IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,494

EDUARDO LOPEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

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BRIEF OF APPELLEE

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INTRODUCTION

The State of Florida, the Appellee, was the prosecution in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. In this brief the Appellee will be referred to as the State.

Eduardo Lopez, the Appellant, was the Defendant in the Eleventh Judicial Circuit. He will be referred to within this brief as the Defendant or Appellant interchangably.

The record in this case, as prepared by the Clerk of the Eleventh Judicial Circuit, is in six volumes and numbered pages 1-1372. Transcripts, although bound separately, are numbered contiguously with the record documents. The Record on Appeal consists of pages 1-560. Transcripts consists of 561-1372. All transcript and record references will be designated (R.). Further the State, along with the filing of this brief, will move to supplement the record on appeal with the June 13, 1984 plea colloquy, designated as (SR.).

STATEMENT OF THE CASE AND FACTS

(A). Prologue

This appeal from a sentence of death comes to this Court in two distinct stages. First, the State's Motion to Enforce Plea Agreement coinciding with the Defendant's Motion to

Vacate Plea. Second, after the resolution of above two motions, the penalty phase. The enumeration of the facts and procedure will thus be divided into the two appropriate states. By necessity this statement of the facts will delete motions and proceedings not involved in the Defendant's appeal.

On June 10, 1983 the Defendant was indicted by the Dade County Grand Jury with:

> (A) 1 Count of First Degree Murder in the shooting death of Luis Reimar Perez-Vega;
>
> (B) 1 Count of Attempted First Degree Murder in the shooting of Maria Luisa Perez-Vega;
>
> (C) 1 Count of Burglary of a Dwelling at 1101 Wallace Street, Coral Gables. (R.1-3).

On June 13, 1984 the Defendant plead guilty to all three counts as charged. (SR.1-18). The plea was based upon a written plea and accepted in open court. (R.204-207). The defendant received three (3) life sentences in lieu of a death sentence. This plea agreement was signed by both the Defendant and his counsel. (R.206, 207).

Essential terms of this agreement required the defendant testify "truthfully and honestly" in all proceedings in the case as well as any proceedings against all". . .

accomplices, principals and accessories related to the case in which Luis Reimar Perez-Vega was shot and killed ...." (R.205). If the defendant failed to comply with the terms of his agreement the State's remedy was to move to vacate the sentence only and proceed with the sentence phase of a capital crime. (R.205-206). All pleas and adjudications were not to be vacated. (R.206). The defendant failed to fulfill his responsibilities, requiring his testimony in accomplice's cases.

(B). The State's Motion To Enforce Plea Agreement and the Defendant's Motion to Set Aside Plea Agreement.

On May 14, 1985 the State filed a "Motion to Enforce Plea Agreement." (R.200-260). A memorandum of law in support of the motion was filed July 19, 1985. (R.315-326). The defendant responded with "Defendant's Motion to Set Aside Plea Agreement and Memorandum of Law In Support Thereof in Response To the State's Motion to Enforce Plea Agreement" on July 22, 1985. (R.340-354). Hearings and evidence on these two Motions were heard July 22, 1985, and August 1-2, 1985. The testimony is summarized below.

Samuel Rabin

Mr. Rabin, former Assistant State Attorney, Eleventh Judicial Circuit, was the first witness. He was the chief

prosecutor first assigned to the case and identified the defendant in Court. (R.567-568). The nature of this first degree murder lead the State to actively seek the death penalty. Counsel for defendant began negotiations. (R.570).

However, the State entered into the plea negotiations because of the heinous nature of this offense and a priority that all the persons involved be brought to justice. (R.575). The State had information the defendant had not acted alone; but there were no other indictments or arrests pending at the time of the plea negotiations. (R.571). In fact as to the accomplices the State had no prosecutable case without the defendant's testimony. (R.572). So the State in exchange for the defendant's testimony against the accomplicies forewent the death penalty. (R.573). In a "nutshell" the defendant plead guilty to all three counts and received life in prison with a twenty-five (25) year minimum mandatory on the murder charge. He also received two life sentences with three year minimum mandatory sentences on the burglary and attempted murder. (R.573). The defendant was required to testify on all occassions. (R.574). Additionally, the defendant was required to take a polygraph examination. (R.588).

Mr. Rabin specifically informed, more than once, via a detective, the defendant that trial testimony was required as part of the plea.[1] (R.588-589).

[1]Both Detective Riley and Diaz are fluent in Spanish. (R.594).

Mr. Rabin emphatically stated that up until the time he left the State Attorney's Office neither the defendant nor his lawyer, Mr. Castro informed Rabin of any threats against the defendant. Furthermore, arrangements for the defendant's safety in prison could be made. (R.590).

On cross examination Mr. Rabin reemphasized that he instructed Mr. Castro, prior to the plea to explain the plea to his client. This step was taken because of the gravity of the plea and the use of a written plea agreement. (R.596-597). It was Mr. Rabin who drafted the remedy clause which embodied the plea discussions with Mr. Castro. The clause, in event of the defendant's failure to follow his agreement, permitted the State to vacate the life sentence only and empanel a penalty jury. (R.597). Even on the day of the plea, while in the courthouse holding cell the defendant was told he would have to testify in front of a jury. (R.599-600). Mr. Rabin explained the situation:

> A. It was a situation where everybody was explaining to him what was going on. It was a situation, as I recall where he was having reservations about what he was getting involved in, and everybody was kind of taking turns talking to him and explaining to him from their perspective either why he should or should not enter the plea or why he should

or what he was getting involved in. . . .

(R.600).

Matter-of-fact, the defendant assisted in the initial stages of the investigation by rendering some information and statements. (R.602). It was after the arrest of the co-perpetrators (Garcia and Felipe) that the defendant refused to cooperate. (R.603).

Andrew H. Boros

Mr. Boros was the attorney for Margarita Cantin Garcia the co-defendant with Francisco Felipe. (R.606). Trial was set for August 12, 1985 subsequent to Garcia's January (30), 1985 arrest. (R.606-607). Defendant, Lopez, was the chief witness for the State and Mr. Boros attempted to depose him. (R.607). This occurred in fact on two occassions with a court reporter present. Judge Snyder (sitting on the Garcia cse) ordered Defendant Lopez to give the deposition. (R.607). On April 16, 1985 a deposition was held in which Lopez both refused to answer questions and retracted prior sworn statements (implicating Garcia & Felipe) in the murder of Luis Reimar Perez-Vega). (R.609). He refused to hold a discussion off the record with Mr. Boros. (R.610). In fact, Lopez was uncooperative and refused to give details about Garcia's involvement. (R.611-612).

On May 3, 1985, the rescheduled deposition occurred at

the Dade State Attorney's Office, Lopez was sworn. He again recanted his statement against Felipe and refused to answer questions regarding Garcia's involvement, except to say his prior implicating statements were false. (R.615-617).[2] He said he was not going to "finger" anybody. (R.617). During this deposition Lopez was advised protection and precaution for his safety were available if he felt threatened. (R.615-616). Lopez' did not wish to testify. (R.621).[3]

Jose A. Diaz

Detective Diaz was a homicide investigator for five years assigned to CENTAL 26 - a special narcotics homicide unit. He was the lead detective in the investigation of the January 29, 1983 murder of 8 year old Luis Reimar Perez-Vega. (R.633).

The defendant swore a statement in which he stated he shot an 8 year old boy while confronting the mother. This occurred after entry was gained through a window. (R.634). The statement was corroborated with the surviving mother's identification and the physical evidence. (R.635). The defendant subsequently implicated Felipe (aka "Paco") and Garcia. There was no other evidence to implicate "Paco"

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[2] Charges agaist Felipe and Garcia were dropped. (R.615).

[3] During the deposition Lopez attempted to assault Boros and was restrained.

other than this statement. (R.635-636). Prior to the plea Detective Diaz was not able to obtain warrants for anyone else. (R.636-637).

Detective Diaz never had any problems communicating with the Defendant in Spanish. He specifically informed the defendant of his obligation to testify at trial. In fact the defendant was told this several times including by Mr. Castro, his attorney. Specifically this occurred one time in the holding cell the day of the plea.

The defendant's understanding and desire to testify are best enumerated by the fact the defendant believed he was in his predicament because Felipe (Paco) owed him money and suggested they burglarize the home. (R.639-640). Cooperation was the only way to make things right with the Reimar's family. (R.639-640). The defendant's understanding and willingness to testify is exemplified by Detective Diaz' testimony the defendant wanted to testify and knew he had to do so. That was explained to him while awaiting a polygraph test, in the police car, in the jail and in the homicide office. (R.641). In Detective Diaz' opinion the defendant clearly understood all the plea agreement obligations. (R.642).

Detective Diaz also testified regrding the defendant's knowledge of Garcia and Felipe ("Paco"). The following

questions and answer are signifiantly illuminating:

> Q. [ASA BERK]: Did you ever have discussions with Mr. Lopez, at that time, regarding the potential danger to him, if he was going to testify against these other people who were alleged murders?
>
> A. Yes, there were.
>
> Q. What did you say; what did he say; what was the discussion?
>
> A. Mr. Lopez was well aware that these people were dangerous, He mentioned it himself.
>
> He said, "I know these people are dangerous, but there is nothing else I can do. These things happen, and I feel real bad that the kid was killed. It is my obligation to do it now. That is the least I can do for the family at this point."
>
> He knew he was going to have to testify. He knew there was an element of danger involved in testifying. He discussed it with myself, with Detective Riley. I am sure he discussed it with Mr. Castro because I was present at least one time when he did
>
> (R.642-643).

Detective Diaz had a good rapport with the defendant who never contacted the Detective regarding any threats. (R.644).

Regarding the facts that precipitated the State's motion to enforce the plea bargain Detective Diaz was specific. On February 8, 1985 he went to the Dade County Jail to discuss

trial preparation and testimony. The guard brought the defendant who, upon observing Detectives Diaz and Riley, gestured and began to walked away. Detective Diaz asked the defendant what was wrong. The defendant responded if he knew that it was Diaz[4] he would not have come out. In regards to his plea agreement the defendant said: "I do not give a shit about my agreement and do not bother me anymore." The defendant walked out. (R.645-646).

On cross examination Detective Diaz was able to enumerate for counsel further explanations given to the Defendant by Mr. Castro. Specifically, Mr. Castro informed his client a guilty plea also waived the rights of appeal and jury trial. (R.648-649).

Furthermore, the defendant was "pushing" Detective Diaz to arrest Garcia and knew that he would have to testify. Finally the Detective suggested the defendant had other reasons for not testifying; specifically he was involved in an aborted planned escape attempt. The Detective could not assist the defendant in getting out of the problems the escape created. (R.652).

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[4] The defendant specifically referred to the Detective as "asshole."

William Berk

Mr. Berk is an Assistant State Attorney in the Eleventh Judicial Circuit who, in late December, 1984 or early January 1985, became involved in this case involving the defendant fullfilling his agreement. (R.655). Mr. Rabin turned the full case responsibility over to him. (R.655-656).

Felipe ("Paco") had been arrested and Mr. Berk wished to prepare the defendant for his deposition as well as to review the plea agreement. The Defendant was reluctant to testify and expressed "surprise" at the 25 year minimum mandatory. So a Spanish speaking investigator from the State Attorney Office reviewed the agreement with the defendant. Again, he was reluctant to talk. (R.656-657). Then Mr. Berk had the court interpreter translate all the documents and statements into Spanish (approximately one to two inches of documents) and delivered them to the defendant. (R.657). The defendant's attitude was he had not been advised of the 25 year minimum mandatory. (R.657).

Most germane to the pending motion was Mr. Berk's testimony regarding threats against the defendant. Specifically, at no time did either the defendant or Mr. Castro indicate any threats were made against the defendant. In fact, the first time any mention of threats occurred was at the hearing. In cases where a defendant

testifies against a co-defendant Mr. Berk was always concerned with the informant's safety. He gave the defendant a card with contact information specifically including a Spanish speaking investigators number. (R.658-659). Further, in the May 3, 1985 deposition the defendant was told he would be protected if he had been threatened. (R.662). At that time the defendant refused to cooperate in accordance with his plea agreement. Only "Paco" was under arrest. Garcia had not been arrested.[5] (R.660-661).

The defendant refused to meet with Mr. Berk on January 29, so Investigator Alonso (State Attorney's Office) accompanied Mr. Berk on January 30. The defendant saw them and walked away refusing to talk. (R.661). This lead to Detective Diaz'contact (as described above). (R.661).

On cross examination Mr. Berk unequivocally stated that the State actively was seeking the death penalty at the time of the plea. (R.676).

Eduardo Lopez

The defendant took the stand. (R.682-745). He indicated that he understood English, but wanted a perfect Spanish translation. (R.682). He stated he only spoke with

[5] Garcia was arrested later on that night, January 30, 1985 (R.661).

Detective Diaz and Assistant State Attorney Berk. He alleged he was never informed of an obligation to testify in front of an audience instead he thought his testimony was to be in front of the assistant state attorney and attorney. Further, had he known testimony meant "in court" he would not have accepted the plea. (R.685-87).

He testified to several alleged incidents in which he claimed he was threatened. (R.688-690). Regarding one of the alleged threats he gave conflicting accounts of the location where the threat occurred, i.e. either the baseball diamond or BTU Dormitory 24. At any rate he did not give the threat much importance. (R.690-1). The defendant does not know Garcia or her family and never had personal contact with them. In fact he was never afraid of them. (R.693-694). On cross-examination the defendant could not identify any Garcia family member of whom he was afraid. (R.728-729).

He further claimed Mr. Castro had represented that a life sentence meant seven (7) years although he also stated he understood Castro because they both spoke Spanish. (R.697, 698). The Defendant while being cross examined responded to the Assistant State Attorney's question in English. (R.709). The defendant recanted his confession to Detective Diaz. (R.719). He lied to get "Paco" in trouble.

Finally, regarding the plea colloquy he answered yes to

the Court's question - that he had discussed the agreement with his attorney just to get rid of the "whole thing". (R.741).

William Castro

Mr. Castro was the defendant's attorney during the plea negotiation. (R.768). During the pretrial stage the defendant maintained his innocence claiming he was outside the residence. (R.771). Since the State sought the death penalty and the defendant maintained his innocence counsel did not approach the State for a plea. (R.772). However, approximately 10-14 days before the plea the defendant contacted counsel. (R.773). At that time the defendant changed his "story" admitting he was the murderer. (R.775). This new statement lead to a different evaluation of the case. First, it would be hard to present a contrary version. Second, it would be hard to acquit the defendant (this was true with the original version). Last, the probability of a conviction and affirmable sentence of death increased. (R.776-777). It was the defendant, who, then initiated the request for counsel to engage in plea negotiations. (R.773).[6]

Counsel also testified he and Lopez understood each

[6] The strategy of saving his client from the electric chair was reaffirmed on cross examination. (R.810-811).

other and that he explained all the plea terms to the defendant. (R.784). No one in the case ever promised a seven year sentence or anything less than 25 years to the defendant. (R.778,787). The defendant was told the 25 year minimum mandatory was without parole. (R.787). The last paragraph of the agreement was explicitedly explained to the defendant in Spanish[7]

All the terms and consequences of the plea were explained. (R.786). Of course, this included the remedy if the defendant failed to aide by the plea requirements. (R.789). This included the term he would have a jury as to the death penalty only (the defendant reneged on his agreement).

The requirement the defendant had to testify was also explained. He was in fact "itching" to testify because he wanted to make sure the persons who orchestrated his predicament paid. The defendant was quite willing to "point the finger". (R.784-785). Also included in this explanation was the exchange of the sentencing bill of particulars, in case of a death sentencing phase. (R.789-90). Counsel was satisfied that, prior to the plea, the defendant knew and understood all the plea terms. (R.791). He anticipated no problems based on the negotiations and discussions (R.792).

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[7] This clause certified all the terms and conditions of the plea were explained to the defendant. (R.206).

On June 13, 1984 the defendant handed counsel written questions regarding areas of the plea the defendant previously stated he understood. (R.792-793). Discussions were held (R.794). As a result of the discussions counsel formed the opinion that the defendant was "pulling my leg" as to his lack of understanding. (R.797). The defendant appeared to be fidgeting as he kept referring to the sentencing guidelines and the 25 year sentence. It was counsel's opinion the defendant would be evasive as to his understanding of the 25 year minimum mandatory. (R.799).Based on the "alleged" misapprehension of the defendant a conference was held and the agreement was "clarified." (R.801). Counsel drew a graph for the defendant describing how the sentences would run. (R.801-803). The defendant said he understood. (R.803).

The defendant never informed counsel of any fears of reprisal.

The plea agreement colloquy thereon occurred June 13, 1984.

Subsequent to the plea the defendant contacted Mr. Castro, via Castro's investigator, and stated he was pleased with Castro's performance and wished to pay him. The fee was declined as Mr. Castro was court-appointed.

Counsel withdrew when the defendant refused to perform under the agreement. (R.806).

After hearing the evidence and arguments of counsel. (R.826-860). The Court orally ruled:

> (1) The defense Motion to Vacate the sentence was Denied;
>
> (2) The State's Motion to Enforce the plea was Granted.
>
> (R.861).

The Court specifically found the defendant's version of the facts not credible. Further, the defendant's refusal to testify was willful and he refused all offers of protection. Last the Court held the Colloquy was the best evidence of the events. (R.862).

C. The Sentencing Phase

(1) The State's Case

The State gave its opening statement. (R.875). The defendant waived opening statement. (R.888).

In the case-in-chief the State, without objection, entered into evidence certified copies of the judgements for attempted murder and burglary (State Exhibit 1, R. 422). The Court took judicial notice of those judgment documents (R.888-889). A stipulation as to ballistic evidence was also

entered. (R.890).

The State then presented testimonial evidence.

Daniel Eydt

Detective Eydt, a Metro Dade Police Officer was a crime scene investigator on January 29, 1983. He arrived at the crime scene, 1101 Wallace at 4:20 a.m. to process the scene.[8] (R.891-2).

Upon arrival he began to photograph, sketch the scene and dust for latent prints. (R.892). A variety of crime scene photographs were also introduced into evidence. (R.432-456) without objection. (R.895). Additional photographs were introduced. (R.895-903).

Detective Eydt dusted for fingerprints. The window outside the northwest bedroom was open and several prints were recovered. (R.901). Burnt and ignited matches were found in the south east, north west, master bedroom; along the north wall floor. (R.908-909).

Specifically, the master bedroom showed the bed strewn with the covers partially on the bed and and partially on the

[8] The Detective assisted Detective Stone in collecting evidence. Detective Stone was deceased at the time of the hearing. (R.920).

floor. The north wall sliding door cabinets were open. One live .22 caliber cartridge was found on the floor west of the waterbed. (R.912-913). Two spent casings and three live cartridges were recovered at the scene. (R.913-914). The Detective decribed how a .22 caliber semi auto pistol ejects cartridges and casings. (R.916-917). Projectile fragments were entered into evidence. (R.924). A blood soaked pillow case was introduced into evidence. (R.921-922).

Maria Perez-Vega

"The victim's mother and a victim herself".

The Background

Mrs. Perez-Vega had been in the United States 6 1/2 years and was the mother of four (4) children: Yvette (19); Jeanette (17); Sharron (16) and Reimar (8), the victim. (R.935-936; 940). She had been married to General Reynaldo Perez-Vega of the Nicaraguan National Guard, who was murdered during the Sandanister revolution. (R.936). The General, after the birth of Reimar, purchased the house at 1101 Wallace Street, Coral Gables.

After the revolution Ms. Perez-Vega moved her family to the United States and the house in Coral Gables. (R.937). At first she had a savings account. This account along with an investment in a small restaurant were the financial support for the family. However, because of her lack of experience in restaurant endeavors she lost her money. (R.938).

Her cousin had a lucrative business taking Spanish speaking visitors from Latin America and Mexico shopping. (R.938). The business was not related or connected to narcotics trafficking. (R.939). It was her cousin who initiated her into the tourist business by giving her the

less lucrative accounts. Ms. Vega received either a 10-15% commission from the retail outlets or a flat fee. The tour guide activities would include, in addition to clothes shopping, medical care and entertainment. Ms. Vega, at first made $15-$20 per day, but the fees went as high as $200 per day. (R.939-941).

It was through one of her customers that she met Zulie Paz. Zulie Paz, a Venezuelian, became Ms. Vega's best customer. She would purchase clothes, often $3,000 every month to six weeks, to take back to Venezuela. Ms. Paz and a son or daughter would stay with the Vegas. At one point Ms. Vega met Rafael Paz, Zulie's husband at the Holiday Inn on Red Road. (R.942-943). She had no business or personal relationship with Rafael. (R.944).

Zulie upon arriving in the United States, would call and ask Mrs. Vega if they could go shopping. (R.944). Occassionally, Zulie would ask if they could stop to pick up som money owed her husband. (R.945, 988-989). They would stop, Zulie would go in alone and come out grinning. (R.945). Zulie would always spend large amounts of cash. (R.946).

She later learned that the money came from drug transactions; although she never observed Zulie involved in any narcotics transactions. (R.946). This information came from Zulie's brother. (R.945).

On January 1, 1983 Mrs. Vega received a telephone call from Rafael who was alone and wanted to come over. Rafael, Raul Gomez and Anna Rose arrived in two cars. As the three approached the house Raul gave Rafael a small bag. Rafael entered the house alone, Raul and Anna said "Happy New Year" and left. (R.947-949). Rafael stated he had to go shopping and did not trust hotels. He took the package, sat at a coffee table and began to count money from the bag. (R.949-951). Twenty minutes later Rafael asked where he could leave the money. He nosily walked through the house. It was placed in a closet as Mrs. Vega had no safe. There was nothing wrong in holding the money. Rafael was returning to Venezuela and needed that countries currency. He gave Ms. Vega $4,000 and asked her to exchange the money. (R.953-954).

Rafael left saying he would return in an hour. Ms. Vega and Jeanette locked the house and left for the airport to exchange that $4,000.[9] The money was exchanged, the Vegas stopped at a bakery and returned home. (R.955).

Upon returning from the airport Mrs. Vega discovered the house had been ransacked. The back door was opened, as was the window in the converted (garage) bedroom; but no windows or doors were broken. Most important Rafael's money was gone! It was through this open bedroom window that three

[9] It was Sunday and the banks were closed. (R.953).

burglars entered Mrs. Vegas home on the tragic day January 28, 1983. (R.955-956).

Rafael returned and Mrs. Vega informed him of the burglary. He specifically refused to let her call the police and left. Rafael returned with Raul who never came into the house. Paz repeatedly said he was ruined. Finally, Paz requested that should anyone from Venezuela call Mrs. Vega should explain what happened. (R.957-958).

The next day at 6:00 a.m. Paz telephoned and put a female on the line. Ms. Vega explained the burglary. Then Paz accused Ms. Vega and next her daughter Yvette of theft. (R.958-960). Later Zulie called and appologized for her husband. (R.961).

Zulie's brother later explained to Mrs. Vega that Rafael purchased marijuana from "bajitos" (peasants) on promises to pay later. Paz always returned without money; but with stories of police seizures, or lost money. The peasants were pressuring him. (R.960-962). Mrs. Vega never heard from Paz' after that last telephone call. (R.962).

The Murder

On the evening of January 28, 1983 Mrs. Vega's daughters went out leaving Reimar and herself alone. The house was

clean with no indications of cigarette smoking in the house. (R.963-964). She and Reimar watched "t.v." and he fell asleep. Mrs. Vega aroused her son he was so sleepy, she helped him to the bathroom. Reimar wanted to sleep in his mother's bed, because his sisters were not home and he wished to take care of his mother. Mrs. Vega brushed her teeth and her son had already fallen asleep in the bed. She laid down next to her son and fell asleep. They were alone in the house. (R.968-969).

Mrs. Vega, who has no eyesight problems, was awaken by the ceiling light in her room. At first she believed her daughters were home. She looked at the door and saw three individuals enter her room. Mrs. Vega sleeps face down and in an instant felt a hand on her mouth and one on her head. (R.969). The defendant was at her side immediately. (R.995). From the corner of her eye she looked up and saw her assailant's face. In Cuban Spanish she heard a voice say, "Quiet, Quiet." She felt something against her temple, it was a long barreled handgun with a silencer.[10] She bit the hand over her mouth as she was suffocating. The defendant said "I'm going to let go be quiet." "What do you want?" There was no response. A voice from behind her said "Kill her, kill her", she screamed for her children and jerked. Her son awoke and said "Leave my mommy alone. Dam

[10] Mrs. Vega was familar with firearms because of her late husband's position in the military. (R.936).

you; leave my mommy alone." She felt an explosion a"blah" resounded in her head. (R.969-972).

Reimar was awake and on his knees, on the left side of the water bed. (R.983). A voice said "Kill him, kill him" Reimar said: - "Dam you, Dam you leave my mommy alone." There were two "blah" noises then snoring from Reimar. (R.974).

Someone lifted her nightgown but saw Cuban "good luck beads" around her waist. One of the persons in the room said "Look here", three times in Spanish. They became frightened and left. (R.975-976). The entire shooting incident took less than a minute. (R.995).

There was some additional noises in the house so Mrs. Vega laid still, dazed and bleeding with her eyes closed. Finally, she grabbed the wall, struggled up and could see the front door was open. With a bullet wound in her head she called "911" for assistance. (R.977).

The paramedics would not allow her back into her bedroom with your son. He was taken to Children's Hospital and she to Doctor's hospital. She was released to be with her son. Reimar had no brain waives - he was dead; but on artificial life support for organ donor purposes.

During the murder investigation Mrs. Vega informed Detective Diaz of the entire incident and relationship with the Pazes. (R.980).

Mrs. Vega described the shooter to Detective Diaz. The defendant was the only person she saw face to face. She only saw the other two figures dressed as men. One looked like a mullato black. (R.992-994). It was the defendant who stood next to her and was the sole person threatening her. (R.984). Detective Diaz, several months later, showed her a photographic line-up. She identified picture 4, the defendant, as the shooter, without a doubt. (R.981-982)

William McQuay

Mr. McQuay spent 18 of the last 20 years as a fingerprint examiner with the Metro Dade Police Department. (R.1003). As an "expert's expert" he responds to crime scenes if evidence is difficult to collect. (R.1007). On January 29, 1983 he responded to the Vega's house. (R.1006). There were several "block prints" on the outside wall of the Vega residence beneath a window. (R.1007). The prints were found, lifted and collected by Technician Stone.[11] The latent prints were compared to standards of the defendant. The result was a positive identification. (R 1013)

[11] The evidence was admitted. (R.1008-1012).

A stipulation was entered to the report of Dr. Gopinath Rao regarding the examination of a hair sample. (R.1024).

John Marraccini

Dr. Marraccini, formerly of the Dade Medical Examiner's Office, currently works as the Chief Deputy Medical Examiner in Palm Beach County. He was stipulated to be an expert. It was the Doctor who performed the autopsy on Luis Reimar Perez-Vega. Reimar died of a gunshot wound to the head. (R.1025-1026).

The bullet entered 1/4" from the top of the head and 3/8" to the post midline to the back of the head. Once in the head the bullet richoceted inside the skull, right to left, back to front, slightly downward. It collided with the base of the skull inside, left. (R.1035-1036)[12]

The residue on the hair, stippling, was consistent with a gunshot wound within 18 inches. (R.1038). Bruises on the victims arms and chest were consistent with the murder time frame and the victim being held by the armpit or chest. The murderer stood above the victim, who was on his knees, turning his head away, when he was shot. (R.1040-1042).

[12] The doctor collected the bullet and other evidence. (R.1033-35) (State Exhibits 48-54).

Jose Carrerro

Mr. Carrerro has known the defendant since 1982 or 1983. In February, 1983 the defendant and Garcia were at Luis Maldonodas house at 2:00 or 3:00 p.m. The defendant and Garcia said they entered a house to get money and fired shots at a boy and his mother. (R.1047-1051). The defendant admitted this was done to eliminate witnesses. (R.1056). The defendant always carried a firearm. (R.1072).

Jose Diaz

Detective Diaz was assigned as the lead investigator in this homicide. Mrs. Vega indicated this matter may have involved Paz and narcotics. However, his investigation indicated Mrs. Vegas was not involved in drug trafficking. An investigation revealed Paz was heavily involved in the importation of cocaine into the United States. (R.1073-1076).

The defendant became a suspect based on information from Jose Hung. (R.1078). As a result a photo line up was shown to Mrs. Vega who positively identifed the defendant. (R.1078-1079). The defendant was arrested by the detective May 23, 1983. (R.1080).

The defendant understood written and spoken Spanish. He was read and waived his constitutional rights. At first he

denied all knowledge of the shooting except for what he heard in the media. However, he gave the detective information not released to the media. (R.1082-1086). After being shown a photo of Reimar the defendant told a different story, which was repeated for a court reporter via a professional translator. (R.1087-1090). That statement was admitted into evidence as State Exhibit 56. (R.1092; 476-500).

The defendant detailed the shooting in his statement. His friend "Paco" (Felipe) was involved in illegal drugs. Paco asked him if he wanted a job collecting $52,000 owed Paz by Vega (who the defendant never met). (R.1102-1104). The defendant's job was to search the house for the money. The defendant met with Paco who showed him the victim's house. (R.1105). Afterwards Paco returned him to their point of origin, the Lion's Club, and said good luck. The defendant "got back" with Tingo (a friend). In Tingo's car they cased the house again. They returned to the Lion's Club, and were informed the family had left. Paco wished them luck. (R.1109-1011).

They went back to the Vega's the defendant broke the glass. Tingo thought someone was home. The defendant walked around the house and rang the doorbell three or four times. The defendant entered, Tingo stayed outside. (R.1112-1113). Once inside the defendant turned on the bedroom lights. He then entered the other bedroom where the

"incident occurred" he turned on the light, Mrs. Vega screamed, she jumped him. The defendant said he only wanted money and a struggle ensued, the gun fired two or three times. The defendant left. (R.1113-1115). The pistol was dropped behind an 8th Street business club. (R.1116). (The gun was never recovered. (R.1120)). After the shooting the defendant accused Paco of framing him. A week later he was called to the telephone by Paco who put him in touch with Paz. Paz said he had a gift for him, but would not say where he was except he had to go on a trip. (R.1117-1118).

Later in 1984 the defendant contacted the Detective by telephone, requesting to meet him. It took several days to make contact; however, when they met the defendant said he had additional information. (R.1221-1222). The defendant declined his attorney's presence. (R.1123-1124). During this new statement the defendant denied being in the house but implicated Paco and others. The defendant said he was to be the lookout. (R.1124-1126). It should be noted that the defendant's look out role, was to stand at 8th and Wallace and light a match if the police came, was not possible. The house could not be seen from that street location. (R.1126).

Detective Diaz testified, on cross examination, that his investigation revealed Garcia dressed like a man and was suspected of being involved in armed robberies. Lopez and Hung also gave information on Garcia. (R.1113-1139). The

defendant was part of this group. His street reputation was that of con man, robber and vessel size load of marijuana smuggler. (R.1140). The defendant himself threatened to kill Paco. (R.1141).

Furthermore, the Detective's investigation lead him to believe "Tingo" was Garcia. (R.1144). The defendant never indicated he was dominated or threatened by anyone. (R.1147).

(2). The Defendant's Case In Mitigation

Alfredo Lopez

Mr. Lopez, a former police officer turned private investigator. (R.1188). He testified regarding his investigation.

The defendant appeared to be a family man, who showed Mr. Lopez letters and cards, drawings from his family in Cuba. The defendant sent money to Cuba with a Ms. Alvarez. The defendant said he would not kill a child. In fact he never heard the defendant was violent. (R.1197-1198). Apparently the defendant was not a disciplinary problem in the Dade County Jail. (R.1199). The defendant appeared to be remorseful when they talked. (R.1200).

On cross examination he admitted he could not attest to the authencity of the documents the defendant showed him. (R.1205). The defendant never mentioned Garcia by name except there was one capable of killing him in prison. (R.1213).

Nelson Delgado

Mr. Delgado testified he knew the defendant from employment at an air conditioning company. (R.1227-1228). The defendant was a hard worker and learned fast. He spoke of his family. (R.1229-1230). On cross examination, the witness said he did not socialize with the defendant outside of work. (R.1240). Further, he had no contact with the defendant after the defendant left the company. The defendant had a strong character and was not afraid to tell people anything. It was not in the defendant's character to be dominated. (R.1232).

Antonio Vega

Mr. Vega was the defendant's foreman at the SOLO air conditioning company. He became familar with the defendant through work in 1980-81. (R.1234-1235). The defendant arrived early, was not sick often, or lazy. His work was satisfactory and he talked about missing his family. (R.1237-1238). However, Mr. Vega did not socialize with the

defendant. The defendant was intelligent as he learned quickly. Finally, the defendant wasn't the type to be dominated. (R.1238-1239).

Robert Alvarez

Mr. Alvarez was a 14 year old junior high student. He knew the defendant through his father. Robert and his friends would visit the defendant's cafe often. He would never charge them for food. Finally, he was never afraid of the defendant. (R.1240-1243).

Dr. Syvil Marquit

Dr. Marquit spent 50 years in the area of clinical psychology. (R.1244). He spent 15 plus hours examining the defendant. (R.246). He administered tests and derived most of his opinion from interviewing the defendant.

He first administered the WAIS-R (Weschler Adult Intelligence Scale-Revised) to the defendant. As a result of the eleven different tests he believes the defendant did not understand things when you talked to him. (R.1251-1253). On cross examination he admitted that "cultural bias" was a criticism of the WAIS-R test; especially when applied to blacks. That bias may apply to Spanish speaking persons. (R.1268-1269). In fact he prorated two of the eleven parts

of the test because they did not apply. (R.1271).

The defendant was also administered the Bender-Gestalt design test. That test is responsive to persons with "inner conflicts". As a result of this test it was clear the defendant was not brain damaged. (R.1257).

Dr. Marquit also administered the Rorschach ink blot test. The defendant's intelligence was below average, in the 80-90 range. Average is considered 90-110. (R.1258-1260).

The doctor could not elicit anything from the defendant that was relevant to violent behavior. (R.1260). His behavior was contrary to violence because he appeared to have a close relationship with his mother.

The doctor, on cross examination, conceded that his opinions based on the interviews were based on the defendant's truthfulness. (R.1266). If in fact the defendant had shot the victim (Reimar) or attempted to execute the mother those things would be significant. (R.1277; 1280-1).

There was no evidence the defendant was dominated by his cellmate Joe Paterno (a reputed mafia chief).

Dr. Marquit recognized as an authoritative work the DSM-III, a scheme for classifying mental diseases. The

defendant had no disease listed in the DSM-III and he was not emotionally disturbed. (R.1271-1273). He further testified the defendant was not insane and was competent. The defendant appreciated the criminality of his acts. (R.1273-1274).

(3). The State's Rebuttal

Detective Diaz

The detective testified he received telephone calls from the Defendant in August or September, 1984. The defendant admitted he had been involved in a planned escape attempt from the Dade County Jail. (R.1290-1291). Because the defendant could not depend on either his wife or girlfriend for money he became involved. The defendant was friendly with an allegedly dishonest guard who was going to supply the defendant, on behalf of some narcotics dealers, a key. The defendant was to receive $20,000. (R.1291-1292).

Both the State and the defense rested. (R.1299).

Arguments of counsel were heard. (R.1300-1340-the State) (R.1342-65 the defense).

On February 13, 1986 the defendant was sentenced to death. (R.530-542). Apparently, the transcription of the actual sentencing hearing was not completed. This hearing has

been ordered by the State. The record on appeal will be supplemented.

POINTS ON APPEAL

The State respectfully rephrases the points on appeal as:

I.

WHETHER THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO VACATE THE GUILTY PLEA AS THE DEFENDANT DID NOT ESTABLISH "GOOD CAUSE".

II.

WHETHER THE TRIAL COURT CORRECTLY REFUSED TO SET ASIDE THE KNOWING AND INTELLIGENT GUILTY PLEA AND INSTEAD ENFORCED THE PLEA BARGAIN.

III.

WHETHER THE TRIAL JUDGE COMMITTED NO REVERSIBLE ERROR WHEN HE DID NOT ORDER A COMPETENCY HEARING AS THE RECORD REFLECTS THE DEFENDANT WAS COMPETENT.

IV.

WHETHER THE TRIAL COURT'S SENTENCING ORDER CORRECTLY FOUND THAT THREE STATUTORY AGGRAVATING FACTORS EXIST; OF THESE THE DEFENDANT ONLY CHALLENGES "WITNESS ELIMINATION" WHICH WAS ESTABLISHED BY DIRECT AND CIRCUMSTANTIAL EVIDENCE BEYOND A REASONABLE DOUBT.

V.

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S REJECTION OF ALL THE DEFENDANT'S MITIGATING EVIDENCE THEREFORE, THE DEATH SENTENCE SHOULD NOT BE VACATED.

SUMMARY OF THE ARGUMENT

The defendant has presented five issues for this Court's review: two of these review his guilty plea; one his competency and two his sentence. This Court should deny relief on all five issues.

I.

The defendant entered into a written plea bargain. Terms of the bargain permitted the defendant to enter a guilty plea and receive a life sentence to capital murder. In exchange for the life sentence the defendant had to testify truthfully in all trials and proceedings against two co-defendants. Failure to testify permitted the State to vacate the life sentence only and proceed to a penalty phase advisory jury. The defendant refused to testify.

He challenged his plea. The trial court denied him relief. His argument before this Court establishes he failed to establish good cause to vacate the plea. He relies on facts which were resolved, based on his lack of credibility, against him. These facts are discussed and refuted in detail within the main argument.

II.

The trial court correctly held the defendant's guilty plea and bargain were knowingly and voluntarily made. This

Court's decision in Hoffman v. State, 474 So.2d 1179 (Fla. 1985) controls.

The plea was made in open court. Terms of the plea were discussed in Court and the defendant understood them. All the parties including the judge signed the plea bargain. A review of the plea colloquy clearly establishes the plea was voluntary and knowing. Clearly, the evidence elicited at the evidentiary hearing estblished there were no misunderstandings.

III.

The trial court committed no error by not ordering a competency hearing. The defendant exhibited no behavior which demonstrated he was incompetent. In fact his own expert witness stated the defendant was competent.

IV.

The trial court found three aggravating factors and no mitigating circumstances. The defendant only challenged the aggravating factor of "witness elimination". The facts showed the murder of 8 year old Reimar was motivated by the desire to eliminate him as a witness. The defendant admitted that the murder was effecuated to eliminate the witness. The record facts support the Court's order. Even if there exists error in finding this one aggravating factor any error was harmless.

V.

The essence of the defendant's last point is the trial court should not have rejected his mitigating evidence. Finding of mitigating circumstances is solely the province of trial court reversal can not be based upon the defendant's different conclusion. The facts show the defendant was competent, the victim's mother was not a narcotics trafficker; and the contemporaneous convictions for the attempted murder of Mrs. Vega negated the defendant's lack of prior record.

This Court should affirm the guilty plea and sentence of death.

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO VACATE THE GUILTY PLEA AS THE DEFENDANT DID NOT ESTABLISH "GOOD CAUSE".

The defendant contends the trial court's refusal to allow him to withdraw his plea for "good cause" was an abuse of discretion. However, his point is meritless. He ignores the nature of the plea bargain and of the evidence and the trial court's factual findings after an evidentiary hearing. A discuss of the plea bargain and the evidence will show this Court it should affirm.

The factual predicates of this case involves a plea bargain and a guilty plea. Guilty pleas in death penalty cases are not unique in and of themselves. Mikenas v. State, 460 So.2d 359 (Fla. 1984); Holmes v. State, 374 So.2d 944 (Fla. 1979) cert. den. 446 U.S. 913 reh. denied. 448 U.S. 9101 (1980).

In summary the nature of this plea bargain was the State agreed to allow the defendant to plead guilty. In exchange for the guilty plea the defendant would testify in all cases against two co-defendants whom the defendant's testimony was the only evidence of their involvement. The defendant would be to sentenced to life in prison (a 25-year minimum mandatory); however, failure to testify against the co-defendants would lead the vacating of the life sentence and

the empaneling of a sentencing jury. The defendant refused to testify. Therefore, the State moved to enforce his plea bargain via vacating the sentence. The defendant countered allegedly he had good cause to vacate his plea.

A guilty plea maybe withdrawn:

> . . .court may, in its discretion, and shall upon good cause, at any time before a sentence, permit a plea of guilty to be withdrawn and, if judgment, and allow a plea of not guilty, or, with the consent of the prosecuting attorney allow a plea of guilty of a lesser included offense, or of a lesser degree of the offense charged, to be substituted for the plea of guilty.
>
> [Emphasis added]
> F.R.C.P. 3.170(f)

It is the defendant's burden to establish that "good cause" existed on which he maybe allowed to withdraw his guilty plea. Onnestad v. State, 404 So.2d 403, 405 (Fla. 5th DCA 1981); Adler v. State, 382 So.2d 1298, 1300 (Fla. 3 DCA 1980). The appellate review standard of the trial court's denial is abuse of discretion. Onnestad, supra , Adler, supra.

In the case at bar the trial court held a combined evidentiary hearing on the State's "Motion to Enforce Plea Bargain" and the Defendant's motion to withdraw his plea. The trial court at the close of all the evidence made the following findings:

(1) the defendant's version of the facts were not credible

(2) the defendant's refusal to testify as he agreed to do was willful;

(3) the plea colloquy was the best evidence of the defendant's plea.

(R.861-2). The State's motion was granted and the defendant's denied. (R.861).

The defendant appears before this court and argues facts which the trial court clearly resolved against him based upon witness credibility. Witness credibility is determined solely by the trier of fact. Johnson v. State, 380 So.2d 1024 (Fla. 1979); Giuliano v. State, 46 So.2d 182 (Fla. 1950).

A brief review of the facts presented by the witnesses supports the State's position. The State will refute each of the factual allegations contained in the defendant's brief.

The Defendant Spoke No English

It is true the proceedings were translated from Spanish to English. However, the defendant ignores the following exchange during his cross examination:

> [ASA] Q. Do you remember the Judge asking you -- let me back up for a minute.
>
> Mr. Lopez, have you had a chance to review the transcript of your plea of guilty with your attorney?
>
> A. As I said, if that is what you send me, I tore it up and I threw it in the wastebasket. I told you not to send me anything.
>
> Do you remember?
>
> MR. BERK: I would like the record to reflect that Mr. Lopez said, "Do you remember, in English.
>
> [Emphasis added)
> (R.709).

The defendant also at the outset of his direct testimony indicated he understood English, but wanted a perfect Spanish translation. (R.682). Therefore, his claim he did not understand English is directly refuted by the record. [13]

The Defendant's Competency

The defendant cites to record references from Dr. Marquit's testimony to support this proposition. Without discussing the meritlessness of the doctor's testimony suffice it to say that evidence is derived from the subsequent penalty phase and was not presented to the trial judge at the motion to vacate hearing. During the plea

[13] The State submits even if the defendant did not understand English he has not challenged the Spanish translations; thus, his point is meritless.

colloquy the defendant was essentially found competent. (SR 15). His contention here is without substance.

The Defendant's Understanding of the Plea Agreement And That He Never Contemplate A Death Sentence

The defendant's counsel at the time of the plea testified the defendant first approached him regarding a plea bargain. (R.773). At that point in time (10-14) days before the plea) the defendant dropped his claim he was innocent and admitted being the killer. (R.775). It was the defendant's desire to avoid the death penalty. During the course of he plea negotiations counsel clearly explained all the terms and consequences of the plea to the defendant. (R.786). This especially included the fact he was required to testify. (R.784-785). In fact the defendant was itching to testify (R.784-785). The explained terms also included that should the defendant renege on his promise he would get a jury trial only on the death penalty. (R.789-790).

These facts along with the trial court's finding the defendant's claim he did not understand was not credible refutes the defendant's contention.

Trial Counsel's Alleged Persuasion

The defendant blindly alleges counsel persuaded him to take the plea. He cites no facts to support this allegation. Once again the trial Court's finding the defendant was not credible refutes this allegation. Trial counsel testified the defendant understood the plea, its effects and all the terms. (R.791). In fact he anticipated no problems on June 13, 1984 the day of the plea.

On the day of the plea the defendant questioned counsel as to the plea agreement which he previously stated he understood. (R.792-793). They discussed the plea and counsel formed the opinion that the defendant was "pulling my leg" as to his lack of understanding. (R.797). In fact the defendant was deliberately being evasive as to his understanding the life sentence. (R.799). Further explanations were held. (R.801-803). The plea was entered. (SR.1-18).

As a result the defendant's allegation is not supported by the record.

Threats by Co-defendant Garcia

The defendant testified he was threatened twice while in jail. (R.688-690). Specifically, he was "afraid" of reprisal by co-defendant Garcia. However, his testimony even if

believed totally refutes his contention he was threatened by the co-defendant. The defendant gave conflicting accounts of where the "BTU" threat occurred; either on the baseball diamond or in dormitory 24. Most importantly the defendant did not give the threat much importance. (R.90-691).

The State submits the alleged threats from co-defendant Garcia were so amorphus as to not be "good cause". The defendant could not identify any Garcia family member of who he was afraid. (R.728-729). He said he did not know Garcia or her family and had no contact with them. (R.693-694). Finally, Detective Diaz testified the defendant knew "these people are dangerous". He wanted to testify. (R.642-643).

Clearly, the facts as outlined above establish the defendant failed to establish "good cause". Therefore, the trial judge did not abuse his discretion in denying the defendant's motion.

The State suggests the defendant changed his mind and did not wish to go to prison as an informant. A change of mind does not constitute good cause for purpose of F.R.Cr.P. 3.170 (5).

Therefore, the State requests this Court affirm the trial courts ruling not to vacate the guilty plea.

II.

THE TRIAL COURT CORRECTLY REFUSED TO SET ASIDE THE KNOWING AND INTELLIGENT GUILTY PLEA AND INSTEAD ENFORCED THE PLEA BARGAIN.

The issue here involves the voluntary nature of a plea bargain initiated by the defendant. At the heart of the issue is the nature of plea bargaining and the ability of a defendant to receive benefits from a plea bargain. As a result of the plea bargain here the defendant got a life sentence instead of death contingent upon his complete testimony against two co-defendants. The defendant was the sole source of evidence by which the State was to bring all three killers to justice.

Plea bargaining itself involves:

> . . .each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange.
>
> [Footnote omitted].
> Mabry v. Johnson, 467 U.S. 504, 508, 104 S.Ct. 2543, 81 L.Ed. 437, 443 (1984).

The State, because of the heinous nature of this crime, actively sought the death penalty against the defendant. (R.570). It was the defendant who initiated plea negotiations when he requested Mr. Castro to do so. (R.773).

Because of the nature of this murder the State desired to prosecute all the perpetrators. (R.575). Information existed that the defendant did not act alone; however, without he defendant's testimony there was no prosecutable case against the potential co-defendants. (R.571-2). Negotiations ensued and plea bargain was reduced to writing. (R.204-07). The agreement was signed by the defendant, his lawyer, the Assistant State Attorney and the judge. (R.206-207).

The terms of this agreement provide three concurrent life sentences, including one for the capital murder of 8 year old Luis Reimar Perez-Vega. In exchange for the State no longer seeking the death penalty the defendant agreed to testify truthfully in all proceedings against all parties involved in the murder. (R.205). Should the defendant fail to testify the guilty plea and adjudications would not be vacated. However, the State could move to vacate the life sentence and proceed with the empanelling of an advisory jury for a penalty phase. (R.205-206).

Formal acceptance of this plea occurred when the trial court held the plea colloquy. (SR1-18). The Court after reviewing the agreement with defendant specifically said:

> THE COURT: I am going to accept your plea of guilty and find that you, Eduardo Lopez, are now alert, intelligent, that you understand the

> nature of the charges against you and appreciate the consequences of pleading guilty.
>
> The Court finds the facts are sufficient to sustain your plea and that your decision to plead guilty was freely, voluntarily and intelligently made; that you have had the advice and counsel of a competent lawyer with whom you are satisfied.
>
> (SR.15).

Finally it was clear the Court and all the parties intended to be bound by this agreement, as the Court and defendant exhanged.

> THE COURT: I have signed the agreement. Enter the agreement now as part of the record.
>
> I would like to leave Mr. Lopez with these few parting words, and that is this. Just hang on a second before he is printed.
>
> When you made the comment about your life, Mr. Lopez, you were probably correct when you made that statement, and I will tell you that if you violate the agreemeent that you have entered into today and the matter is brought back before me, that I will impanel an advisory jury and go through the entire acts and circumstances in this case and if that jury had come back and recommended to me or I find that the aggravating circumstances outweigh the mitigating circumstances, your life may be exactly what is at question.
>
> Do you understand that?
>
> THE DEFENDANT: Yes.

THE COURT: Okay.

(R.16-17).

Formal acceptance by the Court bound all the parties. See, Harden v. State, 453 So.2d 550, 551 (Fla. 4th DCA 1984).

The facts of this plea bargain are similar to those in Ricketts v. Adamson, 483 U.S. ___, 107 S.Ct. ___, 97 L.Ed.2d 1 (1987). In Ricketts, the Supreme Court sustained a capital conviction which resulted from a vacated second degree murder plea when the defendant failed to live up to a plea bargain. The Court held the reinstitution of the death charge did not violate double jeopardy. Similarly, this defendant's sentence only was vacated when he willfully refused to testify in accordance with his plea agreement. Therefore, the United States Supreme Court has approved the type of plea bargain sub judice.

This Court's opinion in Hoffman v. State, 474 So.2d 1179, 1182 (Fla. 1985) appears to be on practically all four corners with this case at bar. In Hoffman this Court held:

> Hoffman's next argument is that the state improperly sought the death penalty to punish him for not giving testimony against a co-defendant. In support of this contention appellant shows us that before trial, in exchange for a promise of a recommendation of life sentences, he agreed to plead guilty to the two first-degree murder charges and testify against Mazzara. When appellant

> later reneged on the agreement to testify, the state withdrew from the bargain and proceeded to prosecute him on the charges. Appellant's argument is without merit.
>
> Hoffman had the choice of abiding by the plea agreement or not. When he refused to go along, the agreement became null and void s if it had never existed. A defendant cannot be allowed to arrange a plea bargain, back out of his part of the bargain, and yet insist the prosecutor uphold this end of the agreement. Ehl v. Estelle, 656 F.2d 166 (11th Cir. 1981), cert. denied, 455 U.S. 953, 102 S.Ct. 1459, 71 L.Ed.2d 669 (1982).

As in Hoffman the defendant here wants to have his cake and eat it too. The trial court gave the defendant exactly what he bargained for when he plead. His willful refusal to testify got him a sentencing hearing. This Court should affirm.

This Court has held a guilty plea must be knowingly and voluntarily made to be valid. Mikenas v. State, 460 So.2d 359, 361 (Fla. 1984); Holmes v. State, 374 So.2d 944,947 (Fla. 1979). The best evidence of the voluntariness of a guilty plea was found in the colloquy.

The Court conducted an extensive plea colloquy. (SR.1-18). As part of the colloquy the court specifically inquired if the defendant knew what sentence was reflected by the agreement. The defendant answered yes to concurrent life

sentences. (SR.10-11). Furthermore, the Court had the State attorney review the written plea agreement terms during the colloquy. (SR.9-10). The Court made specific findings the defendant's pleas was ". . .freely, voluntarily and intelligently made. . . ." with the advice of counsel. (SR.15).

The issue regarding the voluntariness of the plea is resolved by Mikenas, 460 So.2d at 361:

> Concerning appellant's second point. the law is that a plea guilty must be voluntarily made by one competent to know the consequences of that plea and must not be induced by promises, threats or coercion. Hooper v. State, 232 So.2d 257 (Fla. 2d DCA 1970); Young v. State, 216 So.2d 497 (Fla. 2d DCA 1968); and Reddick v. State, 190 So.2d 340 (Fla 2d DCA 1966). The record shows that appellant's pleas was not the result of promises, threats or coercion.
>
> As for appellant's third point, due process requires that a court accepting a guilty plea carefully inquire into its voluntary nature. Boykin v. Alabama, 395 U.S. 238, 243-244, 89 S.Ct. 1709, 1712-13, 23 L.Ed.2d 274 (1969). When appellant entered his pleas, Florida Rule of Criminal Procedure 3.170(j) set forth the procedure to be followed to satisfy the due process requirements enunciated in Boykin. Under Florida Rule of Criminal Procedure 3.170(j), trial courts are charged with determining on the record "that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness. . . ." We find that the April 12th plea hearing sufficiently complied with this rule. The plea was taken in open court and was properly

> recorded. The record reflects that appellant understood the nature of the charges against him and the consequences of his plea. Contrary to appellant's assertions, the plea hearing was not superficial and the trial judge asked questions in such a manner that appellant would fully understand the significance of his plea and its voluntariness.

A review of the plea colloquy and the plea agreeement establish, as did the Mikenas record, the defendant's guilty plea was voluntary and should not be aside.

It is the State's position this Court need examine no other documents than colloquy and the written plea agreement in order to resolve the voluntariness of the plea. However, the defendant refers to several facts which he claims support the involuntariness of his pleas. First, he claims had he known his testimony was required he would not have plead. This position was rejected when the trial court, as a fact finder, held the defendant's version of his plea was not credible. The colloquy refutes this contention (SR.9-11) and as did the testimony of Mr. Castro (R.784-785), Mr. Rabin (R. 599-600) and Detective Diaz (R.639). Second, the defendant claims he did not understand English. This factual allegation was disposed of in the prior point on appeal. Additionally, every proceeding was translated so his claim is of no import. Third, he claims his counsel lied to him regarding the plea. The trial court found him to not be credible thus he that fact can not be relitigated here.

The defendant cites several cases which stand for the proposition a guilty plea should be vacated if based upon misunderstanding. These cases are clearly distinguishable.

In Forbert v. State, 437 So.2d 1079 (Fla. 1983) the defendant plead to an illegal sentence so that he never got that which he bargained for. The defendant sub judice got what he bargained for, a sentencing hearing.

In Ritchie v. State, 458 So.2d 877 (Fla. 2 DCA 1984) the defendant was out of the courtroom when facts out of the Court's control and essential to his plea were resolved. He acted on those facts in pleading. The defendant before this Court was present before the Court when all the facts regarding the plea were discussed.

Costello v. State, 260 So.2d 1981 (Fla. 1972) was cited for the proposition under the facts of that case the defendant did not freely and voluntarily plead guilty because his Court appointed lawyer represented the judge would not sentence him to death. No such promises were made by Mr. Castro to his client. In fact the defendant knew failure to testify would lead to a penalty phase hearing. (R.789-790; SR.17).

Coon v. State, 495 So.2d 884 (Fla. 2 DCA 1986) is distinguishable because the trial court "did not make

clear. . .the consequences if she did not so testify." Id. at 885. The defendant sub judice indicated he understood that the judge would empanel an advisory jury if the refused to testify. (SR.17).

This Court should affirm the trial court's order holding the defendant freely and intelligent plead guilty.

III.

THE TRIAL JUDGE COMMITTED NO REVERSIBLE ERROR WHEN HE DID NOT ORDER A COMPETENCY HEARING AS THE RECORD REFLECTS THE DEFENDANT WAS COMPETENT.

A review of the facts and the application of this Court's decisions in Trawick v. State, 473 So.2d 1235 (Fla. 1985) and Agan v. State, 503 So.2d 1254 (Fla. 1987) demonstrate the defendant's point is wholly without merit.

In Agan, 503 at 1255-1256 this Court held:

> On his first point appellant asserted that he was not competent to enter a plea and that the trial court at the time the guilty plea was entered should have ordered expert evaluation of his competency. Appellant relies heavily on the decisions of the United State Supreme court in Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); and Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), and this Court's decision in Hill v. State, 473 So.2d 1253 (Fla.1985). The principle of law stated by these decisions is that a trial court, on its own motion, must order inquiry into the defendant's mental competence to stand trial (or, as in this case, to formally respond to criminal charges) if there is evidence, information, or any showing before the court that raises questions concerning the defendant's competency. Appellant says that his behavior before the trial court did raise

> questions so there should have been a professional evaluation and hearing on competency.

This standard was also set forth in Trawick 473 at 1238. This Court must look to the facts which conclusively show the defendant exhibited no behavior which would call in question his competency.

At the outset the defendant ignores the penalty phase testimony of his own expert Dr. Syvil Marquit. Dr. Marquit testified the defendant was competent, sane, not emotionally disturbed and had not classifiable mental disorders. (R.1271-1274).

The record establishes that defense counsel filed a motion for appointment of mental health experts. (R.356-358). That motion was granted by the trial (R.359). The order was a standard evaluation for sanity, competency and involuntary hospitalizations. (R.359). The results of the experts regarding the competency evaluation are not in the record before this Court. Of course the only inference possible is the experts found the defendant competent.

He also ignores the plea colloquy in which the trial court found defendant alert and intelligent. (Sr.15). Instead he cites the fact the defendant stated he was confused by the plea agreement. (R.697). Of course, this

position was rejected when the trial court ruled the defendant's version of the plea was not credible. As such the proffer of this fact carries no weight here. Finally, the defendant offers out of context the trial court's warning the defendant and his counsel regarding the defendant's method of answering questions. A review of the defendant's answers to cross examination questions shows he was being evasive. He responded clearly to direct examination questions.

The facts here are even less indicative of a competency issue than Trawick, supra (the defendant was despondent and thought of suicide) or Agan, supra (a confession of guilt does not make a defendant incompetent). Therefore, this Court should hold the trial court committed no error.

IV.

THE TRIAL COURT'S SENTENCING ORDER CORRECTLY FOUND THAT THREE STATUTORY AGGRAVATING FACTORS EXIST; OF THESE THE DEFENDANT ONLY CHALLENGES "WITNESS ELIMINATION" WHICH WAS ESTABLISHED BY DIRECT AND CIRCUMSTANTIAL EVIDENCE BEYOND A REASONABLE DOUBT.

The trial court in it sentencing order found the three statutory aggravating factors of:

> (1) Prior conviction for a capital felony or felony involving violence (F.S. §921.141(5)(b);
>
> (2) the murder was committed while the defendant engaged in a burglary §921.141(5)(d);
>
> (3) the murder was committed for the purpose of avoiding arrest or detection §921.141(5)(e).
>
> (R.539-40).

The defendant challenges only the last "witness elimination" factor. He raises the challenge on the alleged lack of proof which supports this aggravating factor. In doing so he relies on material misstatements of fact.

The law regarding witness elimination of non law enforcement victims to avoid arrest is clear. This Court reiterated the standard in Clark v. State, 443 So.2d 973 (Fla. 1983) cert. denied. 467 U.S. 1210, 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984):

> The burden is upon the state in the sentencing portion of a capital felony trial to prove every aggravating circumstance beyond reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). Not even "logical inferences" drawn by the trial court will suffice to support a finding of a particular aggravating circumstance when the state's burden has not been met. In regard to the third circumstance listed above, in order for a witness elimination motive to support finding the avoidance of arrest circumstance when the victim is not a law enforcemen oficer, "[p]roof of the requisite intent to avoid arrest and detection must be very strong." Riley v. State, 366 So.2d 19, 22 (Fla. 1978). We have also said that an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for murder was the elimination of witnesses. Menendez v. State, 368 So.2d 1278 (Fla. 1979).
>
> [Emphasis added.]
> 443 So.2d at 976.

Accord: Oats v. State, 446 So.2d 90, 95 (Fla. 1984). Proof of the "dominant or only motive" may be direct or very strong circumstantial evidence. Rivers v. State, 458 So.2d 762, 765 (Fla. 1984). The direct circumstantial evidence unequivocally establishes the defendant murdered Reimar Vega to eliminate him as a witness. The relevant portion of the order is reproduced here:[14]

[14] The State has bracketed appropriated record references which support the trial court findings.

Finally, the State has proven beyond a reasonable doubt that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effectuating an escape from custody. It appears, Reimar Perez-Vega was murdered to eliminate him as a witness, either to the burglary, or to his mother's murder. Even though the intent of the Defendant and his accomplices as to buglarize the home of Maria Perez-Vega, the prepetrators carried the necessary weapons to eliminate any possible witnesses to their crime. Both Maria Perez-Vega and Reimar Perez-Vega were shot at close range with a semi-automatic small caliber weapon with a silencer.

Generally, when the victim of a murder is not a police officer, the proof of the intent to avoid arrest and detection by murdering a possible witness must be very strong before such murder can be considered to be an aggravating circumstance. Hooper v. State, ____ So.2d ____ 10 F.L.W. 393;95 (Fla. 1985). The State has met this high burden. Even if it were to be considered that Maria Perez-Vega was not shot to eliminate her as a witness, it is beyond doubt that Reimar Perez-Vega was murdered to eliminate him as a witness, either to the burglary, or to his mother's murder.

In Hooper, supra, the Court affirmed the Defendant's death sentence upon the trial court's finding of the applicability of F.S. 921.141(5)(e), where the mother and child were murdered by the Defendant in their home and another child was severely hurt by the Defendant. In this case, Lopez attacked Maria Perez-Vega who was in bed with her son, Reimar. **[R.968-74].**

According to Maria's unrefuted testimony, Reimar witnessed the shooting. He tried to intercede by begging, please don't hurt my mommy", **[R.969-972]** he was then held by his

> armpits as Lopez pointed the gun at him. **[R.1040-42]** The Defendant misfired four times as the child screamed for his mother's life. **[R.913-16; 974]** Finally, Reimar was executed with one shot at close range to the back of the head. **[R.1025-26; 1035-6; 1038]** Like Hooper, supra, Lopez killed the victim to eliminate him as a witness. Also, like Hooper, Lopez made an extra effort to guarantee the death of the child.
>
> Finally, Defendant's own admission is sufficient proof that he committed the murder to eliminate a witness to the burglary. Johnson v. State, 442 So.2d 185 (Fla. 1983). Jose Carreno-Carmona testified that he heard the Defendant and Margarita Cantin Garcia discussing the murder a few days after it was committed. According to Carreno-Carmona, Lopez said they had to kill the child because "they could not leave any witnesses behind." **[R.1056]**.

The State submits that above record references which support the factual findings of the Court established beyond a reasonable doubt the defendant murdered Reimar to eliminate him as a witness. This was the dominant or only motive to kill Reimar.

The defendant claims the shooting was accidential this is refuted by both his guilty plea to first degree murder and the trial court's finding Mr. Lopez's version not credible.

Finally assuming in arguendo, this Court eliminates factor three the death sentence cannot be vacated because

there were not any mitigating factors. Dufour v. State, 495 So.2d 154, 163 (Fla. 1986). Therefore, any error was harmless.

Therefore, this Court should affirm the sentence of death.

V.

THE RECORD SUPPORTS THE TRIAL COURT'S REJECTION OF ALL THE DEFENDANT'S MITIGATING EVIDENCE THEREFORE, THE DEATH SENTENCE SHOULD NOT BE VACATED.

Although the defendant has couched this claim in the terms of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) that is not the crux of his claim. The defendant's claim is centered around the trial judge's rejection of the mitigating evidence.

This Court held in Daughterty v. State, 419 So.2d 1067, 1071 (Fla. 1982) that ". . .it is within the province of the trial court to decide whether a particular mitigating circumstance in sentencing has been proven and the weight to be given it." Clearly the review of the record establishes the defendant presented a plethora of mitigating circumstances. (R.1188-1274). His objection to the court order is the judge did not find his mitigating evidence credible. "Finding or not finding a specific mitigating circumstance applicable is within the trial court's domain, and reversal is not warranted simply because an appellant draws a different conclusion." Stano v. State, 460 So.2d 890, 894 (Fla. 1985) cert. den. 471 U.S. 1111, 105 S.Ct. 2347 85 L.Ed.2d 863 (1985). Finally, the facts below demonstrate there was a proper basis for rejecting the offered mitigating evidence.

The Defendant's Mental State?

His claim rests on his claim he suffered from extreme mental or emotional disturbance and he could not appreciate the criminality of his acts. However, Dr. Marquit, the defendant's own witness concluded he was: not emotionally disturbed; sane and competent. (R.1271-74). Therefore, the Court properly rejected this mitigating evidence.

The Victim's Mother A Drug Dealer?

Detective Diaz's unrefuted testimony showed he investigated Mrs. Perez-Vega and concluded she was not involved in drug trafficking. (R.1073-76). Therefore, the trial court correctly rejected the defendant's contention.

No Prior Criminal Episode?

As this Court held in Wasko v. State, 505 So.2d 1314, 1317-1318) (Fla. 1987):

> Contemporaneous convictions prior to sentencing can qualify as previous convictions of violent felony and may be used as aggravating factors. Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984); King v. State, 390 So.2d 315 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981); Lucas v. State, 376 So.2d 1149 (Fla. 1979). These cited cases,

> however, involved multiple victims in a single incident or separate incidents combined in a single trial. E.g., Johnson (attempted murder of deputy while fleeing from scene of robbery/murder); King (attempted murder during escape several hours after robbery/murder); Lucas (single incident resulting in murder of one victim and attempted murder of two others). In this case, on the other hand, the trial court depended on Wasko's contemporaneous conviction of attempted sexual battery upon the murder victim to find prior conviction of violent felony in aggravation. This case, therefore,is factually distinguable from other cases where a contemporaneous conviction has been found to be proper support for this aggravating factor.

In the case before this Court the Defendant was convicted of the contemporaneous attempted murder of the victim's mother. This aggravating factor sufficiently negated any lack of prior criminal conduct.

This Court should affirm the sentence.

CONCLUSION

Based upon the above facts discussion and authorities this Court should affirm the guilty plea and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICES

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **MICHAEL B. CHAVIES**, Esquire, 2650 S. W. 27th Avenue, Suite 300, Miami, Florida 33133 on this 7th day of March, 1988.

RICHARD L. KAPLAN
Capital Collateral Coordinator

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