IN THE SUPREME COURT OF FLORIDA

NO. ~~75,846~~ 75847

EDUARDO LÓPEZ,

Petitioner,

v.

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent.

REPLY TO RESPONDENT'S RESPONSE TO SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner, Eduardo López, relies on the Preliminary and Procedural Statements contained in his Supplement to Petition for Extraordinary Relief and for a Writ of Habeas Corpus. Mr. López objects to Respondent's Procedural History to the extent in that it contains argumentative information in no way relevant to the disposition of Mr. López's arguments. Furthermore, as Respondent had no objection to the filing of the instant Supplementary Petition, (See Motion to Permit Filing of Supplement to Petition for Habeas Corpus, filed Oct. 21, 1992), and this Court granted Mr. López the opportunity to supplement his initial Petition, Respondent's current position regarding the timeliness of the instant pleading is of no consequence.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. López asserts that his conviction and sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. López's case, substantial and fundamental errors occurred in his capital trial. These errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM I

MR. LÓPEZ'S SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. López was convicted of one count of first-degree murder, with burglary being the underlying felony. The court found that the burglary served as the underlying felony to satisfy the "felony murder" aggravating circumstance (R. 435). The death penalty in this case was thus predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder that formed the basis for the conviction.

Respondent argues that this claim has already been decided on the merits by the United States Supreme Court in Lowenfield v. Phelps, 484 U.S. 231 (1988), and that the Supreme Court reaffirmed its Lowenfield holding in Stringer v. Black, 112 S.Ct. 1130 (1992), when it rejected Lowenfield's claim that his sentencing procedure failed to properly narrow the class of death eligible defendants (Response at 5). Respondent fails to mention, however, that the Supreme Court wrote that "Lowenfield, arising under Louisiana law, is not applicable here," Stringer, 112 S. Ct. at 1138, due to the fact that in Louisiana, unlike Mississippi and Florida, the narrowing function required by the eighth amendment occurs at the guilt phase rather than at the penalty phase. Id. The Supreme Court went on to hold that the "State's premise that the Mississippi sentencing scheme is

comparable to Louisiana's is in error." Id. Respondent's reliance on Lowenfield is therefore erroneous.

Because felony murder was the basis of Mr. López's conviction, the subsequent death sentence must be unlawful. The aggravating circumstance of "in the course of a felony" was not "a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." Stringer v. Black, 112 S. Ct. 1130, 1138 (1992). Mr. López's conviction rests upon the murder being committed while the defendant was engaged in the commission of a burglary. Then, an element of the offense was simply repeated as an aggravating circumstance. Unlike the situation in Lowenfield, the narrowing function did not occur at the guilt phase. Thus, the use of this non-narrowing aggravating factor "create[d] the possibility not only of randomness but of bias in favor of the death penalty." Stringer, 112 S. Ct. at 1139.

Certainly, the word "aggravating" in and of itself means that it must be a circumstance which is over and above first degree murder. Moreover, this Court has previously demonstrated its disapproval of aggravating circumstances whose description simply repeats an element of first degree capital felony murder:

> To avoid arbitrary and capricious punishment, this aggravating circumstances [cold, calculated, and premeditated] "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder" Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983) (footnote omitted). Since premeditation is

> already an element of capital murder in Florida, section 921.141 (5)(i) must have a different meaning; otherwise it would apply to every premeditated murder.

See Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990) (footnote omitted) (emphasis added).

The sentencer in this case was entitled to return a death sentence upon a finding of guilt of first degree (felony) murder because an element of the underlying felony was used as an aggravating circumstance which justified a death sentence. Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created which does not narrow. "[L]limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988). In short, because Mr. López was convicted of felony murder, he then faced statutory aggravation for felony murder. This is too circular a system to meaningfully differentiate between who should live and who should die, and it violates the eighth and fourteenth amendments. Relief should be granted.

CLAIM II

THE AVOIDING ARREST AGGRAVATING FACTOR WAS IMPROPERLY APPLIED, IN VIOLATION OF MR. LÓPEZ'S RIGHTS AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

This claim was raised on direct appeal, and was re-presented in this supplementary Petition because new case law from the United States Supreme Court demonstrates that Florida's aggravating circumstances have been vaguely and overbroadly applied, thereby failing to channel the sentencer's discretion, in violation of the eighth amendment. See Espinosa v. Florida, 112 S.Ct. 2926 (1992); Sochor v. Florida, 112 S.Ct. 2114 (1992); Stringer v. Black, 112 S.Ct. 1130 (1992).

Respondent recognizes that the United States Supreme Court in Espinosa found Florida's standard jury instruction on the heinous, atrocious, and cruel aggravating factor unconstitutionally vague, (Response at 6), but argues that Espinosa is "clearly inapplicable" (Response at 7), because the heinousness factor was not found by the trial judge. Respondent is incorrect in assuming that the Supreme Court's holding in Espinosa was limited to the vagueness of the heinousness factor. See Hodges v. Florida, 113 S. Ct. 33 (1992) (remanding in light of Espinosa where cold, calculated, and premeditated aggravator was only issue).

The avoiding arrest aggravating factor was overbroadly applied in Mr. López's case. See Godfrey v. Georgia, 446 U.S. 420 (1980). Under the facts of this case, if this Court were to apply the narrowing constructions on this aggravator that it has

in other cases,[1] it cannot be said that the dominant or only motivating reason for the homicide was witness elimination. In fact, the trial judge's sentencing order states that the intruders' intent was to commit a burglary (R. 436).

The application of this factor, like the heinousness factor in Espinosa and the cold, calculated, and premeditated factor in Hodges, was unconstitutional, rendering the death sentence unreliable and arbitrary. Stringer v. Black, 112 S. Ct 1130 (1992). Relief is warranted.

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[1]See Menendez v. State, 368 So. 2d 1278, 1282 (Fla. 1979), appeal after remand, 419 So. 2d 312 (Fla. 1982) (where the facts fail to establish that the dominant or only motive for the homicide was the elimination of witnesses, the finding of the avoiding arrest aggravator is improper). Accord Bates v. State, 465 So. 2d 490 (Fla. 1985); Oats v. State, 446 So. 2d 90 (Fla. 1984); Clark v. State, 443 So. 2d 973, 977 (Fla. 1983); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983); Herzog v. State, 439 So. 2d 1372, 1378-79 (Fla. 1983); White v. State, 403 So. 2d 331 (Fla. 1981). The mere fact that the victim knew and could have identified his or her assailant is insufficient to prove intent to kill to avoid lawful arrest. Perry v. State, 522 So. 2d 817, 820 (Fla. 1988); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1988); Riley. In this case, as in Jackson v. State, 599 So. 2d 103, 109 (Fla. 1992), "[t]here is no direct evidence of [Mr. López's] motive for killing the [victim], and the circumstantial evidence was insufficient to prove that [he] killed the [victim] to eliminate [him] as [a] witness[]."

CLAIM III

THE TRIAL COURT'S AND DEFENSE COUNSEL'S FAILURE TO ASSURE THAT MR. LÓPEZ WAS PROVIDED WITH A TRANSLATOR, TO ASSURE THAT MR. LÓPEZ WAS PROVIDED CONTINUOUS TRANSLATION, AND TO ASSURE THAT ANY TRANSLATOR WHO WAS PROVIDED WAS PROPERLY QUALIFIED, AND APPELLATE COUNSEL'S FAILURE TO RAISE THIS ISSUE ON DIRECT APPEAL, VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Respondent is incorrect is stating that Mr. López "cannot show that he was deprived access to an interpreter or in any way thwarted from having one available" (Response at 12). Respondent completely ignores the fact that the record reflects that an interpreter was not always present, that even when an interpreter was present Mr. López was not provided continuous translation, that no inquiry was ever made regarding interpreters' qualifications, and that interpreters were not sworn at times when this was required.

At the June 13, 1984, plea proceedings, an interpreter appears to have been present but was never sworn or qualified. (See Supp. R., 6/13/84 hearing, p. 4). At the July 22, 1985, hearing on the state's motion to enforce the plea agreement, there was no mention of an interpreter (See R. 561-678). On the second day of that hearing, July 23, 1985, Mr. López was a witness (R. 682). An interpreter was sworn for Mr. López's testimony (id.), but there was no inquiry as to the interpreter's qualifications, and the transcript reflects numerous errors in translation regarding idiomatic usages, syntax and grammar. At the August 1, 1985, continuation of the same hearing, there was

also no mention of an interpreter (See R. 755-868), although at one point the court questioned Mr. López. However, whoever translated this exchange was neither sworn nor qualified.

At the September 5, 1985, hearing at which the reports of the mental health experts appointed to evaluate Mr. López's competency were received, the court mentioned the need for an interpreter, but there is no indication that an interpreter was ever provided (See Supp. R., 9/5/85 hearing). At the beginning of the December 2, 1985, hearing at which the penalty phase jury was waived, the court mentioned the need for an interpreter, but again there is no indication that an interpreter was actually provided (See Supp. R., 12/2/85 hearing, p. 17). Later in that hearing, an interpreter was sworn for the court's colloquy with Mr. López, but there was no inquiry into the interpreter's qualifications (See id. at 33). At the penalty phase conducted on December 3-6, 1985, there was again no mention that an interpreter was present to assist Mr. López.[2]

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[2]This fact directly refutes Respondent's conclusory allegation that Mr. Lopez was provided with an interpreter during all critical stages of his proceedings (Response at 12). Moreover, Respondent argues that because Mr. Lopez had a Spanish-speaking attorney at one point, this somehow obviated the need for an interpreter. Respondent cites no law to support the proposition that a Spanish-speaking attorney vindicates a non-English speaking defendant's right to an interpreter at trial. See Suarez v. State, 481 So. 2d 1201, 1203-04 (Fla. 1985). Respondent writes that this situation is like the one in Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987); this is not the case. In Blanco, the public defender had retained a personal translator for the defendant, and the trial record reflected that the translator was qualified in open court and that the judge retained a vigilant watch over the interpreter. Blanco, 507 So. 2d at 1380-81. This was certainly not what happened in the instant case.

During the hearing on the state's motion to enforce the plea agreement, Mr. López testified that the interpreters did not "understand to give a complete explanation of everything that goes on in court because sometimes they state things and I have to say what did they say" (R. 701). At the plea hearing, Mr. López "had to tell [the interpreter] many times to translate for me" (R. 702); he "had to tell [the translator] to please tell me what was being said because she would keep quiet and would not translate" (R. 706). Mr. López "spoke about this [problem with not understanding the proceedings] one, two occasions [with defense counsel William Castro], but he was not interested about that and that is the way it was" (R. 702).

Appellate counsel for Mr. López failed to present this meritorious and compelling claim on direct appeal, and was ineffective for failing to do so. Counsel could have no valid strategic reason for not presenting this argument. This claim is now properly brought pursuant to this Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. Counsel's failure deprived Mr. López of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985); Maitre v. Wainwright, 811 F.2d 1430 (11th Cir. 1987). Accordingly, habeas relief must now be accorded.

CLAIM IV

MR. LÓPEZ WAS ABSENT DURING CRITICAL STAGES OF HIS CAPITAL PROCEEDINGS, AND THE PREJUDICE RESULTING THEREFROM, VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Both of Mr. López's absences were from "critical stages" of the proceedings. The first absence occurred during testimony upon which the court based its decisions to enforce the plea agreement and to deny the defense motion to withdraw the plea (See R. 779-82). This testimony was thus critically important to whether Mr. López would be allowed to exercise his right to trial. Had Mr. López been present during Mr. Castro's testimony, Mr. López could have advised defense counsel regarding cross-examination and regarding potential rebuttal evidence. The second absence also involved a "critical stage" -- the determination of whether Mr. López would waive his right under Florida law to have a jury determine whether he would live or die (Supp. R., 12/2/85 hearing at 17). Had he been present for the entire hearing and heard all of the arguments of counsel, Mr. López could well have chosen not to make such a waiver.

If there is any "reasonable possibility" that Mr. López's rights were prejudiced because of his absences, he is entitled to relief. Proffitt, 685 F.2d at 1260 (11th Cir. 1982). There is such a possibility, as noted above; relief is warranted.

Appellate counsel for Mr. López failed to present this meritorious and compelling claim on direct appeal, and was ineffective for failing to do so. Counsel could have no valid

strategic reason for not presenting this argument. This claim is now properly brought pursuant to this Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. Counsel's failure deprived Mr. López of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985); Maitre v. Wainwright, 811 F.2d 1430 (11th Cir. 1987). Accordingly, habeas relief must now be accorded.

CLAIM V

THE INTRODUCTION AND USE OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. LÓPEZ'S CAPITAL TRIAL AS TO RESULT IN THE IMPOSITION OF THE DEATH PENALTY IN AN ARBITRARY AND CAPRICIOUS MANNER IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Aggravating circumstances specified in the statute are exclusive. No other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979). This Court, in Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977) stated:

> We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.
>
> Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

See also Miller v. State; Riley v. State, 366 So. 2d 19 (Fla. 1979); Robinson v. State, 520 So. 2d 1 (Fla. 1988).

Respondent argues that Miller and Elledge are inapplicable because those cases dealt with different non-statutory aggravating circumstances than those considered in this case. Respondent, however, ignores the fact that those cases stand for the proposition that a trial court's consideration of any non-statutory aggravating factor is improper and unconstitutional. Respondent's opinion that these remarks were "not only innocuous they were entirely proper" is irrelevant, and one which this Court's jurisprudence in this area has attempted to eradicate.

CLAIM VI

MR. LÓPEZ DID NOT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVE HIS RIGHT TO A CAPITAL SENTENCING JURY, AND THE TRIAL COURT'S INQUIRY ON THE PURPORTED WAIVER WAS CONSTITUTIONALLY INADEQUATE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

While a defendant may waive a constitutional right to a jury trial, State v. Garcia, 229 So. 2d 236 (Fla. 1969), the record must demonstrate the defendant's knowing, voluntary, and intelligent waiver. Blackwelder v. State, 489 So. 2d 95, 96 (Fla. App. 2 Dist. 1986); Johnson v. State, 411 So. 2d 1023 (Fla. App. 2 Dist. 1982). The record does not so reflect in this case.

Contrary to Respondent's conclusion that the trial judge's colloquy was "more than sufficient," (Response at 18), the record reflects substantial confusion on Mr. López's part regarding what was going on. Respondent ignores that the record reflects that even the prosecutor registered his concern over the voluntariness of Mr. López's purported waiver:

> MR. BERK: Judge, I do not think that this defendant is making a free and voluntary clear waiver of jury. I think there is a lot of ambiguity.

(Supp. R., 12/2/85 hearing) (emphasis added). The prosecutor summed up his view of the colloquy:

> MR. BERK: I think there is such inherent ambiguity in his responses and his attitude towards sentencing, that you just simply, based on his record, cannot find a clear, amicable waiver of jury, certainly in such a matter of great important, sentencing a man to death.

(Supp. R., 12/2/85 hearing, pp. 16-17) (emphasis added).

Also contrary to Respondent's position, the record does not reveal that Mr. López repeatedly wanted a judge to determine his sentence:

> If the jury were to know all the allegations made the facts, then I agreed for the jury to be the one to determine my sentence.
>
> * * *
>
> If the jury is going to listen to all that is alleged and all the proof in the case, then let the jury sentence me. If there is a priority that the jury is going to listen and they are going to be able to analyze and they are going to be able to know my innocence, inside that, I give all the facts.
>
> If they are not going to hear it out, if they are not going to listen to it, then I would like for you to sentence me.
>
> MR. BERK: Now we have got a situations where Mr. López very clearly wants the jury to hear his side of the story.
>
> * * *
>
> THE COURT: I am not convinced that he is not under the impression that the facts are going

to come out at this hearing that he does not want a jury to hear it.

(Supp. R., 12/2/85 hearing, pp. 20-30) (emphasis added). It is clear from the record that Mr. López's purported waiver was not as freely, knowingly, or intelligently made as Respondent indicates, given the prosecutor's continuing concern over Mr. López's obvious confusion.

The record clearly indicates Mr. López's lack of understanding and establishes that, in fact, what he truly wanted was to have a jury for the penalty phase. Given Mr. López's obvious confusion, it is evident that the waiver was not voluntarily, knowingly, and intelligently entered, in violation of the fifth, sixth, eighth, and fourteenth amendments. See Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938). Relief is warranted.

Appellate counsel for Mr. López failed to present this meritorious and compelling claim on direct appeal, and was ineffective for failing to do so. Counsel could have no valid strategic reason for not presenting this argument. This claim is now properly brought pursuant to this Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. Counsel's failure deprived Mr. López of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985); Maitre v. Wainwright, 811 F.2d 1430 (11th Cir. 1987). Accordingly, habeas relief must now be accorded.

CLAIM VII

MR. LÓPEZ WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR THE FAILURE TO RAISE THE MERITORIOUS ISSUE OF PRIOR DEFENSE COUNSEL'S DISCLOSURE OF CONFIDENCES AND SECRETS, VIOLATION OF HIS DUTY OF LOYALTY, THE FACT THAT HE OPERATED UNDER A FUNDAMENTAL CONFLICT OF INTEREST, AND THE FACT THAT THE COURT ERRED IN PERMITTING DEFENSE COUNSEL TO VIOLATE THE ATTORNEY-CLIENT PRIVILEGE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

William Castro's testimony at the hearing on the state's motion to enforce the plea agreement concerned matters well beyond the scope of the hearing. Mr. Castro revealed confidential communications with Mr. López, going into details in no way relevant to the limited allegations raised by the defense motion to vacate the plea.

Contrary to Respondent's position, the scope of the hearing was not whether Mr. Castro's representation was generally effective or not, but rather centered on Mr. Castro's representations regarding the plea itself. Respondent, in condoning Mr. Castro's revelations of highly privileged matters, fails to explain why "Mr. Castro's knowledge concerning the extent of the defendant's participation in this murder is critical in determining if he effectively represented the defendant." (Response at 22).

Respondent admits that the crux of the motion to vacate the plea was that Mr. López claimed that he did not understand the terms of the agreement (Response at 21), specifically the sentencing provisions. What Respondent fails to explain is how

Mr. López's supposedly privileged admissions to his attorney "greatly impacted the likelihood of conviction," (Response at 23), or how the relevation of this information was even remotely relevant to Mr. López's understanding of the sentencing provisions of the plea agreement.

Mr. López was deprived of the right to counsel, for Mr. Castro operated under a conflict of interest and thus "breach[ed] the duty of loyalty, perhaps the most basic of counsel's duties." Strickland v. Washington, 466 U.S. 668 (1984). Mr. Haymes unreasonably allowed confidential information to be revealed to be trial judge, the ultimate sentencer. Relief is warranted.

Appellate counsel for Mr. López failed to present this meritorious and compelling claim on direct appeal, and was ineffective for failing to do so. Counsel could have no valid strategic reason for not presenting this argument. This claim is now properly brought pursuant to this Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. Counsel's failure deprived Mr. López of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985); Maitre v. Wainwright, 811 F.2d 1430 (11th Cir. 1987). Accordingly, habeas relief must now be accorded.

CLAIM VIII

MR. LÓPEZ'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE TRIAL COURT SHIFTED THE BURDEN TO MR. LÓPEZ TO PROVE THAT DEATH WAS NOT AN APPROPRIATE PENALTY.

Under Florida law, a capital sentencer must follow the law regarding the proper allocation of the burden of proof for aggravating and mitigating circumstances when determining if death is an appropriate penalty:

> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973) (emphasis added). This straightforward standard was never applied in Mr. López's capital proceedings. The trial court shifted to Mr. López the burden of proving whether he should live or die. See Supp. R. 65.

The trial court employed an erroneous standard in sentencing Mr. López to death; this standard obviously shifted the burden to Mr. López to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The standard violated state law, for the sentencer could not "full[y] consider[]" and "give effect to" mitigating evidence. Penry, 109 S. Ct. 2934, 2951 (1989). This burden-shifting standard thus "interfered with the consideration of mitigating evidence." Boyde v. California, 110 S. Ct. 1190, 1196 (1990). Since "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose

the [death] penalty," McCleskey v. Kemp, 481 U.S. 279, 306 (1987), the standard employed by the trial court violated the eighth amendment's requirement of individualized sentencing in capital cases. Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990). See also Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987).

Appellate counsel for Mr. López failed to present this meritorious and compelling claim on direct appeal, and was ineffective for failing to do so. The claim was apparent in the trial court's sentencing order, and no contemporaneous objection is required to raise a claim appearing in a sentencing order. Counsel could have no valid strategic reason for not presenting this argument. This claim is now properly brought pursuant to this Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. Counsel's failure deprived Mr. López of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985); Maitre v. Wainwright, 811 F.2d 1430 (11th Cir. 1987). Accordingly, habeas relief must now be accorded.

CONCLUSION AND RELIEF SOUGHT

The claims presented herein involved ineffective assistance of counsel, fundamental constitutional error, and significant changes in the law. Because the foregoing claims present substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. López's capital

conviction and sentence of death, and of this Court's appellate review, they should be determined on their merits. The relief sought should be granted.

WHEREFORE, Eduardo López, through counsel, respectfully urges that the Court issue its writ of habeas corpus and vacate his unconstitutional conviction and death sentence.

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 19, 1993.

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