 of the Florida Constitution.

[2] The fill in the blank AO-241 form did not allow enough room to fully set forth the ground raised. This statement of the Ground is that upon which Almeida relies.

the defendant's attempt to fire it again. As they continued to struggle, the defendant pulled out an unopened knife. Another person at the rest area helped subdue the defendant. During the entire episode and after his arrest the defendant made a number of confused statements including that he wanted to be killed by the victims or by the police. The defense contended that the defendant did not intend to kill Haynes, and that he was guilty of lesser offenses as to the kidnaping and attempted robbery charges. (T 653-55)[3]

TRIAL TESTIMONY

Mrs. Janette Lackore testified that on December 21, 2015, she was teaching her son, Brandon Haynes, how to drive a stick shift in the parking lot at Gator Run Elementary in Weston (T 236). The school was closed, and the parking lot was empty (T 237). They put the car in reverse, drove back to the location where they had started, and she saw a man was standing outside of their jeep with a gun pointed at her stomach (T 238-239). Mrs. Lackore testified that the man asked if she wanted to live or die and told her to get in the backseat (T 239). Appellant got in the front seat and told her son to drive at gunpoint (T 240). Appellant told her son to get off at US 27 (T 241). Eventually Appellant told her son to turn into a boat ramp (T 244).

Mrs. Lackore testified Appellant told them to walk towards the picnic benches

[3] Record references are to the trial transcript unless otherwise noted.

(T 245). Appellant asked her son, "Do you want to live, or do you want to die?" (T 246). Her son said, "I want to live" (T 247). Appellant again asked her if she wanted to live or die, and she told Appellant she wanted to live (T 247). Appellant told them to keep calm, don't worry, this is all going to be like a joke and we will all laugh at this one day (T 247-248). Appellant said we have two options; kill me now, here is the gun, or you can help me (T 248). Her son immediately said, we will help (T 248). Mrs. Lackore told Appellant I can get as much money as you want from an ATM (T 248). Appellant's demeanor changed (T 248). Appellant asked where she worked, how many cars they had, and asked about their bank accounts (T 249). Appellant said he wanted the money to buy drugs (T 249).

Appellant kept looking towards the parking lot and told them we have company (T 249). Mrs. Lackore testified that Appellant asked if they wanted these people to die (T 250). Appellant told them to get back in the Jeep and he would tell them where to drive next (T 250). Mrs. Lackore testified her son asked if she could drive because this was his first time driving a stick shift (T 251). Appellant agreed (T 251). Mrs. Lackore testified she was on the driver's side and her son and Appellant were on the passenger's side (T 251). For a brief moment Appellant stepped in front of her son to open the door (T 252). She heard a commotion and saw her son on top of Appellant wrestling for the gun; her son was screaming for help (T 252). Mrs. Lackore told her

son to let Appellant go (T 252). Her son looked at her and said no, mom (T 252). Both of their hands were inside Appellant's pocket trying to get control of the gun (T 253). The gun came out, her son was trying to get the gun away from Appellant, and she heard a gunshot (T 253).

Mrs. Lackore testified Appellant was pointing the gun at her son's chest; Appellant took another shot and the gun just clicked; it didn't fire (T 254). Her son was able to take the gun away, unload the magazine, and throw it off to the side (T 254). She told the man in the SUV that Appellant had kidnapped them and was trying to kill them (T 255). Appellant took out a knife and attacked her son again, trying to kill him (T 255). Her son was able to kick the knife out of Appellant's hand (T 255). Her son held Appellant down and the man from the SUV helped hold Appellant down (T 256). Her son told her to call 911; she was so distraught she couldn't remember how to call 911 (T 256). She was very scared and had a hard time describing where they were (T 257). The 911 recording was played for the jury (T 258-265).

On cross-examination, defense counsel asked Mrs. Lackore how she knew the boat ramp was now closed to the public (T 285). Mrs. Lackore testified that as part of her therapy session, she was asked to go back to that same spot (T 285). Defense counsel asked if Appellant asked her to keep calm and Mrs. Lackore testified she was shaking a lot (T 286). When Appellant said you can kill me now, the gun was on the

table with Appellant's hand on top of it (T 287). Appellant said he was ready to die (T 288). Mrs. Lackore knew she was going to die; Appellant kept his hand on the gun (T 290-291). Defense counsel asked if Mrs. Lackore had ever made a different statement and if it would help if they showed her that statement (T 291). The State asked for a recess stating that it appears she needs one (T 292). The trial court took a five-minute break (T 292). The defense moved for a mistrial (T 292). The trial court denied the motion (T 293).

After the recess, Defense counsel asked Mrs. Lackore if she was really distraught through the whole incident and Mrs. Lackore answered, yes (T 295). Mrs. Lackore testified she saw the gun when it discharged (T 299). The second time she heard a click (T 301). When she heard the click, Appellant was pointing the gun at Brandon's chest (T 302). Mrs. Lackore testified that when Appellant was attacking her son with the knife, her son was underneath Appellant with his back on the ground (T 303). Defense counsel again asked Mrs. Lackore if she was distraught at the time (T 303).

Brandon Haynes testified they turned into a boat dock (T 320). It was a remote location off of US-27 (T 320). There were two benches and about six parking spots (T 321). Appellant walked them to the benches and told them to sit down (T 322-323). Appellant put the gun on the table (T 323). Appellant said he wanted

money for drugs (T 324). Appellant said they could either help him or they could kill him now (T 324). Mr. Haynes testified he told Appellant they would help him (T 325). Mr. Haynes testified that if he grabbed the gun, it could have been a trick and Appellant could have killed him (T 325). Mr. Haynes testified it was a very scary situation and he was thinking about how to get out of the situation (T 325). Appellant said at the end of the day, years later, they would laugh at this (T 326). Appellant asked what jobs they had and said he wanted money for drugs (T 327). Mr. Haynes testified he told Appellant he was a student and his mother was a scientist (T 327).

Appellant told them somebody just pulled in, and two people got out of the car (T 329). Appellant said if the people come over he will shoot them in the head without any thought (T 329). Appellant asked them for money (T 329). Mr. Haynes told Appellant they could go to an ATM and take out a couple thousand dollars; they did not have cash on them (T 329). Appellant agreed to go to an ATM (T 330). Appellant said he didn't want to hurt anybody, but if he had to he would kill for it (T 330). Appellant said he wasn't afraid of a shootout with the cops; he wasn't afraid of dying; he wanted money for drugs and then would take his own life (T 330).

Deputy Chris Kostrzecha testified that on December 21, 2015, he was dispatched to the scene (T 409-411). It took about ten minutes to get to the location (T 411). Deputy Kostrzecha observed the red Jeep and several people in the parking

lot (T 413). People were laying on top of the person they were holding down (T 414). Brandon Haynes and Janette Lackore told him the person on the ground was trying to shoot them with a gun (T 416). Appellant was handcuffed and placed into a police car (T 417).

Appellant was talking a lot, so Deputy Kostrzecha read Appellant his Miranda warnings (T 417). Appellant said he thought they would be easy prey (T 421). Appellant said he approached the victims in the Jeep, pulled out a gun, and told them to drive (T 421). Appellant said he ordered them to a picnic table area with the gun (T 421). Appellant said he observed two vehicles pull into the boat ramp (T 421). Appellant said he decided to order them to walk back to the red Jeep (T 421). Appellant said the male victim tackled him and a struggle ensued (T 422). Appellant said the handgun fired and jammed (T 422). Appellant said he dropped the handgun on the ground, the male victim kicked the gun away, tackled him and held him down (T 422). Appellant never mentioned a knife (T 422). Appellant said his intention in kidnapping the victims was to either be killed by the police or to have the victims kill him (T 422). Deputy Kostrzecha testified Appellant said he would have killed the victims if necessary to attain his goal (T 422). Appellant said he wanted to die (T 422). Mr. Haynes testified that appellant said he would attain his goal by killing the victims first (T 423). The gun was laying on the ground (T 423). The slide was back

slightly, and a shell casing was stuck in the slide (T 423). The magazine was laying on the ground a couple feet away (T 428). There was a knife and an unspent cartridge on the ground (T 430). Brandon Haynes had a gunshot wound to his right knee (T 436).

FACTS SPECIFIC TO CLAIM

Almeida's counsel had Almeida evaluated by two Ph.D. psychologists, Dr. Michael Gene Simonds, and Dr. Allan Ribbler. Neither doctor was prepared to give an opinion that Almeida met the Florida legal standard for insanity at the time of the offense, but Dr. Simonds did render an opinion that Almeida suffered from traumatic brain injury from a motorcycle accident and suffered from bi-polar disorder and that at the time of the offense, he was in a manic bi-polar episode, not having slept for days. Dr. Nibbler also found that Almeida suffered chronic deficits from his traumatic brain injury which affected his executive decision making functions and caused him to have abnormal emotional reactions.

Given Almeida's lack of criminal history and his professional educational and career background, this anomalous carjacking was *only* explainable as the product of a psychotic manic episode complicated by traumatic brain injury.

Defense counsel apparently was of the opinion that an insanity defense could not be presented without an expert opinion that the defendant met the Florida legal

standard for insanity and apparently did not consider the possibility of an insanity defense once the single expert found he did not meet the legal standard in that expert's opinion. The only viable defense available to Almeida on the facts of his case was insanity. No expert was required to present this defense.

Mental health experts may form opinions about a defendant's mental state. But courts do not afford any special deference to such opinions, as shown by the fact that a defendant may establish insanity without presenting expert testimony. The facts of the case, the prosecution's witnesses, lay testimony or any combination thereof is sufficient to raise the issue of insanity. Expert psychiatric testimony is not necessary to raise the issue of insanity, nor is it necessary for the state to present expert medical testimony that a defendant is sane in order to counter the defense experts' testimony regarding insanity. It is by now settled that expert psychiatric testimony is not necessarily required to establish an insanity defense and that nonpsychiatric testimony is admissible for that purpose. An insanity defense does not require the expert testimony of a psychologist or psychiatrist. Opinion testimony of experts is not necessary on the issue of insanity. Expert psychiatric testimony is not necessary to raise the issue of insanity.

Indeed, a factfinder may deem a defendant insane based on lay testimony even if an expert opines that the defendant isn't insane. Opinion testimony regarding a

defendant's sanity is not reserved for experts. Lay witnesses may also testify concerning whether in their opinion a defendant is sane or insane. Indeed, a factfinder may credit lay witness testimony over that of an expert, if it finds the lay witness testimony concerning the defendant's mental state to be more persuasive.[4]

Indeed, in the federal courts, experts are prohibited from testifying about their opinion on the ultimate issue of insanity, but this has certainly not stopped the presentation of the defense.

However, defense counsel was further deficient in failing to continue to seek an expert who would have been able to opine that Almeida was legally insane. Just because one, or even two experts decline to find a defendant insane by no means suggest that a third expert will not reach an opposite conclusion. Given the lack of any dispute that Almeida suffered from bi-polar disorder, which is a serious mental disorder, and the lack of any dispute that he was not on any medication to control this mental disorder, and further given that the evidence was seemingly clear that Almeida, not having slept in days, was in an extreme manic phase of his mental disorder, and further given his undisputed serious, traumatic brain injury and its effect

[4] Evidence of Almeida's mental condition and the presentation of the insanity defense would not have required the presentation of any expert nor could the jury have been informed that the defense had chosen to not use the experts who had rendered the adverse opinions. *Milburn v. State*, 742 So. 2d 362 (Fla. 2nd DCA 1999).

on his judgment and reasoning, and combine all of this with his actions which were so irrational, including his repeated statements that he wanted to commit suicide or be killed either by his victims or by the police, in contrast to his decades of law abiding conduct, it would seem self-evident that a legitimate expert opinion could have been obtained to support the insanity defense.

Put simply: when Dr. Simonds was unable to opine that Almeida was legally insane, a doctor should have been found who would so testify and it is reasonable to believe that such an expert could have been found had one been diligently pursued. Any reasonably competent defense counsel on the facts of this case would have continued to seek an expert until an expert were found who would support the insanity defense, and had one been obtained and used this Court cannot be confident the outcome of the trial would have been the same.

There was no real dispute as to the essential facts of the case, that Almeida had seized this mother and son at gun point and commandeered their vehicle forcing them at gunpoint to drive to a park, where he had asked to be killed, and when the son attempted to wrestle the gun from Almeida, the gun went off, striking the son in the knee.[5] The son then was able to get the gun away from Almeida, who then pulled a

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[5] The only disputed essential fact was whether Almeida intentionally tried to shoot the son. The knife attack was not disputed.

knife. The son was able to kick the knife from Almeida's hand and then began to wrestle him to the ground at which time a person who had driven up while this was happening joined in and helped the son subdue Almeida and hold him until the police arrived.

The defense closing argument focused on the fact that Almeida's underlying intent was to kill himself, that he was mentally ill and distraught. When the people drove into the park where the incident was happening, the defense argued that in the "DVD in his mind" Almeida thought these were undercover cops and he would commit suicide by cop. Defense counsel stated in closing that the jury knows beyond a shadow of a doubt he was suicidal and that guns and mental health don't mix.

Defense counsel then argued for a guilty verdict as to a lesser included misdemeanor assault as to count two and a no to the special interrogatories, same for count three, on count four she asked for guilty on a lesser misdemeanor assault, and count five, guilty of a lesser included misdemeanor assault. The defense counsel asked for a not guilty verdict on count one, attempted first degree murder, but did not tell the jury any reason why they should reach such a not guilty verdict nor did she offer any reason to support the guilty verdict on lesser included misdemeanors as to the other counts. In particular there was no explanation or reason offered in closing argument why the jury should return a no answer to the interrogatories regarding the

discharge of the firearm and the serious bodily injury arising out of the discharge of the firearm. The defense had conceded that Almeida was armed with a firearm and conceded that he had taken the mother and son at gun point and demanded money from them and that the discharge of the firearm took place when the victim tried to wrestle the gun from Almeida. So on the facts the defense conceded there was no *evidentiary* basis for the jury to return a not guilty verdict on any of the lesser included offenses and no basis to return a no answer to the special interrogatories.

The defense made a brief abandonment/renunciation argument. Abandonment was a theoretical affirmative defense to attempted murder, and attempted armed robbery, but as a matter of law was not a defense to armed kidnapping which carried a mandatory twenty-five year to life sentence with the discharge of the firearm and serious bodily injury. In other words, abandonment was an imperfect defense because it left Almeida undefendant on a life offense.

Once the defendant was found guilty of the special interrogatory of discharge of a firearm with serious bodily injury, he then faced a day for day mandatory minimum 25 year up to life sentence and the judge imposed a life sentence stating that despite the mitigation presented at sentencing, the legislature intended a life sentence for such offenses.

Had the defense used the evidence available to it regarding the defendant's

mental state and insanity, this would have been a viable defense to *all* of the charges. The defense presented was no real defense to any of the charges and was no defense at all in fact or at law to the kidnaping charges. This constituted deficient performance. The Court cannot be confident beyond a reasonable doubt that the jury would have returned a not guilty by reason of insanity defense had it been presented given the undisputed evidence that Almeida had traumatic brain injury and bi-polar disorder and was suffering a bi-polar manic episode at the time of the incident.

GROUND TWO SUPPORTING FACTS

B. ALMEIDA WAS DENIED DUE PROCESS OF LAW AS A RESULT OF THE FLORIDA SUPREME COURT PRECEDENT WHICH BARRED HIS USE OF PSYCHIATRIC EVIDENCE OF MENTAL DISEASE OR DEFECT AND MEDICAL EVIDENCE OF TRAUMATIC BRAIN INJURY TO REBUT AN ELEMENT OF EACH CHARGED OFFENSE, THAT IS, SPECIFIC INTENT OR *MENS REA* AND AS A COROLLARY HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE THIS ISSUE FOR DIRECT APPEAL BY PROFFERING A DEFENSE OF LACK OF SPECIFIC INTENT OR *MENS REA* RESULTING FROM HIS MENTAL CONDITION AND TRAUMATIC BRAIN INJURY.[6]

SUPPORTING FACTS

Almeida adopts the facts set forth in ground one above.

Binding precedent from Florida's highest appellate court at the time of Almeida's trial barred Almeida from presenting expert evidence of or otherwise present a defense of diminished mental capacity arising out of either his bi-polar disorder or traumatic brain injury or both. *Hodges v. State*, 885 So. 2d 338, 352 n.8 (Fla. 2004) ("This Court has held on numerous occasions that evidence of an abnormal mental condition not constituting legal insanity is inadmissible to negate specific intent.")

But even after the Insanity Defense Reform Act which altered Rule 704, federal

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[6] The fill in the blank AO-241 form did not allow enough room to fully set forth the ground raised. This statement of the Ground is that upon which Almeida relies.

courts have held with near unanimity that a trial court cannot bar psychiatric or other evidence to support a diminished capacity defense addressed to lack of specific intent or *mens rea*. *See* Most of the circuits that have considered the question, however, have determined that evidence of mental disease can still be used to disprove specific intent for specific intent crimes. *United States v. Cameron*, 907 F.2d 1051, 1063-66 (11th Cir. 1990); *United States v. Twine*, 853 F.2d 676, 679 (9th Cir. 1988); United States v. Bartlett, 856 F.2d 1071, 1082 (8th Cir. 1988); *United States v. Newman*, 889 F.2d 88, 91-92 & n.1 (6th Cir. 1989), cert. denied, 495 U.S. 959, 109 L. Ed. 2d 748, 110 S. Ct. 2566 (1990); *United States v. Pohlot*, 827 F.2d 889, 897-98 (3d Cir. 1987), cert. denied, 484 U.S. 1011, 98 L. Ed. 2d 660, 108 S. Ct. 710 (1988), and *United States v. LaPlante*, No. 96-1316, 1997 U.S. App. LEXIS 3687, at *2 (2d Cir. Feb. 28, 1997).

To hold otherwise would violate Due Process. Florida's blanket prohibition of such evidence and the defense itself violates Due Process. This Court cannot be confident beyond a reasonable doubt that the outcome of the trial would have been the same if Almeida had been permitted to present a diminished capacity defense attacking specific intent or *mens rea*.

Despite the holding in *Evans*,[7] a reasonably competent criminal defense

[7] *Evans v. State*, 946 So. 2d 1, 11 (Fla. 2006).

counsel would have recognized that Florida's *per se* rule prohibiting diminished capacity defenses challenging specific intent violates Due Process, and would have proffered the defense and sought a jury instruction on the defense, arguing that Almeida's right to Due Process guaranteed under the Fifth and Fourteenth Amendments was violated by Florida's *per se* rule, and had counsel done so, this Court cannot be confident that the outcome of the trial would have been the same had such evidence and defense been presented to the jury.

Almeida is entitled to issuance of a certificate of appealability as to both claims.

REASONS FOR GRANTING THE PETITION

A certificate *must* issue if the appeal presents a "question of some substance," i.e., at least one issue (1) that is "'debatable among jurists of reason'"; (2) "'that a court *could* resolve in a different manner'"; (3) that is "'adequate to deserve encouragement to proceed further'"; or (4) that is not "squarely foreclosed by statute, rule, or authoritative court decision, or . . . [that is not] lacking any factual basis in the record." *Barefoot, supra*, 463 U.S. at 893 n.4, (quoting *White v. Florida*, 458 U.S. 1301, 1302 (1982)).

III. REASONS FOR GRANTING A CERTIFICATE OF APPEALABILITY

ALMEIDA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AS A RESULT OF HIS TRIAL COUNSEL'S STRATEGY OF CONCEDING GUILT TO LESSER INCLUDED OFFENSES, WHEN THE CONCESSION OF GUILT HAD NO CHANCE OF SUCCESS, INSTEAD THE ONLY VIABLE DEFENSE WAS A DEFENSE OF NOT GUILTY BY REASON OF INSANITY, AND THAT WAS THE DEFENSE WHICH SHOULD HAVE BEEN ARGUED.

Almeida respectfully disagrees with the District Court's conclusion that Almeida enjoyed the effective assistance of counsel (see R&R paragraphs B., B. 1, and B. 2, Doc. 17, pp-13-17) with respect to counsel's concessions of guilt and failure to present any defense to a charge with respect to an offense which carried a mandatory 25 years to life sentence, given that there was an abundant record to support an insanity defense, it was a viable defense, and it would have applied to all

of his charges - nothing needed to have been conceded had the insanity defense been presented.

When counsel failed entirely to present any defense to the 25 year to life minimum mandatory charge, as a matter of logic it simply cannot be said that the failure to present an *available* defense of insanity was a reasonable strategic choice. If ever a record supported an insanity defense this record did, and for that reason Almeida respectfully disagrees with the conclusion that Almeida did not explain how the defense would have been successful. Almeida outlined in detail in his statement of facts in support of this ground the reasons why the defense would have been successful.

Dr. Simonds, an expert retained by defense counsel, rendered an opinion that Almeida suffered from traumatic brain injury from a motorcycle accident and suffered from bi-polar disorder and that at the time of the offense, he was in a manic bi-polar episode, not having slept for days. Dr. Nibbler, another defense expert, also found that Almeida suffered chronic deficits from his traumatic brain injury which affected his executive decision making functions and caused him to have abnormal emotional reactions.

Given Almeida's lack of criminal history and his professional educational and career background, this anomalous carjacking was *only* explainable as the product of

a psychotic manic episode complicated by traumatic brain injury.

That long after the incident when no longer in a manic state, confronted by the detective, he expressed remorse and wished to take responsibility for his actions, in no wise affects the conclusion *that at the time of the crazed carjacking and struggle he was suffering a bi-polar manic psychotic episode.* Rather just the opposite. The contrast only heightens the conclusion that at the time of the carjacking he was insane.

The District Court's focus on the failure to have an expert prepared to offer an expert opinion that Almeida was insane is misguided. Undersigned counsel has tried cases including an insanity defense. As Almeida noted and this Court is well aware the federal rules, which were amended after the assassination attempt against President Ronald Reagan, *prohibit* the use of expert testimony on the ultimate insanity issue. None of this frankly weakens the ability to present an insanity defense, rather it makes it easier. Jurors are not predisposed to accept expert psychiatric testimony and are more willing to apply common sense and listen to and accept lay witness testimony to determine the issue of insanity.

This was not only not a frivolous defense strategy (the District Court appears to accept that it was not a frivolous defense) - it would have been a compelling and strong defense, certainly one which meets the habeas prejudice standard. There can

be no confidence that this verdict would have been the same had an insanity defense been presented.

If this were a matter where trial counsel had presented an alternative defense to all the charges, there might be the basis to try to argue - unsuccessfully that an alternative defense strategy was a reasonable choice - but here no defense whatsoever was offered to the 25 to life charge. No defense versus a defense founded on the evidence of the case is not a reasonable and cannot be a reasonable strategic choice.

ALMEIDA WAS DENIED DUE PROCESS OF LAW AS A RESULT OF THE FLORIDA SUPREME COURT PRECEDENT WHICH BARRED HIS USE OF PSYCHIATRIC EVIDENCE OF MENTAL DISEASE OR DEFECT AND MEDICAL EVIDENCE OF TRAUMATIC BRAIN INJURY TO REBUT AN ELEMENT OF EACH CHARGED OFFENSE, THAT IS, SPECIFIC INTENT OR MENS REA AND AS A COROLLARY HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE THIS ISSUE FOR DIRECT APPEAL BY PROFFERING A DEFENSE OF LACK OF SPECIFIC INTENT OR MENS REA RESULTING FROM HIS MENTAL CONDITION AND TRAUMATIC BRAIN INJURY.

With respect to the District Court's conclusion that the second claim, the argument that Florida's prohibition on the use of a diminished capacity defense to rebut specific intent violates Due Process, is procedurally barred is incorrect, as is the District Court's conclusion that the failure to reply to the procedural bar argument in Almeida's reply to the State's response constitutes an abandonment of the claim, as is the conclusion that Almeida's claim fails on the merits. (*See* Doc. 17, pp. 17-20)

Almeida argued that his *trial counsel* was ineffective for failing to preserve the claim. Because trial counsel failed to preserve the claim it was not preserved for appeal, therefore the failure to exhaust the issue on appeal does not bar a *trial counsel ineffectiveness claim.*

Second, the District Court cites not binding authority for its curious conclusion that a failure to rebut an argument in a discretionary reply in a habeas proeceeding somehow constitutes an abandonment of a claim. If that were true then every appeal in which no reply brief was filed would be deemed abandoned. Counsel has been at this long enough to remember when replies in 2255 proceedings were not even permitted absent a special grant of permission. Certainly the amendment of the rule to *permit* reply did not thereby intend to *mandate* a reply. The State's argument was not on point. It needed no reply.

Finally, Almeida cited *United States v. Cameron*, 907. F2nd 1051, 1063-66 (11th Cir. 1990), which carefully elucidates the proper use of expert testimony regarding diminished capacity to rebut specific intent. This opinion and others cited within it provided Almeida's trial counsel with the legal reasoning needed to make the argument that he be permitted to present such evidence in his trial. That the Florida Supreme Court's blanket prohibition on the introduction of evidence to rebut

specific intent violates Due Processs would at least to this counsel appear to be self-evident and requires not new Constitutional decision from our Supreme Court. The Constitutional right is already well established and the Florida Court's decision to the contrary is an unreasonable application of the controlling precedent.

> Nonetheless, without "[signaling] any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures," we have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial. Id., at 302-303.
>
> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, *supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska*, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S., at 485; *cf. Strickland v. Washington*, 466 U.S. 668, 684-685 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

Crane v. Kentucky, 476 U.S. 683, 690 (1986).

> The proposition that due process requires a fair opportunity to present a defense in a criminal prosecution is not new. *See id.*, at 690; *California v. Trombetta*, 467 U.S. 479, 485, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984). In *Chambers*, the defendant had been prevented from cross-examining a witness and from presenting witnesses on his own behalf by operation of Mississippi's "voucher" and hearsay rules. The

Court held that the application of these evidentiary rules deprived the defendant of a fair trial. "Where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302. The plurality's characterization of *Chambers* as "case-specific error correction," ante, at 52, cannot diminish its force as a prohibition on enforcement of state evidentiary rules that lead, without sufficient justification, to the establishment of guilt by suppression of evidence supporting the defendant's case.

In *Crane*, a trial court had held that the defendant could not introduce testimony bearing on the circumstances of his confession, on the grounds that this information bore only on the "voluntariness" of the confession, a matter already resolved. We held that by keeping such critical information from the jury this exclusion "deprived petitioner of his fundamental constitutional right to a fair opportunity to present a defense." 476 U.S. at 687. The Court emphasized that, while States have the power to exclude evidence through evidentiary rules that serve the interests of fairness and reliability, limitations on evidence may exceed the bounds of due process where such limitations undermine a defendant's ability to present exculpatory evidence without serving a valid state justification.

In *Washington v. Texas*, 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967), the trial court refused to permit a defense witness to testify on the basis of Texas statutes providing that persons charged or convicted as coparticipants in the same crime could not testify for one another, although they could testify for the State. The Court held that the Constitution prohibited a State from establishing rules to prevent whole categories of defense witnesses from testifying out of a belief that such witnesses were untrustworthy. Such action by the State detracted too severely and arbitrarily from the defendant's right to call witnesses in his favor.

These cases, taken together, illuminate a simple principle: Due process demands that a criminal defendant be afforded a fair opportunity to defend against the State's accusations. Meaningful adversarial testing of

> the State's case requires that the defendant not be prevented from raising an effective defense, which must include the right to present relevant, probative evidence.

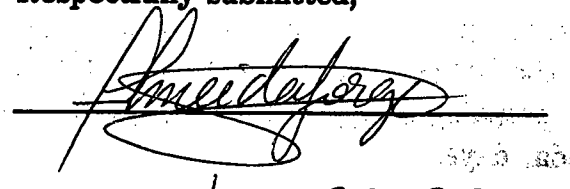
Montana v. Egelhoff, 518 U.S. 37, 62-63 (1996).

The clear trend in the decisions of our Supreme Court is to emphasize the Constitutional importance of specific intent. This is a Due Process claim *against the State of Florida* as to which the failure of trial counsel to present the argument bears first and foremost on the exhaustion question, which in turn looks to counsel's deficient performance in failing to preserve the claim, but otherwise the Due Process claim is directed against the State of Florida.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: JAN - 30 - 25