IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,494

EDUARDO LOPEZ,

Appellant,

VS.

THE STATE OF FLORIDA,

Appellee,

APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT
OF FLORIDA IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

The Appellant Eduardo Lopez, was the Defendant in the Trial Court, the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, and the Appellee will be referred to as the State.

The following symbols will be utilized:
The symbol "R" will designate the Record on Appeal; the symbol "Tr" will designate the Transcript of Trial Proceedings; the symbol "Ex." will designate the Supplemental Record of Duplicate Trial Exhibits; and the symbol "A" will designate the Appendix to this Brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND OF THE FACTS

Eddie Lopez, death row inmate, is yet another victim of underworld life in Miami. The circumstances which placed him on death row embrace the inability of our society to control the outrageous profitability of drug trafficking.

Eddie is a Mariel refugee who sought a better life in America. He worked cooperatively and well with fellow employees in the air conditioning installation business.

Tr. Vol. VII, Pgs. 1227-1239,(Testimony of Nelson Delgado and Antonio Vega, co-workers). He became able to purchase a small, (Defendant characterized it as a "little hole in the wall") Cuban style cafeteria. (R. 485) he befriended children, giving youngsters he knew and their friends free meals. (Tr. Vol. 1240-1243 Testimony of Robert Alvarez, age 14). Eddie stayed in regular touch with his own children back in Cuba. Tr. Vol. VII, Pg. 1230, L 5-11, Testimony of Delgado).

By his own admissions, we know that Eddie got caught up in the drug underworld. (R. 476-500). Defendant's statements to Detective Diaz on the date of the arrest (May 23, 1983) introduced in evidence by the State at second sentencing proceeding, December 4, 1985, (Tr. Vol. VI, Pg. 1092) Money was owed to Eddie by an associate for transactions in marijuana, (Tr.Vol. I, Pg. 624 L 9-14, Testimony of Detective Diaz) . Eddie was offered the

opportunity to recover that money. (R. 480) The acquaintance who owed Eddie the money, Felipe, had information from a Colombian drug dealer, Rafael Paz, that a local (Miami) woman, Maria Perez-Vega, had stolen Rafael's money. The amount of her theft was in excess of Fifty Thousand Dollars. All Eddie would have to do would be to steal it back from her house. (R. 486)

The sad consequence of this multi-layered drug related rip off was the 29 January, 1983, death of Maria Perez-Vega's eight year old son, Raimar. On the evening of January 29, 1983, Mrs. Perez-Vega's three older daughters drove away from their home, located at 1101 Wallace Street, Coral Gables, Florida, together. Tr. Vol. V, Pg. 963, L 4-11 [Testimony of Maria Perez-Vega] & R. 491-492 [Eddie's statement to Det. Diaz]) There is no evidence suggesting that Eddie Lopez knew the total number of people who lived at Maria's residence. During his May 23, 1983 statement to Diaz he said that he had been told the house was occupied by Mrs. Maria Luisa Perez-Vega and two other girls. (R.489 & again at 496). This lends credibility to his testimony that when three females were seen leaving the residence he belived no one was left in the house. R. 491. Eddie said he believed that somebody in the home had caused the window to be partly open. Therefore, Tingo, (a.k.a. Rogelio, a.k.a. Piti) rang the bell. No one answered (R.Page 492) That three females did leave the house

Several hours before the incident is the undisputed testimony of Mrs. Perez Vega. (Tr.Vol. V, 963).

In Eddie's original version of the events to Det. Diaz he said he was the only one to enter the residence. He explained he did not fire to injure anyone, that he did not know how many times the gun was fired and that "..honestly, I would like for the record to reflect that what occurred was not because I really wanted to do it." (R.497) Nothing in the record contradicts the inference that Eddie reasonably believed that all the residents of the house had left prior to his entry.

Maria, remained at home with her son, Raimar. The two of them went to her bed and fell asleep. Maria was awakened when the light was turned on by burglars. Within a few minutes she had been shot and Raimar had been fatally wounded. (Tr.Vol. V, 968-974 & 976)

On a tip, (Tr.Vol. VI, 1078 L 10) Eddie's picture was shown in photo line-up to Mrs. Perez-Vega. He was selected as the one subject she could identify. (Tr.Vol.VI, 1078 L 13-Page 1079 L 15) She recalled two other strangers being present in her bedroom at the time of the incident. The tipster who fingered Eddie was the person Eddie had called as his friend to the Dade County Jail to take possession of his belongings. (Tr.Vol. VI, 1120 L 13 22).

Eddie was arrested on May 23rd, 1983. (Tr.Vol. VI,

1080 L 1) Detective Jose Diaz of the Metro Dade Police Department was the lead officer assigned to the case. The only signed statement taken from Eddie was taken by Det.Diaz on the date of the arrest. That statement appears in the record at 476-500. Defendant, Eddie was indicted on June 10th, 1986 for first degree murder (R.1-3) The indictment also charged him with attempted first degree murder (count II) and burglary of a dwelling (count III). William Castro, Esquire, was appointed to represent Eddie. Mr. Castro filed twenty five motions on Eddie's behalf (R. 14-17 and 29-122) Those motions included a motion to suppress confessions or admissions of Defendant (R. pgs. 62-63), a motion to dismiss the indictment (R. pgs. 76-78) two motions to declare F.S. 921.141 unconstitutional (R.Pgs. 114-116). The only record on the proceedings or rulings upon those Motions is the clerk's notations of the court's May 8, 1984 rulings which appear on the faces of the motions.

At the request of his client, Mr. Castro approached Mr. Rabin, Assistant State Attorney in an effort to obtain a plea agreement which would avoid the possibility of imposition of the death penalty. (Tr. Vol. III, Pg. 773 L 5-22) Mr. Castro's fee affidavit reflects that his plea discussions with Mr. Rabin took place on June 1st, 1984 for one half hour and with Eddie and Detective Diaz on June 7, 1984 for one hour.
(R. 189) On June 13th, 1984, a written plea agreement was entered into. It was sined by Samuel J. Rabin, Assistant State Attorney (its author; see Tr. 201 & 202.
William Berk, Assistant State Attorney, William Castro, Special

Appointed Assistant Public Defender, The Defendant, Eddie Lopez, and D. Bruce Levy, Circuit Court Judge. There is no translator's certificate.

The agreement appears in the record at Pgs. 123-126.

Among the provisions of plea agreement, Eddie:

A. "...agrees to testify truthfully and honestly on any and all occasions when called upon to do so, as to his full and complete knowledge of the facts and circumstances surrounding the crimes in which the Defendant is involved, and to which the Defendant has agreed to plead guilty." (R. 124, Para. 4)

B. "...agrees to take polygraph examinations whenever called upon to do so by the State of Florida or any of its agents." (R. 124, Para. 5)

C. "...agrees to testify truthfully and honestly in all proceedings in this case and in any other case involving accomplices, principles and accessories related to the case in which Luis Raimar Perez-Vega was shot and killed by the above named Defendant and Maria Luisa Perez-Vega was shot and seriously injured by the above named Defendant. The Defendant's testimony shall include but not be limited to pre-trial hearings, depositions, statements and trial proceedings." (R. 124, Para. 6)

As purported consideration for Eddie's fulfilling his

obligation, he was to be sentenced to:

A. Life imprisonment with mandatory minimum term of twenty five years for the alleged first degree murder.

B. Life imprisonment with mandatory minimum term of three years for the alleged attempted first degree murder with a firearm.

C. Life imprisonment with a mandatory minimum term of three years for the alleged armed burglary with assault, of an occupied dwelling. All sentences were to run concurrently.

A plea colloquy was conducted by the Court. Upon a finding that the Defendant was "...alert, intelligent and that he understood the nature of the charges...", the Court accepted the plea agreement and sentenced the Defendant in the agreed upon manner. (Supp. Record, Tr. of June 13, 1984 proceedings, also see June 13, 1984 Judgment (R. 423, 424 and Sentence (R. 425-428).

The record reflects that the motive of the Defendant for entering into the agreement was sparing himself the possible infliction of the death penalty. (Supp. record, Tr. of June 13, 1984, Pg. 7 L 25 and see Judge Levy's comment, Pg. 17, 12, 14).

The State, by its entry into the agreement, took the position that the possibility of successful prosecution of additional persons for the death of Raimar Perez-Vega was more important than the infliction of the death penalty upon the person it believed to be the shooter. As Mr Rabin said, "... it was in the best interest of the state

and in an effort to obtain the arrest and convictions of all other individuals involved in this criminal episode. (Supp. Record. Pg. 14 L. 10-13)

Rafael Paz, the person who the State contends was the instigator of the several events leading to Raimar's death, was not indicted. This was so despite the State's theory, expressed at the second sentencing proceeding by A.S.A. Berk that "...we know that this was a Machiavellian[sic] plot by Rafael Paz to do in Maria Luisa Perez-Vega, certainly not to do in her son. I think the evidence is clear that it was his [Rafael Paz's] intention to have her assassinated." (R. Tr. Vol. VII, Pg. 1301 L 8-12)

The immediate accomplices of Eddie Lopez in the commission of the offense were arrested and charged. Felipe was arrested July 12, 1984, and Margarite Cantin was arrested January 30, 1985.

Beginning in February of 1985, Eddie became reluctant to testify or to otherwise assist the State. Between the time of his plea of guilty and February of 1985 , Eddie exhibited, according to Detective Diaz, a pattern of being helpful and of assistance. (Testimony of Diaz, Tr. Vol.1, 652 L 4-20) The State contended that Eddie had breached his plea agreement contract. It sought specific enforcement of the agreement's terms. (R. 200-260,"Motion to Enforce Plea Agreement", May 14, 1985)

In March of 1985, the court had appointed Keith

Haymes, Esquire, to represent Eddie. (R. 261 & 545) between Mr. Haymes' appointment to represent Mr. Lopez and his filing of a response to the State's motion to enforce the plea agreement, Mr. Haymes sought to withdraw from further representation. of Mr. Lopez. (R.261-314) No written order in response to that motion appears in the record. On July 22, 1985, through Mr. Haymes, Eddie Lopez filed a motion to set aside the plea agreement. (R. 340-354) The court heard testimony from State Witnesses and from the Defendant in support of their respective motions. (Tr. Vols. I,II,III & IV. July 22 and 23 and August 1 and 2, 1985).

On August 2, 1985, Honorable Bruce David Levy denied the Defendant's motions to set aside the plea and granted the State's motion to enforce the agreement. The Defendant did not appeal the ruling denying his motion to vacate the plea. The State had not purported to suggest a basis either constitutional or statutory for the court to excersise jurisdiction to consider and rule upon the State's motion.

Pursuant to the court's ruling enforcing the plea agreement, a sentencing hearing was scheduled to commence on December 3, 1985. On December 2, 1985, the Defendant waived his right to an advisory jury opinion on sentencing. (R.374-375) The record does not explain the circumstances giving rise to the waiver. The sentencing hearing was conducted on December 3, 4, 5 and 6, 1985. (Tr. Vol V, VI, VII & VIII) On February 13, 1986, Eddie was sentenced to death by electrocution for the first degree murder charge.

THE RECORD FACTS RE: THE PLEA AND AVOIDANCE PROCEEDINGS

THE PROCEDURAL HISTORY OF THE CASE LEADING TO A SECOND SENTENCING FOR THE SAME CRIMES

Eddie Lopez was arrested by Detective Jose Diaz, Metro Dade Police Department, on May 23, 1986, (Vol. VI, 1080 Line 1) pursuant to an"Affidavit of Probable Cause" (R. 9-10). The charges were first degree murder, burgalry of an occupied dwelling and possession of a firearm during the commission of a felony. A waiver of rights form, in spanish, purports to have been voluntarily signed by Eddie on that date. The English translations of questions posed to him and of his answers appear in the record at Vol III, Pages 477-500. The transcribed statement commenced three hours and fifty five minutes after Defendant's"waiver of rights". The transcribed statement was signed by Eddie at 1:50 a.m. on the morning of the 24th (R. 499), apparently several hours before his appearance in front of a magistrate and the appointment of counsel. (R. 8).

On June 8th, 1986, Eddie was charged by the Grand Jury with three offenses:

1. The first degree murder of Luis Reimar Perez- Vega.

2. The attempted first degree murder of Maria Luisa Perez-Vega.

3. The armed burglary of the occupied dwelling of Maria Luisa Perez-Vega with intent to commit "assault and/or theft" (an armed assault during course of the burglary) (R. Vol. I, Pgs. 1-3)

The record is silent as to any activity other than the appointment of the public defender between the May 23 arrest and September 6, 1983. On that day Assistant Public Defender Robin Roth, purporting to act upon behalf of Assistant Public Defender Brian Mc Donald, sought and obtained a continuance from the Honorable Bruce Levy. (R. 14-17) The Court made it a defense continuance and requested that Miss Roth have Mr. Mc Donald "...follow it up with a written motion." (R. 16 lines 11-13) 11-13) The State expressed concern that neither the Defendant nor his own Assistant Public Defender were present. Mr. Rabin had asked that the court require a follow up motion "...adopted by the Defendant." (R. 16 lines 2-6)

The State went so far as to file, on November 16, 1983, a motion to compel the public defender to file a motion for continuance or, alternatively, to accelerate the trial date. That motion was served on both the Defendant's old and new counsel. (R. 18-25).

On November 18, 1983, one day prior to the 180th day from Eddie's arrest, Brian Mc Donald, no longer Eddie

Lopez's counsel of record, filed and served a motion requesting a continuance of the long since past September 6, 1983 trial date. That motion was not signed by the Defendant and there is no record supporting his acquiesence in it. (R. 26) [The clerk's index to the record says this was "filed or entered" on November 16, 1983. The document with the Clerk's stamp reflects filing and service on November 18.])

At hearings on November 8 and 9, 1983, William Castro, Esq. was appointed to represent Eddie and agreed to do so. The trial was reset by the Court from November 14, 1983, until February 6, 1984. Assistant State Attorney William Berk requested that a defense continuance be recorded. Mr. Castro, according to the State, "...indicated that he was not going to waive his client's speedy trial rights or take a defense continuance, and in fact [Willie Castro, Esq.] requested that a continuance be charged to the State. (State's motion of November 16, 1983, (R. 1825). Except for the obvious fact that the proceedings did in fact continue, the record is incomplete as to the resolution by the court of the issues surrounding the Defendant's speedy trial rights and effective assistance of counsel rights vis a vis Defendant's speedy trial rights.

Mr. Castro pursued a number of avenues of defense on behalf of his client. Most of his twenty five motions submitted during November, 1983 were ruled upon by the court on March 8,

1984. A "Motion to Suppress Corporal and Photo Line-Up and other Pre-Trial Identification" was filed on May 25, 1984. The record is silent as to whether or not a hearing was ever held on that motion. No notation of a ruling appears on the face of said motion. (R. 11-12). Depositions, research and investigation by defense counsel were conducted during the period from Febraury 16, 1984, to May 29, 1984. On June 1, 1984, plea discussions commenced. (Fee affidavit of Willie Castro, Esquire, R. 189).

On June 8, 1984, the first of three polygraph examinations was conducted upon the Defendant, at the request of Sam Rabin, Assistant State Attorney, by George Slattery (R. 328-338). While a report of all three examinations was dated July 16, 1984, counsel assumes that the State had immediate knowledge of the substance of Mr. Lopez's statements and the results and conclusions of Mr. Slattery 's examination upon completion of each test. This is based upon the record fact that each examination was .."authorized by Assistant State Attorney, Sam Rabin" and the case information for each examination was .."provided by Metro Dade Homicide Detective Jose Diaz, who was present with his case file." (R. 331) Nothing in the record suggests that Defendant's counsel was present for these examinations.

Even after the plea, the examiner, (then clearly an agent of the State) advised Eddie Lopez of his Miranda Rights.

Eddie was not represented at the post plea examinations. Mr. Castros' obligation on behalf of Eddie Lopez, ended, in Mr. Castros' mind, with the acceptance of the plea by the court. (Testimony of Willie Castro as rebuttal witness for State,(Tr.Vol 111, 8-16, L 13-20). The effect, if any, of this confusing circumstance (post plea advise of representative of the State that Eddie had the right to remain silent) upon the Defendant, is not clear from anything in the record.

On June 13, 1984 the Court accepted Eduardo Lopez's contractual plea and sentenced him accordingly. (Tr. 6/13/84 page 15.

I

THE TRIAL COURT ERRED WHEN IT DID NOT ALLOW THE DEFENDANT TO WITHDRAW HIS GUILTY PLEA AND PROCEED TO TRIAL.

Although pleas of guilty normally vitiate the right of Appellate review of convictions, Section 921. 141 applies in all cases of"conviction on adjudication of guilt of a Defendant of a capital felony." S 921.141 (I) Florida Statute (1977). Section 921.141(4) provides: "The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida." Thus Appellate is entitled to Appellate review not only of his sentence of death but also his first degree murder conviction. Furthermore, Appellant's argument herein pertains to the validity of his guilty plea and the correctness of the courts action in accepting it. This issue is likewise reviewable Robinson v. State, 373 So. 2d 898 (Fla. 1979).

At the trial level, Defendant, Eduardo Lopez, entered into a plea agreement with the State of Florida. Among the terms of said plea agreement, Mr. Lopez was to testify against both Co-Defendants, Felipe Francisco and Margarita Garcia (R 534). At some point subsequent, Mr.Lopez decided that he did not wish to testify for fear of reprisal. [1]

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1. Is based upon an interview with Eduardo Lopez original trial counsel; Mr. William Castro, Esquire.

As a result of the foregoing, Assistant State Attorney Sam Rabin, moved to enforce the plea agreement. (R 200). The position of the defense was that the plea should be set aside and the Defendant allowed to proceed to trial. Following a four day hearing, Circuit Judge D. Bruce Levy, denied the Defendant's motion and ruled that the plea would be enforced (Tr. of August 16, 1985). Judge Levy found that the Defendant, Eduardo Lopez, had not met the conditions of that plea agreement thus would be sentenced consistent with a plea to first degree murder. (Tr. 861).

Apparently the Defendant had been threatened while in jail after the plea.[2]

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1. (Cont'd)
Apparently Mr. Lopez became fearful of going through with the plea once he learned that he would have to testify in front of persons other than the defense attorney, prosecutor and Court.

> "I am not going to testify against anybody in front of anybody". (Tr. 622)

2. Q. Did the man at B.T.U. (The institution where Mr. Lopez was incarcerated) have a weapon?

A. Well, positively, yes.

Q. What did this particular man at the B.T.U. have?

A. Something similar. It was sort of a ---- it more like a big needle because maybe they do it from you know part of the mattress or whatever they can get.

Q. Did he point this at you or do anything with it in you direction?

A. Well, he did not hearm me, but he did threaten me with it. (TR. 692).

Judge Levy set a sentencing hearing for August 16, 1985. (Tr. 868). At said sentencing hearing, Judge Levy found that the aggravating circumstances outweighed the mitigating circumstances at issue and sentenced the Defendant to death.

Florida Rule of Criminal Procedure 3.170 (f) provides that the Court may in its discretion, and shall upon good cause, at any time before a sentence, permit a guilty plea to be withdrawn. Certainly, there was good cause shown here. Mr. Lopez is a Mariel refugee, born in Cuba, who speaks very little, if any, English. Mr. Lopez was convinced that if he signed the plea agreement (plead guilty) he would not die. There was furthermore, evidence that Mr. Lopez's capacity to understand was diminished (Tr. 1243[3]).

The Defendant filed a motion to have his plea vacated, and pursuant thereto a hearing was held. At said hearing the Defendant argued that he had never contemplated the possibility of the death sentence under any circumstances when he entered the plea. (Tr. 697). Furthermore, Mr. Lopez through his attorney, pointed out that he, for various reasons, did not have a complete understanding of the plea as explained to him by his original attorney, William Castro, Esquire. (Tr.697)

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[3] Dr. Sybil Marquit testified that Mr. Lopez's mental capacity was in the dull-normal range.

Our Supreme Court said some time ago:

> Guilty pleas are permitted under The Florida Rules of Criminal Procedure (Rule 3.170 F.R.C.P., 33 F.S.A.) Courts may not, however, "Accept the plea without first determining that the plea is made voluntarily with an understanding of the nature of the charge" Rule 3.170(a) F.R.C.P.) This Court has held that to be voluntary, a plea must be made "By one competent to know the consequences, and should not be induced by fear, misapprehension, persuasion, promises, inadvertence or ignorance." Pope v. State, 1908, 56 Fla. 81, 47 So. 487, 488.

There is certainly more record support in the case at bar to demonstrate that the Defendant's plea was not freely and voluntarily made. As was stated earlier, the Defendant is a Mariel refugee who did not speak any English and who truly believed that once he signed the Plea Agreement, he would not fear the electric chair under any circumstances.

Mr. Lopez's situation does not meet the Pope test of voluntariness. There is a question as to his competency to understand the terms of the plea as evidenced by his diminished capacity. (Tr. 1243) An argument can be made that the plea was induced by fear since he did not want to die.

Additionally, there is at least a possibility that his original trial counsel persuaded him to take the plea. (Tr. 697). Finally, although one cannot say that Mr. Lopez was ignorant there is certainly much in the record regarding his limited capacity.

Therefore, since Eduardo Lopez's plea was not freely and voluntarily made by one competent to understand the consequences of his plea, his case should be sent back to the Circuit Court for trial. Under the circumstances in the case at Bar, the Court abused its discretion in not vacating the plea.

II

THE TRIAL COURT ERRED IN NOT SETTING ASIDE THE DEFENDANT'S PLEA AS IT WAS NOT FREELY AND VOLUNTARILY MADE

At the time the Defendant moved to vacate his pleas, the following colloquy took place between the Defendant's attorney, the prosecution and the Lower Court:

Mr. Haymes (Defendant's Attorney)

Q: If this particular Court or somebody present on that day had made it clear to you that your obligation to testify was not limited to speaking before the Judge, the State Attorney, and your attorney, would that have changed your decision to enter into this Plea?

Mr. Lopez: A: Positively.

Mr.Haymes: Q: How would it have changed that?

Mr. Lopez: A: I would have said that I would not have accepted the negotiation. (Tr. 686, 687)

Furthermore, when the Prosecutor began his cross-examination of Mr. Lopez at the same hearing the following exchange took place:

Mr. Berk: Q: Can you read what it says above your signature or shall we have the translator read it for you in Spanish?

Mr. Lopez: A: I can read some, but please read it to me in Spanish.

Mr. Berk: Q: I have read each of the terms and conditions of this agreement and they have been explained to me by my attorney.

William Castro is your --

Mr. Lopez: A: Do not speak to me any more about that man. That man has lied to me. If you can bring him here right now, I will tell him he lied to me. He told me that it was going to be seven years. That is why I signed all the papers. If not, I would not have signed every one. (Tr. 697)

I do not know English. I lately have learned some because I am in good disposition to do so because I have people helping me out, but I want you to know on the two occasions that Mr. Castro came to see me at the sixth floor it was in a hurry.

He said to me"Sign here". That was it. (Tr. 697)

In the case of Coon v. State 11 495 So. 2d 884 (2d D.C.A. 1986) the Appellate Court ruled that the trial court should have allowed the Defendant to withdraw his Plea and proceed to trial. The facts in Coon supra were similar to those in the instant case. The Court of Appeals in Coon found that although Coon was informed of the possible sentence for the crime in which she was involved, the Trial Judge did not make clear to her the consequences if she did not testify. Under such circumstances, the Appellate Court

felt that the Trial Court should have permitted the Defendant to withdraw her plea.

In the case at Bar, Eduardo Lopez should have been permitted to withdraw his plea. Even if it appears that the Trial Court informed Mr. Lopez of all the consequences of his plea, it is clear that he did not understand the same. The only reason Mr. Lopez entered into the plea in the first place was so that he could avoid the electric chair.

In the case of Costello v. State 260 So.2d 198, the Court said in pertinent part:

> We conclude that under the particular facts in this case, the Defendant did not freely and voluntarily enter the guilty plea. It was entered because he placed his trust in a Court-appointed attorney who led him to believe the Trial Judge would not impose a death sentence if he pled guilty.

Whether the attorney is Court-appointed or not makes no difference. The fact of the matter is that the terms and conditions of a plea must not only be communicated to a defendant, but he must demonstrate that he understands the same. In the case at Bar it is unknown whether or not all of the expressed terms and conditions of the plea were explained to Mr. Lopez. It is clear that based upon his background, he may not have understood them even if they were explained. Certainly based upon the record Mr. Lopez had a different interpretation of the plea than what it actually

said.

In Forbert v. State 437 So.2d 1079 (Fla. 1983) our Supreme Court ruled as follows:

> "It is a well established principle of law that a defendant should be allowed to withdraw a plea of guilty where the plea was based upon a misunderstanding or misapprehension of facts considered by the defendant in making the plea."

In Vaprin v. State 437 So.2d 177 (Fla. 3rd DCA 1983), it was held that where an accused enters a plea "upon a justificable mispprehension of its sentencing consequences, he must be permitted to withdraw it."

Finally, in Ritchie v. State 458 So.2d 877 (Fla. 2nd DCA 1984) the Court made the following pronouncement:

> "A Court should be liberal in exercising its discretion to permit a defendant to withdraw his guilty plea where he demonstrates that the plea was based upon a failure of communication or a misunderstanding of facts which were material in his decision to enter a plea.....
>
> The withdrawal of a guilty plea should not be denied in any case where it is evident that the ends of justice would be best served by permitting it".

Certainly here, there was at least a misunderstanding. Eduardo Lopez believed he was only going to serve a seven year sentence, when in fact he would serve a twenty-five year minimum mandatory sentence without the possibility of parole! (Tr. 697). We also know that Mr. Lopez did not particularly like his first Trial Attorney: William Castro (Tr. 697).

Furthermore, even on the day of sentencing, Mr. Lopez still had questions concerning the Plea arrangement. Tr. 792 &793[4]

In the case at Bar, the defendant agreed to plead guilty to the charges against him so that he might avoid the death penalty.

At some point, the defendant indicated that he did not wish to cooperate as called for in the Plea Agreement. According to the record, Mr. Lopez did not fulfill his obligation because he believed his sentence should have been substantially shorter than what was called for, and because he was afraid of reprisals. He said his lawyer lied to him. (Tr. 697). The foregoing principles of law and fundamental fairness require that the defendant be allowed to withdraw his plea, and proceed to trial.

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[4] 792 & 793

Mr. Berk: Q: Let's talk about the events preceding the actual colloguy. Did Mr. Lopez give you anything in Court that day?

Mr. Castro: A: When I appeared in Court, I anticipated no problem proceeding with the Plea colloquy in Court based on my discussion and review of the Plea Agreement with Mr. Lopez. Upon arriving in Court Mr. Lopez handed me a piece of paper with numerous questions on it. He indicated on a piece of paper an inquiry of certain area of the Plea Agreement.

III

THE TRIAL COURT ERRED IN NOT CONDUCTING A HEARING TO DETERMINE WHETHER OR NOT THE DEFENDANT WAS COMPETENT TO STAND TRIAL

Whenever there are reasonable grounds to believe a defendant is not competent, a Trial Court must on its own motion conduct an inquiry into his competency. Fla. Rules of Criminal Procedure 3.210. At any time before or during trial of a criminal charge, the defendant's irrational behavior, other abnormality of demeanor, and prior medical opinion or behavioral history may be sufficient to call for further inquiry by the Court on its own motion. Drope v. Missouri, 420 U.S. 162 (1975); Lane v. State, 388 So.2d 1022 (Fla. 1980). This principle of law also applies to the situation of an appearance in Court for purposes of tendering a plea and may serve to raise a question about the defendant's competency to submit a plea. Baker v. State, 408 So.2d 686 (Fla. 2nd D.C.A. 1982). Allegio v. State, 338 So.2d 1137 (Fla. 1st D.C.A. 1976).

In the instant case, the Defendant, Eduardo Lopez, consistently displayed irrational behavior before and after entering a plea to the charges against him. For example, during Mr. Lopez's testimony at the Motion to Enforce the Plea Agreement, the Judge himself was having extreme difficulty understanding Eduardo Lopez.

The Court: Tell Mr. Lopez to stop for a second. Would you tell Mr. Lopez that we are

> before the Court not only on the State's Motion to Enforce This Agreement, but on his attorney's Motion to Vacate The Agreement.
>
> He is making it very difficult for me to consider his testimony by his constant rambling. (Tr. 708)

Furthermore, although one cannot guess at what the defense would have been in this case had it gone to trial, Mr. Lopez has been evaluated by doctors who have been asked to give their opinion as to the Defendant's mental state. The fact that there may have been a problem with Mr. Lopez is further evidenced by his confusion regarding the Plea Agreement. (T 697)

Based upon the foregoing the trial court erred when it did not hold a competency hearing concerning Mr. Lopez's ability to enter a plea of guilty.

IV

THE STATUTORY AGGRAVATING CIRCUMSTANCES RELIED UPON BY THE TRIAL COURT ARE NOT SUPPORTED BY THE EVIDENCE AND/OR WEREIMPROPERLY FOUND

With non-statutory aggravating circumstances stricken from the Order of the Court, see Riley v. State, 366 So.2d 19 (Fla. 1978). There are nine statutory aggravating circumstances which must be considered. In the instant case, the Court found that the defendant had been previously convicted of a felony involving the use of threat or violence to the person pursuant to Florida Statute 921.141 (5)(b). The conviction in this case served as the basis for this aggravating circumstance. Additionally,the Court found that the murder was committed while the defendant was engaged in the commission of a burglary pursuant to Fla. Statute 921.141 (5)(b). Finally, the Court found that the homicide was committed for the purpose of avoiding arrest pursuant to Fla. Statute 921.141(5)(e)(RTr. 534). The finding of aggravating circumstances (sub-section 5(e), to avoid lawful arrest or detention by the trial court was erroneous.

In the case of Riley v. State, 366 So.2d 19 (Fla. 1978), the Supreme Court said ..

> "That the mere fact of a death is not enough to invoke this section when the victim is not a lawful enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases. 366 So.2d at 22.

Furthermore, in Menendez v. State, 368 So.2d 1278(Fla. 1979) it was stated that it must be clearly shown that the dominant or only motive for the murder was elimination of a witness. Here, this test was not met since it was represented on many and various occasions that the shooting of the young boy was accidental.

In the case of Rivers v. State, 458 So.2d 762 (Fla. 1984), the Supreme Court determined that it was error to give this aggravating circumstance where it could only be shown through speculation. In the case herein, the Court assumed that since the victim was an innocent small boy, he was killed so he would not be able to identify the assailants. This conclusion is based on mere speculation at best. No one can say what was going through the victim's mind at the time of his death. Aggravating circumstances must be proven beyond and to the exclusion of a reasonable doubt. State v. Dixon, 283 So.2nd 1 (Fla. 1973). Yet, the Court's conclusion that this aggravated circumstance applies based on the fact that the victim was a young boy who had nothing to do with the event, was not proven beyond a reasonable doubt.

Although there was some testimony that someone said, "Kill the boy", and at that point he was shot. This clearly was not proven beyond a reasonable doubt. Furthermore, there is simply no other evidence to support this Court's conclusion that the young boy was shot to eliminate a witness. Based upon a finding of this circumstance, the trial court erred and the death sentence should be vacated.

V

THE DEATH SENTENCE IS UNRELIABLE SINCE THE TRIAL COURT PRECLUDED INDIVIDUALIZED ASSESSMENT OF PENALTY AND EXCLUDED MITIGATING CIRCUMSTANCES APPLICABLE TO THE DEFENDANT

In the trial Judge's sentencing order, it was stated without equivocation that there were no mitigating factors applicable to the Defendant, Eduardo Lopez. The trial court reached this conclusion even though defense counsel argued that many factors, both statutory and non-statutory, applied to the Defendant. First, it was maintained that prior to this episode the Defendant had never been engaged in any criminal episode involving the use or threat of violence to another person. (Tr. 1173) Second, it was argued that the Defendant committed a capital felony while under the influence of extreme mental or emotional disburbance.[5] The defense counsel argued as a third statutory mitigating factor that the victim,(mother) was a participant since she was involved in the drug trafficking business as well. It was mentioned that the Defendant was an accomplice in the murder. That the Defendant acted under extreme duress or domination of another was also asserted by the defense. (Tr. 1173). Finally, based upon the conclusion of the psychiatrist who examined him, it was suggested that the

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[5] Dr. Sybil Marquit, a psychologist, testified that Mr. Lopez was of dull to normal intelligence (Tr. 1260).

capacity of the Defendant to appreciate criminality of his conduct or to conform his conduct to the requirements of law was substantilly impaired. Certainly the argument for some of these mitigating factors was stronger than for others. Nevertheless, the defense argued that six statutory mitigating factors pertained to the Defendant. Furthermore, the defense mentioned that there were additional non-statutory mitigating factors relevant. (Tr. 1173). The trial Court disagreed and found none.

A sentencing procedure which forecloses individualized consideration of the offender and the offense poses the risk of inaccurate penalty assessment. In capital matters that risk is neither acceptable or compatible with the heightened measure of reliability commanded by the Eighth Amendment. Woodson v. North Carolina, 428 U.S. 280 (1976). Accordingly, in Lockett v. Ohio, 438 U.S. 586 98 S.Ct. 2954, 57 L.Ed 973 (1978), the Court held that the sentencer must fully consider all mitigating factors relevant to the individual and his offense which are proffered as basis for a sentence less than death. The principles outlined in Lockett, supra, were extended even further in Songer v. State,365 So.2d 696 (Fla. 1978). The Songer court confirmed that the mitigating factors delineated in Section 921.141 (6), Fla. Statutes have never been treated as an exclusive list and that, therefore, all

relevant mitigating circumstances, whether or not statutorily provided for, have always required the sentencer's condiseration.

The death sentence imposed in this case cannot meet the heightened standards of reliability and accuracy commanded by the Eighth Amendment. The Judges constricted consideration of evidence in mitigation, in not finding that the mitigating circumstances of significant mental or emotional disturbance, impaired capacity,& others applied to the Defendant, precluded a penalty assessment tailored to the individual defendant and his offense. Lockett v. Ohio, supra. The unreliability of the sentence imposed was increased further by the invocation of factors in aggravation which were without record support.

For the above stated reasons the death penalty imposed in this case should be vacated.

CONCLUSION

The Defendant below, Eduardo Lopez, entered a plea of guilty pursuant to a contract, before the Honorable D. Bruce Levy, in the Eleventh Judicial Circuit, Dade County, Miami, Florida, on June 13, 1984. Based upon the above plea arrangement, Mr. Lopez was to testify truthfully against all co-defendants in the case and be sentenced to life imprisonment with a minimum mandatory twenty-five years. Under this arrangement, the Defendant would avoid electrocution.

At some point subsequent, Mr. Lopez decided he did not want to testify due to a misunderstanding of the plea arrangement and through his attorney moved past to vacate the plea.

After four days of testimony, Judge Levy ordered that the plea be enforced and scheduled a sentencing hearing after which he sentenced the Defendant to death.

To impose the highest penalty allowable at law under these circumstances is totally unconscionable. As stated by defense counsel Keith Haynes, Esquire, this situation was tantamount to the Defendant entering into a contract for death.

Eduardo Lopez, Mariel refugee, a man who spoke little English and was unfamiliar with the American justice system, should have been allowed to withdraw his plea and proceed to trial.

Based upon the above and the argument included in this brief the Defendant's sentence should be set aside and the case returned to the Trial Court for trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, Initial Brief of Appellant, was delivered by hand to: Office of the Attorney General, 401 N.W. 2nd Avenue, Room 820, Miami, Florida 33130, this 16th day of December, 1987.

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