IN THE SUPREME COURT OF FLORIDA

NO. 75847

EDUARDO LOPEZ,

Petitioner,

v.

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

Respondent.

SUPPLEMENT TO PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

GAIL E. ANDERSON
Assistant CCR
Florida Bar No. 0841544

TODD G. SCHER
Staff Attorney
Florida Bar No. 0899641

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

COUNSEL FOR PETITIONER

PRELIMINARY STATEMENT

A summary Petition for Extraordinary Relief and for a Writ of Habeas Corpus was filed in April, 1990, in order to invoke the habeas corpus jurisdiction of this Court. At that time, Mr. López's case was being litigated under warrant; CCR was also litigating six (6) other outstanding warrants at the time. As a result, counsel was unable to adequately brief the claims present in Mr. López's case. Counsel had not even had the opportunity to obtain transcripts of Mr. López's trial and sentencing, nor had counsel been able to do any investigation or research into the case. In the summary Petition that was filed, Mr. López fully explained his situation to this Court, and requested leave to amend and/or supplement that initial Petition.

Mr. López therefore presents the instant Petition as an supplement to the original Petition which was filed under the untenable circumstances outlined above.

References to the transcripts and the record of the original trial court proceedings will follow the pagination of the Record on Appeal and will be designated by (R.___). References to supplementary portions of the Record on Appeal will be self-explanatory.

PROCEDURAL STATEMENT

Mr. López was convicted of first-degree murder and related offenses on June 13, 1984, after agreeing to plead guilty. Under the terms of a plea agreement entered into by Mr. López and the Dade County State Attorney's Office, Mr. López would plead guilty

to all three counts of the indictment and receive concurrent sentences, including a life sentence with a minimum mandatory 25-year term before parole eligibility on the first degree murder charge. The plea agreement also specified that if Mr. López did not fulfill his part of the agreement -- to testify against his co-defendants -- the guilty plea would stand, the sentence would be rescinded, and the prosecution would be entitled to seek the death penalty.

The plea agreement ultimately fell through, and, after a defense motion to withdraw the plea was denied, the prosecution announced its intention to seek the death penalty. On December 2, 1985, Mr. López waived a penalty phase jury. Mr. López was sentenced to death on February 13, 1986. The trial court found that "the Defendant has shown no mitigating circumstances, either statutory or non-statutory." (R. 435). In aggravation, the court found that Mr. López was previously convicted of another capital felony or a felony involving the use or threat of violence, that Mr. López committed the murder while engaged in the commission of a burglary, and that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effectuating an escape from custody (R. 435-36).

This Court affirmed the conviction and sentence on direct appeal. See López v. State, 536 So. 2d 226 (1988). After a death warrant was signed, Mr. López filed a Motion to Vacate pursuant to Fla. R. Cr. P. 3.850, which was summarily denied. A summary Petition for Extraordinary Relief and for a Writ of

Habeas Corpus was also filed at that time in order to obtain this Court's jurisdiction. This supplement follows.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. López's sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involve the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. López to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness

of capital trial and sentencing proceedings. Way; Wilson; Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. López's conviction and sentence of death, and of this Court's appellate review. Mr. López's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental and retroactive changes in constitutional law. See, e.g., Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. López's claims.

This Court therefore has jurisdiction to entertain Mr.

López's claims to grant habeas corpus relief. This and other Florida courts have consistently recognized that the writ must issue where fundamental error occurs on crucial and dispositive points, or where a defendant received ineffective assistance of appellate counsel. See, e.g., Wilson v. Wainwright, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, 287 So. 2d 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968).

Mr. López's claims are presented below. They demonstrate that habeas corpus relief is proper in this case. In light of these circumstances, Mr. López respectfully urges that the Court grant habeas corpus relief.

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. LOPEZ'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.

Under Florida law, capital sentencers may reject or give little weight to any particular aggravating circumstance. A jury may return a binding life recommendation because the aggravators are insufficient. Hallman v. State, 560 So. 2d 233 (Fla. 1990). The sentencer's understanding and consideration of aggravating factors may lead to a life sentence.

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.

A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 112 S. Ct. 1130 (1992). Stringer is new Florida law which has been articulated since Mr. López's prior proceedings. The sentencer was entitled automatically to return a death sentence upon a finding of first degree felony murder. 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. This is so because an automatic aggravating circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and one which therefore renders the sentencing process unconstitutionally unreliable. Id. "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). Because Mr. López was convicted of felony murder, he then automatically faced statutory aggravation for felony murder. This aggravating factor was an "illusory circumstance" which "infected" the weighing process; the aggravator did not narrow and channel the sentencer's discretion as it simply repeated elements of the offense. Stringer, 112 S. Ct. at 1139. In fact, this Court has held that the felony murder aggravating factor alone cannot support the death sentence. Rembert v. State, 445 So. 2d 337 (Fla. 1984). Yet the trial court did not apply this limitation in imposing the death sentence.

Recently the Wyoming Supreme Court addressed this issue in Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991). In Engberg, the Wyoming court found the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance to violate the eighth amendment:

In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was used not once but three times to convict and then enhance the seriousness of Engberg's crime to a death sentence. All felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the Furman/Gregg narrowing requirement.

Additionally, we find a further Furman/Gregg problem because both aggravating factors overlap in that they refer to the same aspect of the defendant's crime of robbery. While it is true that the jury's analysis in capital sentencing is to be qualitative rather than a quantitative weighing of aggravating factors merely because the underlying felony was robbery, rather than some other felony. The mere finding of an aggravating circumstance implies a qualitative value as to that circumstance. The qualitative value of an aggravating circumstance is unjustly enhanced when the same underlying fact is used to create multiple aggravating factors.

When an element of felony murder is itself listed as an aggravating circumstance, the requirement in W.S. 6-5-102 that at lest one "aggravating circumstance" be found for a death sentence becomes meaningless. Black's Law Dictionary, 60 (5th ed. 1979) defines aggravation as follows:

> "Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort

itself." (emphasis added).

> As used in the statute, these factors do not fit the definition of "aggravation." The aggravating factors of pecuniary gain and commission of a felony do not serve the purpose of narrowing the class of persons to be sentenced to death, and the Furman/Gregg weeding-out process fails.

820 P.2d at 89-90.

Wyoming, like Florida, provides that the narrowing occur at the penalty phase. See Stringer v. Black. The use of the "in the course of a felony" aggravating circumstance is unconstitutional. As the Engberg court held:

> [W]here an underlying felony is used to convict a defendant of felony murder only, elements of the underlying felony may not again be used as an aggravating factor in the sentencing phase. We acknowledge the jury's finding of other aggravating circumstances in this case. We cannot know, however, what effect the felony murder, robbery, and pecuniary gain aggravating circumstances found had in the weighing process and in the jury's final determination that death was appropriate.

820 P.2d at 92.

In Tennessee v. Middlebrooks, No. 01-S-01-9102-CR-00008, Supreme Court of Tennessee (decided September 8, 1992), the Tennessee Supreme Court followed the decision in Engberg. In a decision remanding for a new sentencing a case involving the torture murder of a fourteen year old boy, the Tennessee Supreme Court adopted the rationale expressed by Justice Rose of the Wyoming Supreme Court seven years before the majority of that court granted Mr. Engberg a new sentencing hearing in Engberg v.

Meyer:[1]

> Automatically instructing the sentencing body on the underlying felony in a felony murder case does nothing to aid the jury in its task of distinguishing between first-degree homicides and defendants for the purpose of imposing the death penalty. Relevant distinctions dim, since all participants in a felony murder, regardless of varying degrees of culpability, enter the sentencing stage with at least one aggravating factor against them.
>
> . . .
>
> A comparison of the sentencing treatments afforded first-degree-murder defendants further highlights the impropriety of using the underlying felony to aggravate felony-murder. The felony murderer, in contrast to the premeditated murderer, enters the sentencing stage with one aggravating circumstance automatically against him. The Disparity in sentencing treatment bears no relationship to legitimate distinguishing features upon which the death penalty might constitutionally rest.

Middlebrooks, slip op. at 55, citing Engberg v. State, 686 P.2d 541, 560 (Wyo. 1984)(Rose J., dissenting).

Compounding this error is the fact that this Court has held that the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert, 445 So. 2d at 340 (no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987)("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every

---

[1]At that new sentencing hearing Mr. Engberg received a life sentence.

murder during the course of a burglary justifies the imposition of the death penalty").

Mr. López was denied a reliable and individualized capital sentencing determination, in violation of the sixth, eighth, and fourteenth amendments. The error cannot be harmless in this case:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer, 112 S. Ct. at 1137.

Relief is proper at this time.

CLAIM II

THE AVOIDING ARREST AGGRAVATING FACTOR WAS IMPROPERLY APPLIED, IN VIOLATION OF MR. LOPEZ'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

This claim was raised on direct appeal, and is presented in this supplementary Petition because new case law from the United States Supreme Court demonstrates that Florida's instructions on 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).

In sentencing Mr. López to death, the trial court found the

"avoiding arrest" aggravating factor (R. 436). However, the trial court did not apply this Court's limiting construction of this aggravating circumstance, and imputed the intent of the other participants to Mr. López in finding this factor. As a result, this aggravating factor was overbroadly applied, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and failed to genuinely narrow the class of persons eligible for the death sentence. See Zant v. Stephens, 462 U.S. 862, 876 (1983). Mr. López's death sentence was imposed in violation of the eighth and fourteenth amendments.

Florida's capital sentencing statute provides that this aggravating circumstance applies when:

> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful or effecting an escape from custody.

Fla. Stat. § 921.141 (5)(e) (emphasis added). The plain language of the statute clearly contemplates that the factor applies when the homicide is committed for this reason. That is, for the factor to apply, the motive for the homicide must be to avoid arrest. A motive is personal to the individual, and the motive of others does not properly establish this aggravator. See Omelus v. State, 584 So. 2d 563 (Fla. 1991). The trial court's findings in Mr. López's case, however, demonstrate that the court relied upon the intent of the co-participants and not upon Mr. López's intent.

This Court has provided a limiting construction of the avoiding arrest aggravating circumstance. These decisions

demonstrate the impropriety of the application of this aggravator in this case. In Menendez v. State, 368 So. 2d 1278 (Fla. 1979), appeal after remand, 419 So. 2d 312 (Fla. 1982), the Court, in vacating a death sentence, held that 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. Id. at 1282 (citing Riley v. State, 366 So. 2d 19 (Fla. 1978)). 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[]."

Under the facts of this case, it cannot be said that the dominant or only motivating reason for the homicide in question was elimination of witnesses, or that the trial court based its application of this circumstance on such facts. Indeed, the sentencing order states that the intruders' intent was to commit

a burglary (R. 436). The application of this factor thus violated the eighth amendment and rendered the death sentence unreliable and arbitrary. Stringer v. Black. The factor was applied overbroadly, directly contrary to the statute and the settled standards articulated by this Court. Godfrey; Cartwright. Relief is warranted.

CLAIM III

THE TRIAL COURT'S AND DEFENSE COUNSEL'S FAILURE TO ASSURE THAT MR. LOPEZ WAS PROVIDED WITH A TRANSLATOR, TO ASSURE THAT MR. LOPEZ 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.

Eduardo López was not familiar with the United States criminal justice system and particularly had no knowledge of capital sentencing proceedings. He spoke no English, and thus an interpreter had to explain events in the courtroom to him. Additionally, Mr. López was not physically present for at least two critical stages of the proceedings.[2] Because defense counsel and the court did not ensure that an interpreter was present at all times, and/or was translating at all times, and/or was qualified to provide accurate translation, Mr. López was frequently "absent" from the proceedings even when he was physically present, and was denied his rights to confrontation,

[2]Mr. Lopez was absent from portions of the hearing held on the motion to enforce the plea agreement, and from the proceedings during which defense counsel waived Mr. Lopez's right to a jury for the penalty phase.

equal protection and due process. These absences from the capital proceedings violated Mr. López's fifth, sixth, eighth and fourteenth amendment rights.

A criminal defendant who does not speak English has a right to an interpreter at trial:

> [A] non-English-speaking defendant has a right to an interpreter at trial. This right is grounded on due process and confrontation considerations of the Constitution. . . . [A] defendant who has no way of understanding the trial at which he is being tried is, in effect, absent from that trial.

Suarez v. State, 481 So. 2d 1201, 1203-04 (Fla. 1985). Thus, the court has a duty to provide a non-English-speaking criminal defendant with a "competent interpreter." Id. at 1204. In Suarez, this Court found that the defendant's right to have an interpreter was protected because the record reflected that the trial court had appointed an interpreter to assist defense counsel, and the interpreter sat at the defense table throughout the trial. Suarez, 481 So. 2d at 1203. Thus, "the court had fulfilled its responsibility in appointing the interpreter, and . . . it was the defense counsel's responsibility to determine how the interpreter should be used." Id.

In Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987), the petitioner, who did not speak English, claimed that he did not receive a simultaneous translation of all proceedings. Blanco, 507 So. 2d at 1380. This Court rejected the claim based on the following facts:

> The public defender retained a personal translator for appellant and assigned a Cuban-born, Spanish-speaking attorney as assistant trial counsel. Both had served

> appellant in a previous trial for armed robbery and advised the court they had no difficulty communicating with him. The trial record contains a notation that the translator was seated next to the defendant throughout the trial. The record also shows that the trial judge required the translator and assistant counsel to demonstrate their proficiency in open court. The record also shows that at a noon recess, after the jury was excused, the trial judge conducted a short conference and noted that the translator had left with the jury, presumably with the permission of appellant and counsel. The trial judge later queried assistant counsel if he had advised appellant, in his native tongue, as to what had occurred and was assured that he had done so. We are satisfied . . . that the court ensured that the appellant had the assistance of a competent translator at all times.

Blanco, 507 So. 2d at 1380-81. In Mr. López's case, none of the factors which this Court found in Blanco is present.

Regarding interpreters translating for witnesses, Florida's evidence code provides:

> (1)(a) When a judge determines that a witness cannot hear or understand the English language, or cannot express himself in English sufficiently to be understood, an interpreter who is duly qualified to interpret for the witness shall be sworn to do so.
>
> * * *
>
> (2) A person who serves in the role of interpreter or translator in any action or proceeding is subject to all the provisions of this chapter relating to witnesses.
>
> (3) An interpreter shall take an oath that he will make a true interpretation of the questions asked and the answers given and that he will make a true translation into English of any writing which he is required by his duties to decipher or translate.

Fla. Stat. § 90.606. These statutory requirements apply when a defendant is conversing under oath with the court, such as in entering a plea or waiving a fundamental right. See Balderrama v. State, 433 So. 2d 1311, 1313 (Fla. 2d DCA 1983). In Mr.

López's case, these requirements were not met during the proceedings resulting in Mr. López's guilty plea or the proceedings in which Mr. López waived a penalty phase jury.

The record in Mr. López's case 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.

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).

All of the proceedings at which translation was not provided, or was not continuous, or was not done by a qualified translator, were critical stages of the proceedings. They all directly involved whether Mr. López would be convicted of a

capital offense and sentenced to death. A criminal defendant's sixth and fourteenth amendment right to be present at all critical stages of the proceedings against him is a settled question. See, e.g., Francis v. State, 413 So. 2d 493 (Fla. 1982); Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982); see also Fla. R. Crim. P. 3.180. "One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. at 338, citing Lewis v. United States, 146 U.S. 370 (1892).

Mr. López was involuntarily absent from critical stages of the proceedings which resulted in his conviction and sentence of death because of the court's and defense counsel's failures regarding translation. Mr. López never validly waived his right to be present at any proceeding. However, during his involuntary absences, essential matters were attended to, discussed and resolved. 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 the gravity of the proceedings discussed above, demonstrates; relief is therefore 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 IV

MR. LOPEZ 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.

A criminal defendant's sixth and fourteenth amendment right to be present at all critical stages of the proceedings against him is a settled question. See, e.g., Francis v. State, 413 So. 2d 493 (Fla. 1982); Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982); see also Fla. R. Crim. P. 3.180. "One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. at 338, citing Lewis v. United States, 146 U.S. 370 (1892).

Mr. López was involuntarily absent from critical stages of the proceedings which resulted in his conviction and sentence of death on two separate, distinct, and "critical" occasions. Mr.

López never validly waived his right to be present in either instance. However, during his involuntary absences, important matters were attended to, discussed and resolved.

Mr. López's first absence from a critical stage of the proceedings occurred during the hearing on the state's motion to enforce the plea agreement. As the prosecutor was examining former defense counsel, William Castro, regarding his discussions with Mr. López about the plea agreement, the following occurred:

> MR. HAIMES [Defense counsel]: My client has indicated that he would like to absent himself from the proceedings at this point, and prior to him getting more verbal than I anticipate him getting, I think that perhaps the Court should make the necessary arrangements for Corrections --
>
> THE COURT: Wait a minute.
>
> The question is -- he is getting ready to leave. Wait one second. I don't want him taken out.
>
> Would you ask Mr. López, please, if I am to presume by his actions that he does not wish to participate in this hearing anymore?
>
> THE DEFENDANT: Because these are a lot of stories that are being told here, and it hurts to hear these stories. There is nothing truthful or sincere at all. It is a futile agreement to sentence me; but I don't want to hear you no more.
>
> THE COURT: You do not wish to stay in the courtroom any further?
>
> THE DEFENDANT: Not while this man is here or while these untruths are being heard. I don't want to be here. I want the truth.
>
> I anticipate the man that was sitting there, Fientes, he also have something to say about this. So he knows everything that being happening here. All that is done is make money out of the State.
>
> Please, lock me up. I don't want to be here anymore. I don't want to hear anymore of these lies.

The judge with his power to determine on me whatever he thinks; but I want to go back to the cell. I give him all of the authorization to do with me what he wants. I don't want to hear this man anymore or --

THE COURT: I understood that.

Do you want --

MR. BURGER: Could you ask him if he understands that he has a right to be present, and also tell him that he has a right to listen to the testimony; and if he feels that it is untruthful, to retake the stand to testify and refute that under oath.

THE DEFENDANT: I just can't -- I am listening. I can't talk, and I am like this. I am boiling up.

MR. BERK: It is the State's feelings we would like Mr. López present for all proceedings.

THE COURT: Obviously, he has a right to be present or not to be present. I want to make sure that Mr. López understands it is his absolute right to be present at this particular hearing and any questioning that is done of Mr. Castro by Mr. Berk or cross- examination that is done by his attorney; and if he leaves, he is giving up the right to consult with his attorney about any questions that his attorney will ask Mr. Castro.

Do you understand that?

THE DEFENDANT: I understand.

But it is just that it is a lot of lies, and I just can't stand it. I just can't stand it because they have talked, and they have agreed, and there is a lot of things that he doesn't know about that I want him to know about.

THE COURT: Let me finish.

Not only do you have a right to be here during the questioning of Mr. Castro, if you absent yourself from the courtroom, then at a later time, if you wish, you may retake the witness stand and testify; and if you leave, you will not have been present during Mr. Castro's testimony to hear what he has said.

Do you understand that?

THE DEFENDANT: All right.

THE COURT: Do you still wish to leave, or do you wish to stay?

THE DEFENDANT: I am going to stay, but with the agreement that I can later on rebut what is said. I would like to have some paper and pencil, please. If you can give me the word, I can just rebut it later.

THE COURT: Tell him to sit down next to his attorney. And if you wish, he can have a pencil and a paper.

Let the record reflect that Mr. Berk has slid a paid and a pencil for the defendant.

Let's proceed.

(R. 779-82).

Although the trial court thus initially recognized that Mr. López' presence was essential, after some seventeen more pages into the examination of Mr. Castro, the following occurred:

THE DEFENDANT: I cannot stand this no more.

THE COURT: Let the record reflect that Mr. López has expressed his desire to leave the courtroom and has left the courtroom.

(R. 799). No inquiry was made by the trial court, and the examination of the witness continued. Mr. López was then absent for the remainder of Mr. Castro's testimony, including the cross-examination by the defense.

Mr. López's second absence from a critical stage of the proceedings occurred at a hearing held on December 2, 1985. At the beginning of that hearing, defense counsel Haymes announced that Mr. López wished to waive his right to have a jury for the penalty phase (Supp. R., 12/2/85 hearing, p. 14). The defense and the state argued this matter for a while, and then the court noted, "Mr. López is not here." (Id. at 17). After the court

took care of other matters, the proceedings resumed with Mr. López present.

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. 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. 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. LOPEZ'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).

Throughout his closing remarks, the prosecutor made repeated improper emotionally-charged references to the fact that the victim was a "little boy" (R. 1316-17).

> Your Honor, the defendant should be held accountable for the execution of this eight year-old child.

(R. 1300) (emphasis added).

* * *

> Raimar is an eight-year-old boy, four-feet some-odd inches tall, under 100 pounds, was in the room witnessing his mother being executed.
>
> We know from the evidence that he experienced the horror of seeing his mother shot in the head . . . He was on his knees and he was screaming.

(R. 1314) (emphasis added).

* * *

> This boy, this child, this baby . . . [N]ot only does Raimar have to be aware and watch his own impending doom . . . to watch his mommy get shot in the head first.

(R. 1315) (emphasis added).

Additionally, the prosecutor repeatedly pointed out the victim's mother's presence at many of the proceedings (R. 761, 778; Supp. R., 6/13/84 hearing, p. 3; Supp. R., 2/13/86 hearing, p. 64), and at sentencing, asked that she be allowed to address the court (R. 1340), which she was allowed to do. (R. 1367).

It is clear from the record that the trial court was influenced by the prosecutor's extraordinarily emotional remarks and by the mother's presence. After closing arguments of both counsel at the sentencing, the judge stated to the victim's mother:

> Let me say to you, Ms. Perez-Vega, that I know of no greater hardship that one can go

> through than the loss of a child. If there is anything I could do to correct that I would do it.

(R. 1368).

The state relied heavily upon each of these nonstatutory aggravating circumstances to justify the imposition of a death sentence both in its arguments to the sentencing jury and court. It is evident from the record that the court considered nonstatutory aggravation, and this resulted in a death recommendation. This was eighth amendment error. The prosecutor's introduction and use of, and the sentencers' reliance on, these wholly improper and unconstitutional non-statutory aggravating factors clearly violated the eighth and fourteenth amendments, see Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977), and should not be allowed to stand.

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 VI

MR. LOPEZ 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.

The waiver of a capital sentencing jury entered by Mr. López on December 2, 1985, was not voluntarily, knowingly, or intelligently made. Mr. López was coerced into entering the waiver, did not understand the consequences of the waiver, did not comprehend the rights he was foregoing by entering the waiver, did not understand the jury's function at capital sentencing, and was unable to make a rational decision which was in his own best interests. 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).

In the instant case, the court's inquiry was thoroughly inadequate to establish that Mr. López was proceeding voluntarily, knowingly, and intelligently. The record of the waiver hearing itself demonstrates Mr. López's obvious confusion and lack of understanding -- even the prosecutor tried to point out that Mr. López did not understand what he was doing:

> [THE COURT:] Let me find out from Mr. López, first of all whether he reaffirms this

waiver, which was executed today, waiving his right to have an advisory jury.

I have in front of me a document Mr. López, which is entitled the Defendant's Written Waiver of Advisory Jury Sentence. As part of that document --

THE DEFENDANT: Could I answer you for one moment?

THE COURT: Yes.

THE DEFENDANT: In this case, but to verify the case and for the sentencing, I would like for you to be the one to verify that.

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.

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.

MR. HAYMES: I would like to be able to inquire of the defendant if when he uses the word "fact" if he is referring to the guilt or innocence phase because he has made it clear, at length, if it is guilt or innocence that is where he would like a jury for the issue of penalty, which he is extremely desirous that the Court address that matter.

I would like to ask Mr. López before Your Honor if that is his understanding of his own feelings.

THE DEFENDANT: I would like for Your Honor to be the one to determine, as far as the sentencing is concerned.

As far as the jury to determine my guilt or my innocence, as long as they know all the facts and what has been alleged.

THE COURT: Let me say this, Mr. López: any further proceedings in this matter will not be to determine innocence or guilt. That stage is over.

The only further proceeding will be to determine a sentence.

THE DEFENDANT: Then I would like to give you that privilege.

THE COURT: Before I do that, I want you to understand you still have the right to have a jury of twelve people selected by you and your attorney make a recommendation to me as to what sentence you should receive.

THE DEFENDANT: No, no, no, for the sentencing I want you to be the one to do that.

THE COURT: I would still be the one to pass sentence in this case, even though the jury made the recommendation.

I do not have to follow their recommendation.

THE DEFENDANT: I would like for you to be the only one.

THE COURT: Are you absolutely sure?

THE DEFENDANT: Yes, sir.
<u>If it is for sentencing, I want you to be the one</u>.

<u>If it is for what I want for all the things that happened to be known, then for the jury</u>.

MR. HAYMES: For the record, that would go back, of course, to the guilt or innocence phase where we had the better part of two weeks in hearing whether or not Mr. López would be entitled to a jury, once again as to the guilt or innocence.

I think that at this point the defendant has made a requisite showing to the Court that sentencing is the only issue; and the only one he wants to hear it at this time, Judge, would be Your Honor.

THE COURT: Once again, is that correct, Mr. López?

THE DEFENDANT: Yes.

MR. BERK: I would ask that the defendant be placed under oath.

I do not think he was placed under oath with respect to this colloquy and that I have a chance to inquire with respect to his waiver.

MR. HAYMES: Your Honor, I think the Court should be the only inquiring person as to his waiver.

THE COURT: I do not think he needs to be placed under oath.

What is it you want to ask him?

MR. BERK: I'm not satisfied that the defendant understands that he has a right, an absolute right to have a jury hear all the facts surrounding the incident and that the jury may recommend life or that it may recommend death.

If the jury recommends life, that the Court can only sentence him to death if the Court finds that no reasonable person could have sentenced him or advised a life sentence.

I would like the Court to inquire along those lines because I'm not really satisfied that he understands what he is doing right now. I think he is showing respect to the Court by recommending or allowing the Court to pass sentence but that would occur in any case.

MR. HAYMES: Your Honor, may I for a minute?

Usually, the cases that while there are many exceptions, most cases the trial jury would be hearing the sentencing phase.

We have what is a very difficult issue to treat at the penalty phase, which is the whole plea agreement issue and probably for the most part there would not be much mention of that plea agreement or the circumstances that in effect catapulted him into the penalty phase.

We feel this Court can best sift through the matters at hand, understanding what has happened up to date; that this Court is in

the best position to understand that.

The only State objection that I would see is that they are reiterating that aren't you sure that you want a jury, Mr. López; aren't you sure you want a jury on all the facts.

It seems to me, Judge, that the State would like very much to allow for the possible prejudice that can over-spill from the fact of the victim's age in this case. I think that that is a very realistic possibility that the State seems vehement in their desire for the defendant to have an advisory jury.

THE COURT: Have you discussed this with Mr. López?

MR. HAYMES: Yes.

Certainly those factors come into play, Your Honor, but I think it is also a tactical move on the part of the State that they would like a jury very much.

Is it Mr. Berk's contention that he is so concerned with the defendant's rights?

THE COURT: I think Mr. Berk brought up a couple of good points worth reiterating with Mr. López. I will do that at this point.

Mr. López, do you understand that even though we will not be dealing with the issue of innocence or guilt, there will still be a hearing and at a hearing, whether there is a jury or not, the facts of the case will be presented.

Do you understand?

THE DEFENDANT: Uh-huh.

THE COURT: If there is a jury to make a recommendation and the jury recommends a life sentence without the possibility of parole for 25 years, then the only way you could be sentenced to death is if the evidence against you was so strong that reasonable people could not differ; that death should be the sentence in the case.

Do you understand that?

Do you still wish to give up your right to have a jury make a recommendation to the Court?

THE DEFENDANT: I am going to repeat it again, Your Honor.

If it is for sentencing and not for hearing the evidence, I will give you the priority.

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.

MR. HAYMES: Only if they can find that he is innocent, Judge.

MR. BERK: Obviously, if there is some ambiguity --

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.

MR. HAYMES: I do not believe the defendant has indicated in any way, Judge, that he is not desirous of the Court hearing the facts for the purpose of sentencing.

THE COURT: I did not get that out of the last thing he said.

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.

MR. HAYMES: This is certainly not a matter between the State and the Court. This is a matter between you and I and the defendant.

The defendant has the right to waive. He has an absolute right to waive jury, qualified only by Your Honor's feeling that for some important reason you should override his wishes.

He has made it clear on the record numerous times that if sentencing is the wish and the Judge is to be the sentencer, that is what he would rather have.

THE COURT: We are going to try it one last time.

MR. HAYMES: Your Honor, if you are going to try it one last time, could you refer to guilt or innocence?

THE COURT: That is what I thought I was doing.

MR. HAYMES: I'm sorry.

THE COURT: Once again, Mr. López, there will be a sentencing hearing in this case, do you understand that?

Do you understand if you wish you have a right to have a jury of twelve people chosen from the community by you and your lawyer make a recommendation as to the sentence, do you understand that?

THE DEFENDANT: Yes.

THE COURT: At the hearing to determine the sentence, all the facts in the case will be presented, whether it is to me or to the jury who will make the recommendation.

The issue will not be innocence or guilt. The issue will be sentencing, but all the facts will come out at the hearing.

THE DEFENDANT: I would like for you to be

> the one. I'm going to repeat again.
>
> If it is sentencing, I would like for you to be the one. I give you all the priority, Your Honor.
>
> THE COURT: I am satisfied, Mr. López understands what is going to happen at his sentencing hearing and his right to have an advisory jury present.
>
> I'm going to make a finding he has waived that right and it is discretionary for the Court to set that ruling.
>
> I am going to set that ruling at this time.

(Supp. R., 12/2/85 hearing, pp. 20-30) (emphasis added).

The record clearly indicates Mr. López's lack of understanding and that, in fact, what he truly wanted was to have a jury for the penalty phase. Even the prosecutor demonstrated his belief that Mr. López's waiver was not constitutionally adequate:

> 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).

Mr. López did not know what he was waiving, and the waiver should never have been allowed to proceed. At the beginning of the hearing, Mr. López was not even present, see Claim IV, and once Mr. López was present, it is not clear that a qualified interpreter was present. See Claim III. Once the colloquy between the judge and Mr. López began, however, it is clear that Mr. López did not understand what he was doing and that he never

unequivocally waived his right to a jury.

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. LOPEZ 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.

During the hearing on the prosecution's motion to enforce the plea agreement, and the defense motion to withdraw the plea, the state called former defense counsel William Castro as a witness. (R. 768). Prior to the beginning of Mr. Castro's testimony, defense counsel Haymes asked the court to instruct the witness on the protection of the attorney-client privilege:

> MR. HAYMES: I would like the Court to caution to witness to please not provide anything more than is not necessary as to the attorney-client privilege and --
>
> THE COURT: The client, through you, has filed a motion to vacate his plea, and he said that his lawyer made some misrepresentations to him. <u>He was waived his attorney-client privilege as to those matters</u>.

(R. 768-69) (emphasis added). Mr. Castro, however, proceeded to reveal all manner of information which was unrelated to Mr. López's motion to vacate the plea.

The defense motion, entitled 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, alleged:

> 1. On the 13th day of June, 1984, the Defendant entered into a written plea agreement delineating the terms and

conditions which was signed by all parties and accepted by the Court.

2. At the time the Defendant entered into the plea agreement, he had every intention of fully abiding by that agreement, and of strictly complying with its ever [sic] term and condition. (Please see the attached Affidavit of the Defendant).

3. While he had every intention of abiding by the agreement, he was not able at the time of entering into the agreement fully apprised of the complete meaning of his responsibility to "testify", and accordingly was unaware that he would have to do so before all parties in open court. (Affidavit of Defendant).

4. Subsequent to entering into the plea agreement, the Defendant learned of persons within the prison system which were either related to, or sympathetic to, the interests of an alleged co-participant in the underlying incident. (Affidavit of the Defendant).

5. These persons within the prison system indicated to the Defendant, via numerous and imminent threats, that he will be killed should he choose to testify. (Affidavit of Defendant).

(R. 340-41). According to the Motion, "the inquiry must be made, 'to what extent did this Defendant fully appreciate, or was he made aware, of the nature and perameters [sic] of his obligation to testify?'" (R. 347).

At the hearing on the motion, however, the information disclosed by Mr. Castro went well beyond the scope of the above-stated inquiry; counsel was permitted absolute discretion with regard to his revelation of confidential communications with Mr. López. Mr. Castro divulged the content of discussions with Mr. López well before the subject of a plea came up, his discussions

with Mr. López regarding Mr. López's version of the offense, and Mr. Castro's views of the case against Mr. López:

> Q [by Mr. Berk] In addition to your legal attack on that ground, had you prepared a defense with respect to claims by your defendant vis-a-vis his lack or [sic] involvement in the case?
>
> A [by Mr. Castro] Yes.
>
> Q What was that?
>
> A All throughout the proceedings at the pretrial stage, which encompasses the taking of depositions and investigative work that I cause to be performed, Mr. López maintained that he was present outside the residence in which the murder occurred. However, he did not actually commit the murder, but it was the other people involved.
>
> And that seemed to be corroborated by the fact that fingerprints found at the scene of the defendant were only found on the outside of the house and not on the inside, and we were going to proceed on the theory that Mr. López was present, however, he withdrew, and he was later told what occurred inside regarding the murder.
>
> Additionally, there was a confession in the case, which we would then be able to explain away by the fact that it was the co-defendants who later told him what had occurred inside.
>
> Q Mr. López had claimed to you it was the co-defendants who told him what had occurred inside?
>
> A Yes.
>
> Q That was his original story to you?
>
> A Yes.
>
> Q Were you aware of whether or not the State of Florida was actively seeking a first degree murder conviction against Mr. López in an event of their seeking his death by electrocution?
>
> A I was aware of it, and, yes, they were.
>
> Q Based upon Mr. López's conversation to you, your own research, both legal and in the field, did you

initially approach the State of Florida in regard to a plea?

A No.

Q Why not?

A Primarily because Mr. López always maintained his innocence, at least based on the story he had given me, and something that stands out in my mind is that he always swore upon his children and made it a point that he was innocent.

Q Did there come a point in time when Mr. López approached you in regards to your dealing with the State for a plea agreement?

A Yes.

Q How did that come about, and what happened?

A I don't recall the exact date, but --

Q When was it in relation to the date of his trial?

A In relation to the day that we had the plea in court it was approximately ten to fourteen days before.

I received a phone call at my office paraphrasing that it was urgent that I go see him, and I did; and when I went to see him, he indicated that I should do everything possible to save him from the chair and pursuant to that I tried to make an agreement with the State in order to save him from the chair.

Q Did he indicate to you then whether or not he was actually the shooter of the child?

A Yes.

Q What was it that he told you that was different from his original version?

A For the first time he told me that he had gone inside, that he did have a weapon; and then I inquired as to the fingerprint evidence, and he told me that the reason that the fingerprints -- his fingerprints appeared on the outside was upon entering he put on gloves.

Q Therefore, his fingerprints did not appear on the inside?

A Exactly.

He then told me that he did shoot his pistol, but I don't believe that he admitted to actually shooting the child. I think --

MR. HAYMES: Let me objection [sic] at this point. Any further testimony by Mr. Castro into the specific facts of the crime would be unnecessary at this point in this way to rebut the allegations of the effectiveness of the representation that Mr. Castro --

MR. BERK: Judge, Mr. Castro's advice as an attorney as well as the specifics of what were advised to Mr. López -- Mr. Castro's legal opinion was called in and questioned as to whether or not he properly advised him to take the plea. These were things that were raised by Mr. López.

THE COURT: Overruled.

BY MR. BERK:

Q Did he later amend that particular statement?

A He initially did not admit to shooting the child; and, I believe, that his story at that time was that the lady, who I name as Margarita Canteen [sic], was with the one that actually shot the boy.

Subsequently, I got a further revised statement, which I first heard about through the detectives, and then it was confirmed later by Mr. López, that he had been the shooter.

Q Of the child?

A Yes.

Q And the mother?

A Yes.

(R. 771-75) (emphasis added).

None of this information was remotely relevant to the issues raised by the defense motion to withdraw the plea or by Mr.

López's testimony at the hearing. Mr. Castro revealed his confidential communications with Mr. López regarding the plea agreement, going well beyond the limited allegations raised by the defense motion to vacate the plea. Mr. Castro even made disparaging remarks about Mr. López, referring to his "disgust" (R. 801) and the fact that he was "embarrassed" (R.800) with Mr. López at the plea proceedings. Mr. Castro went on to state that he assumed that Mr. López was "pulling my leg" (R. 797) and "being evasive" (R. 800).

Mr. López was deprived of his constitutional rights, for in defending himself, his former attorney operated under a conflict of interest and thus "breach[ed] the duty of loyalty, perhaps the most basic of counsel's duties." Strickland, 466 U.S. at 656. Mr. López was also deprived of the effective assistance of counsel, for Mr. Haymes failed to raise necessary objections to this procedure, and unreasonably allowed confidential information to be revealed to the ultimate sentencer. See Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, 468 U.S. 1206 (1984), adhered to on remand, 739 F.2d 531 (1984). In overruling the objection that was made, the trial court erred. Furthermore, the trial court erred in ruling that Mr. López had waived his attorney-client privilege regarding many of the matters elicited from Mr. Castro.

"Privileges are recognized because lawmakers and courts consider protecting confidential relationships more important to society than ferreting out what was said within the

relationship." United States v. Ballard, 779 F.2d 287, 292 (5th Cir. 1986). The attorney-client privilege "promote[s] freedom of consultation between client and lawyer by eliminating the fear of subsequent compelled legal disclosure of confidential communications. International Tel. & Tel. Corp. v. United Tel. Co. of Florida, 60 F.R.D. 177 (M.D. Fla. 1973), aff'd, 550 F.2d 287 (5th Cir. 1977). While a defendant may be deemed to have waived the attorney-client privilege when alleging ineffective assistance of counsel, the waiver only extends to communications relevant to that issue. See Laughner v. United States, 373 U.S. 326 (1967); Industrial Clearinghouse v. Browning Mfg., 953 F.2d 1004 (5th Cir. 1992); Turner v. State, 530 So. 2d 45 (Fla. 1987). The matters outlined above to which Mr. Castro testified were not relevant to the issue before the trial court at the time.

In addition to revealing confidential communications, Mr. Castro's testimony provided the sentencing judge with information which could only serve to divert his attention from permissible sentencing considerations. Sentencing procedures in capital cases must ensure "heightened reliability in the determination that death is the appropriate punishment," Woodson v. North Carolina, 428 U.S. 280, 305 (1976), in order to prevent the "unacceptable risk that 'the death penalty may be meted out arbitrarily or capriciously' or through 'whim or mistake.'" Caldwell v. Mississippi, 472 U.S. 320 (1985) (O'Connor, J., concurring).

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. LOPEZ'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE TRIAL COURT SHIFTED THE BURDEN TO MR. LOPEZ 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. In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, this Court addressed the question of whether

the standard employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion reflects that these claims should be addressed on a case-by-case basis in capital post-conviction actions. Mr. López herein urges that the Court assess this significant issue in his case and, for the reasons set forth below, that the Court grant him the relief to which he can show his entitlement.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so shifting the burden, the court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

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. 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 October 21st, 1992.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

GAIL E. ANDERSON
Assistant CCR
Florida Bar No. 0841544

TODD G. SCHER
Staff Attorney
Florida Bar No. 0899641

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

Gail E. Anderson
COUNSEL FOR PETITIONER

Copies Furnished to:

Mary Leontakianakos
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, FL 32399-1050