IN THE SUPREME COURT OF FLORIDA

EDUARDO LOPEZ,

Appellant,

v. CASE NO. 78,228

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, EDUARDO LOPEZ, was the defendant in the trial court and will be referred to herein as "the defendant." Appellee, the State of Florida, was the prosecution in the trial court and will be referred to herein as "the state." References to the record on direct appeal will be by the symbol "R", references to the supplemental record on direct appeal will be by the symbol "SR" and references to the post-conviction record will be by the symbol "PC-R" followed by the appropriate page number(s). "SR"cites will not only be followed by page number(s) but also by a description of the referred transcript or certified copy as the page numbers in the supplemental record are not all consecutive but repeat in the four unnumbered volumes.

STATEMENT OF THE CASE AND FACTS

On the evening of January 28 of 1983, Luis Reimar Perez-Vega had fallen asleep in his mother's bed. Reimar was eight years old. His mother, Maria Luisa Perez-Vega was sleeping beside him. Sometime during the early morning hours of January 29, Ms. Perez-Vega awakened to see three individuals come into her bedroom (R 968-69).

One of these individuals put his hand over her mouth to stop her from yelling. Ms. Perez-Vega managed to bite his hand and when he pulled it away she started yelling for her children. The man told her to stop yelling and while holding her face with one hand, put a gun with what appeared to be a silencer to her head (R 969-972).

Ms. Perez-Vega heard one of the other intruders say kill her before she heard what sounded like an explosion in her head and felt the flow of warm liquid, her own blood, run down her face. Ms. Perez-Vega had been shot in the face, a wound from which she would recover. Her son's fate though would be different (R 972).

Reimar was awakened by the screaming to helplessly witness the seeming murder of his mother. Ms. Perez-Vega heard her son yell, "leave my mommy alone" several times before she heard someone say "kill the kid". She then felt a struggle beside her before she finally heard another shot and a sound like snoring coming from Reimar. Ms. Perez-Vega then felt someone raise her nightgown while people were talking over her. The intruders then left (R 973-975, 983).

After they left, she managed to get up and call 911 (R 977). She stayed with her son until the paramedics separated them (SR 24-25, certified copy of presentence investigation). When Reimar was taken to Children's Hospital, he was pronounced brain dead. He had been shot once in the back of the head. The bullet had bounced several times inside his skull causing severe damage to his brain (R 1035-39). Ms. Perez-Vega herself had suffered a contact wound to her face, shattering her jaw. Her skin was severely burned from the gunpowder and her jaw had to be wired shut for over a year (SR 24, 30, certified copy of presentence investigation).

Shortly after this ordeal, Ms. Perez-Vega gave a statement to the police describing the crime and her attackers. The only one of the three individuals Ms. Perez-Vega was able to describe in any detail was the shooter as he is the only one she had an opportunity to see well. The other two she described as a black Latin male and another person who appeared to be a man. This second person is the one that told the shooter to kill her and Reimar(PC-R 246-257).

Ms. Perez-Vega also told Detective Diaz of her unfortunate involvement with a Rafael Paz, an individual she had heard was involved in drug trafficking (PC-R 229-245). Mr. Paz is married to a client of hers, Zulie Paz (R 942-45).

A few weeks before the murder, Mr. Paz came over to her home and asked to leave approximately $50,000 dollars in cash for safekeeping. He was to return in two hours. At the same time, Mr. Paz asked the victim to go to the airport and exchange some

currency for him as he was returning to Venezuela that same day. Rafael Paz was very insistent and Ms. Perez-Vega reluctantly agreed (R 947-954).

When she returned she saw that her home had been searched and noticed that one of her windows was open.[1] Only the money was gone. When Rafael Paz returned for his money, she told him what happened. He appeared very upset but asked her not to call the police. He subsequently called her from Venezuela and, along with another man, accused her of stealing his money. (R 955-960).

This was the only lead Ms. Perez-Vega was able to give the police as a possible motive for this killing. Ms. Perez-Vega herself was not involved in any drug dealings and did not recognize any of the three individuals that broke into her home attacking her and her son. After the murder, she never heard from Zulie Paz again.

Through his investigation, Detective Jose Diaz found that Rafael Paz was heavily involved in drug dealing and had in the past gotten in trouble for not paying his suppliers. There was, however, no other evidence to link Rafael Paz to this murder.

In May of 1983, Jose Hung, an inmate at the Dade County Jail, called Detective Diaz claiming to have information about this murder (PC-R 257-58). When they met, Mr. Hung informed Detective Diaz that the defendant, Eduardo Lopez, had told him that he was one of the participants in this crime and, in fact,

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[1] This was the same window that the defendant came in through when he broke into her house.

admitted to killing the child. At the time, Jose Hung was in custody for an unrelated burglary (PC-R 258-60).[2]

After Mr. Hung's statement, a photographic line-up was prepared and shown to the victim. Ms. Perez-Vega immediately identified the defendant as the man who shot her and killed her son. After her identification, an arrest warrant for Eduardo Lopez was issued. He was picked up within days (PC-R 264-68).

After the defendant was arrested he waived his rights and gave Detective Diaz a statement. Initially, he denied knowledge of the crime except through the news. He unwittingly, though, relayed information to Detective Diaz that had not been released to the media (R 1086).

It was only after he was confronted with additional information that he confessed. (R 1087-1088). The defendant gave Detective Diaz a statement admitting to breaking into Ms. Perez-Vega's home and shooting her son. (R 1097-1118). He told Detective Diaz that he was the only one that had a gun and that he was armed when he broke into the home.

On June 10 of 1983, the defendant was indicted by the grand jury of Dade County, Florida, for the first degree murder of Luis Reimar Perez-Vega, the attempted first degree murder of Maria Luisa Perez-Vega and the armed burglary of Ms. Perez-Vega's home.

The defendant was arraigned in June of 1983 and the Public Defender's Office was appointed to represent him. Mr. Brian McDonald, an Assistant Public Defender, later certified a

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[2] No deals were made with Jose Hung for this information. Dectective Diaz did, however, appear at his sentencing and told Judge Mastos of his cooperation (PC-R 260-61).

conflict and William Castro was appointed to represent the defendant an November 8 of 1983.

Mr. Castro prepared the case for trial and filed numerous motions on behalf of the defendant (R 11-13, 27-121). At his client's insistence, Mr. Castro approached the Assistant State Attorney, Sam Rabin, for a plea offer (R 773). Pursuant to these negotiations a plea was agreed on and reduced to writing (R 122-26). The written plea agreement was executed by all parties, including the defendant, in the presence of Judge Levy. Judge Levy conducted a plea colloquy prior to accepting this agreement (SR 1-17, transcript of June 13, 1984 hearing).

In his plea agreement, the defendant agreed to testify truthfully in all proceedings against the other two individuals he had identified as participating in this murder. Fransisco Felipe and Margarita Cantin Garcia were arrested on July 12 of 1984 and January 30 of 1985, respectively. Sometime during February of 1985, the defendant stopped cooperating with the State of Florida.[3] A new lawyer, Mr. Haymes, was appointed to represent him (R 197).

On May 14 of 1985, the State of Florida filed a motion to enforce the plea agreement (R 200-03). This was followed by the defendant's own motion to vacate his plea (R 340-355). Judge Levy conducted a hearing on these motions and on August 2 of 1985 granted the State's motion (SR 36-45, certified copy of August 9,

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[3] Before he stopped cooperating, the defendant was placed in a safety cell for participating in an aborted escape plot from the Dade County Jail where he was being held (R 1290-96).

1985 order). The defense motion to vacate was denied and a sentencing hearing was scheduled (R 861-68).

On December 2 of 1985, the defendant waived his right to an advisory jury for the penalty phase of his case (SR 29, transcript of December 2, 1985 hearing). The sentencing hearing lasted from **December** 3 to December 6 of 1985. On February 13 of 1986, Judge Levy sentenced the defendant to death (SR 65, transcript of February 13, 1982). In so sentencing the defendant, Judge Levy found that the state had proven three aggravating circumstances beyond a reasonable **doubt.**[4] No mitigating circumstances were found (R 531-42).

A direct appeal to this Court was taken in December of 1987. In that appeal, the defendant claimed (1) that the trial court erred by refusing to set aside his guilty plea and proceed to trial on the **merits,** (2) that his plea was not truly and voluntarily entered, (3) that the trial court erred by not ordering a competency hearing prior to his plea, (4) that there was not sufficient evidence to support the judge's finding of the avoiding arrest aggravating factor and (5) that the trial court erred in not finding any mitigating circumstances. This Court, by unanimous written opinion, rejected all of the defendant's claims and affirmed both the conviction and sentence of death. See, **Lopez** v. State, 536 **So.2d** 226 (Fla. 1988).

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[4] The three aggravating circumstances found were: (1)the murder was committed during the commission of a felony, (2)the defendant was convicted of another crime of violence and (3)the murder was committed for the purpose of avoiding arrest (R 531-42).

A death warrant was signed on March 29, of 1990. On April 26 of the same year, this Court stayed the defendant's execution and granted him a four month period within which to file any post-conviction or collateral relief motions.

On August 28, 1990, two days beyond the four month period granted by this Court, the defendant filed a Rule 3.850 motion with special request for leave to amend. This Rule 3.850 motion contained only conclusory allegations without setting forth facts relied upon as required by Rule 3.850 (PC-R 15-26).

On or about October 1 of the same year, in excess of one month beyond the four month period this defendant filed an Amended Rule 3.850 motion (PC-R 27-218). The record does not reflect that the defendant was granted leave of Court for this late filing. Nevertheless, the Rule 3.850 motion was denied on the merits by the trial court on May 21, of 1991 (PC-R 472-82).

In his motion, the defendant raised the same claims he is now raising on appeal. Judge Levy denied the motion finding that the motion, record and files conclusively show that the defendant was not entitled to relief. This appeal followed.

SUMMARY OF ARGUMENT

Point I: The state attorney complied with the defendant's public records request pursuant to Section 119.01 Florida Statutes. The other requests alleged by the defense were never specifically brought to the attention of the trial court and should be deemed waived as not timely made.

Point II: The trial court's denial of the defendant's Rule 3.850 motion without an evidentiary hearing was proper as the motion, record and file conclusively show that he is not entitled to relief.

Point III: The defendant's first lawyer Mr. Castro never "abandoned" him as claimed. Mr. Castro withdrew from the case only after its closure with the defendant's guilty plea,

Point IV: Mr. Castro did not render ineffective assistance by failing to challenge the surviving victim's identification and/or testimony on the ground that she underwent hypnosis. At the time of the defendant's guilty plea hypnotically refreshed testimony was admissible in Florida courts.

Point V: Mr. Castro did not render ineffective assistance by failing to investigate the defendant's alleged incompetence and for allowing him to enter a guilty plea. The issues of the defendant's competence and the voluntariness of his plea were dealt with and rejected on direct appeal. They are now procedurally barred.

Point VI: Mr. Haymes did not render ineffective assistance at the penalty phase of the defendant's case by allowing the defendant to waive jury and by not presenting more mitigating

evidence. Both those claims could have been raised on direct appeal and are now procedurally barred.

Paint VII: Mr. Haymes did not render ineffective assistance by failing to investigate the defendant's alleged incompetence, The defendant was found competent by all four experts appointed to examine him. This issue was raised and rejected on direct appeal and is now procedurally barred.

Point VIII: The defendant's death sentence does not rest upon an improper aggravating circumstance. This issue could have been raised on direct appeal and is now procedurally barred.

Point IX: The trial judge did not preclude the defendant from presenting competent evidence of mitigation. This issue could have been raised on direct appeal and is now procedurally barred.

Point X: Whether the trial judge erred in finding no mitigation is a procedurally barred issue as it was raised and rejected on direct appeal.

Point XI: The testimony of Mr. Castro at the defendant's hearing to enforce or vacate his plea did not deprive the defendant of the effective assistance of counsel. The defendant waived the attorney-client privilege when he testified that Mr. Castro had not discussed the merits of his case and lied to him about the sentence in order to get him to plead.

Point XII: The defendant's claim that he **was** not provided with a qualified interpreter is procedurally barred as it could have been raised on direct appeal.

Point XIII: **The defendant 's** claim that he was absent from **critical court proceedings is procedurally barred as it could have been raised on direct appeal.**

Point XIV: **The State did not withhold exculpatory evidence and there is no reasonable probability that the allegedly undisclosed** material would have rendered a different result.

Point XV: **Whether the avoiding arrest aggravating factor was properly applied in this case is procedurally barred as it was raised and rejected on direct appeal.**

Point XVI: **Whether the defendant's plea was voluntary is procedurally barred as it was raised and rejected on direct appeal.**

Point XVII: **The defendant's alleged incompetence was raised and rejected on direct appeal and it is now procedurally barred.**

Point XVIII: **The defendant's waiver of jury was voluntary as is evident in the court's colloquy. Moreover, this issue could have been raised on direct appeal and is now procedurally barred.**

POINT I

WHETHER THE ALLEGED WITHHOLDING OF RECORDS IN THE POSSESSION OF VARIOUS ENTITIES VIOLATED THE DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AS WELL AS HIS RIGHTS UNDER CHAPTER 119 FLORIDA STATUTES.

The defendant claims that his public records requests pursuant to Section 119.01 Florida Statutes were not honored and ignored by the trial court at the denial of his Rule 3.850 motion. A review of the record reveals that this claim is without merit.

The state attorney did make her files available to the defense, withholding only those portions that are privileged, i.e. work product. The defendant now wants this Court to order the production of the withheld documents or order the trial court to conduct an in *camera* hearing to determine if the undisclosed portions were properly withheld.

To now request an in *camera* hearing is nothing more than a delay tactic on the part of the defendant. This request should have been brought to the attention of the trial judge prior to the taking of this appeal. The cryptic reference to the undisclosed materials in the defendant's Amended Rule 3.850 motion did not properly bring this complaint to the trial court's attention (PC-R 29-30). As this alleged non-compliance was not specifically brought to the attention of Judge Levy it should be deemed waived by this Court.

Moreover, the defendant is not automatically entitled to an *in camera* hearing. The state attorney made available to the defendant all of the records which fall within the provisions of

the Public Records Act. The Court in Kokal agreed that not all documents in the state's file are public record, State v. Kokal, 562 So.2d 324, 327 (Fla. 1990) and stated that if the state attorney "had a doubt as to whether he was required to disclose a particular document, he should have furnished it in camera to the trial judge for a determination." Id. As the state attorney had no doubt, no such inspection was needed in this case.

The other records sought by the defendant are not within the control of the State of Florida. The defendant seeks access to the polygrapher's, Mr. Slatery's records[5] as well as the records of Dr. Rodriguez, the hypnotist.[6] A review of the record reveals that this request has also been waived as it was not timely made or preserved.

There is nothing in the record to suggest that the defendant made these requests except for the allegation in the brief that such requests were denied. According to the defendant, the offices of Mr.' Slatery and Dr. Rodriguez requested a court order to comply. This request, however, was not pursued by the defendant. By not following the proper course of action to secure these records this defendant has waived his request and should be procedurally barred from litigating it in this or future appeals.[7]

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[5] This defendant was given three polygraph examinations after his plea was entered.

[6] Ms. Perez-Vega, the surviving victim, underwent hypnosis prior to assisting the police prepare a composite sketch of her son's killer. See Point IV of this brief.

[7] The defendant claims that this was raised in his Amended Rule 3.850 motion. The cryptic reference to his requests in his

Chapter 119, Florida Statutes, provides the mechanism for public records requests as well as the remedy for their unwarranted denial. under the present scenario, Mr. Slatery and Dr. Rodriguez are asked to turn over information and when they allegedly refuse to do so without a court order, the state is then accused of withholding information from the defendant.

This not only results in lack of notice to these individuals but it also places the State of Florida in the impossible situation of securing files not in its custody or control. The State has no more access to Mr. Slatery's or Dr. Rodriguez's files that the defendant has. Even if this Court found Mr. Slatery's and Dr. Rodriguez's files to be "public" and, therefore, subject to disclosure it further needs to look at the purpose to be served by such disclosure.

The disclosure of public records in this context is permitted in order to allow the defense to determine if any Brady violations exist. Nothing in Mr. Slatery's or Dr. Rodriguez's files can result in a Brady claim under the facts of this case.

Mr. Slatery's reports were part of the State Attorney's file and made available to the defense. There is nothing in those reports to even hint at the existence of a Brady claim. This defendant pleaded guilty and agreed to submit to polygraph examinations. He was not, however, found to be in breach of his

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motion does not bring this non-compliance to the trial court's attention nor does it provide adequate notice to the involved parties, Mr. Slatery and Dr. Rodriguez. A defendant must make a proper and sufficient request for disclosure and only when such request is denied may it properly be made part of a Rule 3.850 motion. Mendyk. v. State, 592 So.2d 1076, 1081 (Fla. 1992). This procedure was not followed in the instant case.

plea agreement for failing a polygraph but rather for his outright refusal to testify against his co-defendants. A request for access to Mr. Slatery's files is nothing more than a delay tactic and a means through which to file additional Rule 3.850 motions beyond the two year limit.

The same is true for Dr. Rodriguez's files. The detectives that were present for the victim's hypnosis session testified in deposition as well as in court. Detective Fiallo testified that the victim was simply asked to relive the incident and that the only difference between her pre and post-hypnosis description of her son's killer was that after hypnosis she was better able to describe his hairline and clothing.[8] Moreover, this session took place before the defendant's guilty plea and is therefore an issue which cannot now be litigated in a collateral proceeding.[9]

The defendant is not entitled to relief under this claim. By not properly pursuing his requests he has waived them and should not be allowed to raise them in this appeal from the Rule 3.850 denial. Moreover, a review of the facts reveals that this is nothing more than a delay tactic on the part of the defendant as none of the material sought is of any consequence to the disposition of his appeal. Relief should be denied.

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[8] For a discussion of the merits of this issue, see Point IV.

[9] For a discussion of the merits of this issue, see Point IV.

POINT II

WHETHER THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S RULE 3.850 MOTION WITHOUT AN EVIDENTIARY HEARING WAS ERRONEOUS

The defendant claims that the trial court's denial of his Rule 3.850 motion was erroneous.[10] He argues that he was entitled to an evidentiary hearing because he pleaded "substantial claims of ineffective assistance of counsel, among other fact-based claims for relief" **(Appellant's Brief, pg. 11).**

A Rule 3.850 motion can be denied without a hearing when (1) the "motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," **Fla.R.Crim.P.** 3.850; Stano v. State, 520 **So.2d** 278, 280 (Fla. 1988); **Agan v.** State, 503 **So.2d** 1254, 1256 (**Fla. 1987**), or (2) the issue is one that either was or should **have been raised on direct appeal.** Francis v. State, 529 **So.2d** 670, 672 (Fla. 1988); O'Callahan v. State, 461 **So.2d** 1354, 1355 (Fla. 1984). All of the defendant's claims were found by Judge Levy to fall in either of these two categories.

Judge Levy was the presiding judge for all proceedings in this case. This is an unusual case because Judge Levy presided over a lengthy evidentiary hearing on whether to enforce or vacate this defendant's plea.[11] During that hearing, the

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[10] Judge Levy denied the defendant's Rule 3.850 motion without a hearing finding that the motion, record and file conclusively show that the defendant is entitled to no relief. (PC-R 472).

[11] Judge Levy was the finder of fact at the hearing and had the opportunity to evaluate the testimony of the defendant's prior counsel, Mr. William Castro, whom he found to be credible. Conversely, he rejected the defendant's testimony.

defendant raised many of the same issues he is now raising in his Rule 3.850 motion. In his motion and through his testimony the defendant claimed that he did not understand the terms of his plea (R 686-87). He alleged that his lawyer, Mr. Castro, did not explain the consequences of his guilty plea to him (R 697). Moreover, he claimed that the interpreter provided had not translated to his satisfaction (R 706). In essence, this defendant maintained that his plea was not voluntary.

After hearing testimony and carefully evaluating the issues, Judge Levy denied the defendant's motion to vacate his guilty plea.[12] This Court should also deny the defendant relief and affirm the trial judge's denial. The defendant is not entitled to an evidentiary hearing as the issues raised can conclusively be resolved by the record, or were or should have been raised on direct appeal.

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[12] The trial judge who presided over the defendant's guilty plea and sentencing is in the best position to decide whether or not the defendant is entitled to relief. See Agan v. State, 503 So.2d 1254, 1256 (Fla. 1987).

POINT III

WHETHER DEFENSE COUNSEL'S ALLEGED ABANDONMENT OF THE DEFENDANT DURING THE PENDENCY OF HIS CASE DEPRIVED THE DEFENDANT OF EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS

The defendant claims that his attorney's withdrawal from his case after the defendant entered into a plea agreement with the State of Florida was tantamount to abandonment and resulted in his current predicament. The defendant argues that this "abandonment" deprived him of the effective assistance of counsel. A review of the record, however, reveals that this claim is without merit.

This court has said that a defendant "who asserts ineffective assistance of counsel faces a heavy burden." Blanco v. Wainwright, 507 So.2d 1377, 1381 (Fla. 1987). First, the defendant must establish that counsel's omissions fall "outside the wide range of reasonable professional assistance." Id. "Second, a claimant must show that the inadequate performance actually had an adverse effect so severe that there is a reasonable probability that the results of the proceedings would have been different but for the inadequate performance." Id.

To prevail on a claim of ineffective assistance the defendant must show difficient performance as well as prejudice. Strickland v. Washington, 466 U.S. 668 (1984). Moreover, counsel cannot be held to be ineffective where his actions are determined or substantially influenced by the defendant's own decisions. Id. at 691.

At no point during the proceedings was the defendant abandoned by his lawyer, Mr. Castro. Mr. Castro was appointed to represent the defendant on November 8 of 1983. He accepted the appointment the very next day.

Between November of 1983 and June of 1984, Mr. Castro diligently prepared this case, doing legal research, taking all material witness depositions and filing all necessary motions. It is evident from the record that even though this case was closed with a guilty plea, Mr. Castro prepared it as if it were going to jury trial (R 768-69).

It was the defendant who urged Mr. Castro to pursue a plea agreement with the State and to do whatever he could to spare him from a sentence of death (R 773). It was at the defendant's insistence that Mr. Castro approached the then assistant state attorney, Mr. Rabin, about a possible plea. It was well after the plea was finalized and the defendant sentenced in open court that Mr. Castro filed a motion to withdraw from the case.

After the defendant entered his plea there were no other proceedings pending in court against him until after he refused to testify at his co-defendant's deposition. At that point, Judge Levy appointed a new attorney, Mr. Haymes, to represent the defendant.

According to the defendant, it was Mr. Castro's abandonment that caused his present predicament. The defendant is trying to blame everyone but himself for the consequences of his own intentional acts,[13] i.e., his refusal to live up to the terms of his agreement.

The defendant should be held accountable for his actions. It is evident from the record that the defendant changed his mind about testifying honestly against his co-defendants soon after he entered his plea agreement and well before Mr. Castro "abandoned" him[14] (R 205-224).

The defendant's uncooperativeness first became evident when he called Detective Diaz to give him a new version of the murder. In this new version, the defendant claims he was simply a look-out and never went near the house. At this meeting with Detective Diaz, the defendant specifically refused the presence of his attorney despite Detective Diaz' offer to have Mr. Castro present[15] (R 287-93).

Shortly after this meeting, Detective Diaz was again contacted by the defendant. This time the defendant wanted Detective Diaz' assistance to get him out of solitary confinement. The defendant was in this predicament as a result of his involvement in an escape plot at the Dade County Jail where he was incarcerated (R 653).

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[13] At his sentencing, the defendant blamed the victim's mother for her son's shooting and death (R 1368).

[14] Mr. Castro withdrew after it became evident that the defendant was not going to cooperate (R 806). This was an approriate decision in light of the fact that Mr. Castro had represented the defendant during his plea and could now be called as a witness at any subsequent hearings to enforce this plea.

[15] The defendant admitted to Mr. Castro that he was the shooter prior to accepting the plea agreement (R 775). In light of that, it makes sense that he would not want him present for his new and abviously false version of the crime.

William Berk, the new assistant state attorney on the case, attempted to meet with the defendant in order to discuss his testimony. The defendant refused to speak to Mr. Berk about the case and made it perfectly clear that he had no intention of testifying for the State of Florida against the persons he had previously identified as his co-participants in this heinous crime[16] (R 661). The cases against these murderers had to be dropped.

It was at that point that Mr. Berk contacted Mr. Castro in an effort to secure the defendant's cooperation. Mr. Berk was willing to work with this defendant, offering him several chances to make good on his plea agreement. Even after the defendant's hearing, Mr. Berk gave him the opportunity to live up to the terms of his bargain.[17]

The defendant, by trying to blame his attorney for his uncooperativeness, is simply trying to avoid responsibility for the consequences of his own willful acts. Neither Mr. Castro, nor Mr. Haymes, ever abandoned this defendant. Any prejudice he may have suffered was not the result of ineffective assistance of counsel but rather the known consequences for his willful failure

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[16] It is obvious from the record that after Detective Diaz refused to intercede on the defendant's behalf with the jail to help him get out of solitary confinement, the defendant's attitude toward the prosecution became hostile and beligerent (R 645-46).

[17] Mr. Berk volunteered to set the case for report and again offered the defendant whatever protection was necessary to ensure his safety in jail as the defendant had made unsubstantiated claims that he had been threatened (R 866).

to cooperate, as he had agreed, with the State of Florida. He is not entitled to relief.

POINT IV

WHETHER THE USE OF THE SURVIVING VICTIM'S TESTIMONY DURING THE DEFENDANT'S SENTENCING AND HIS ATTORNEY'S FAILURE TO CHALLENGE IT, VIOLATED THE DEFENDANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

Ms. Maria Perez-Vega, the surviving victim, gave an initial statement to the police on January 29, 1983, shortly following this heinous crime during which her eight year old son was killed. Her son was shot in the head as she lay helpless and dazed, after she herself had been shot in the face, the bullet shattering her jaw, It was in this state that Ms. Perez-Vega's initial statement was taken.

After this statement, Ms. Perez-Vega was again interviewed by detectives and was able to provide the police with a more detailed description of her son's killer and the events that led up to his murder.[18] Still, the police had no viable leads as to the identity of these murderers.

In order to further assist the detectives with a composite sketch of the shooter and a better description of the other two participants, Ms. Perez-Vega underwent a hypnosis session (PC-R 441-42). This session was conducted by Dr. Pedro Rodriguez on February 2 of 1983. After the session, Ms. Perez-Vega assisted the police with a composite sketch of the shooter (PC-R 447). At this stage of the investigation this defendant was not a suspect in the case.

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[18] It should be noted that Ms. Perez-Vega, besides being severely traumatized by this crime, was also in fear of her life and that of her other children (R 448).

On April 29 of 1983, Jose Hung, an inmate at the Dade County Jail, informed Detective Diaz that the defendant was one of the participants in this murder and had been the one who shot the child. (R 257). According to Mr. Hung, the defendant had admitted this to him because they were friends. (R 259).

This information was not the result of Ms. Perez-Vega's hypnosis session OK the composite prepared by Detective Fiallo. In fact, three months had passed since the crime occurred when Mr. Hung identified the defendant as the shooter. (R 262). It was only after Jose Hung's statement that the victim was shown a photographic line-up from which she immediately identified the defendant as the killer (R 265-265).[19] Ms. Perez-Vega later positively identified the defendant in court during the penalty phase of his case before Judge Levy (R 971).

Appellant now claims that had he known that the victim had undergone hypnosis he would not have pleaded guilty. He further claims that the victim's testimony so undermined the penalty phase of his case that he may have been improperly sentenced. Finally, he asserts that his attorney's failure to challenge this testimony was tantamount to ineffective assistance of counsel.

Mr. Castro, as well as Mr. Haymes, knew that Ms. Perez-Vega had undergone hypnosis to assist the police in their efforts to prepare a composite sketch of her son's killer and to get a better description of the other two participants. Mr. Castro had

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[19] The photographic line-up was shown to the victim on May 19 of 1983. (R 263). A motion to supress this lineup was filed by Mr. Castro (R 11-12). It was never argued, however, as the defendant pleaded guilty.

extensively researched the issue and concluded that her testimony would be admissible under current law (R 769). He was correct. In fact, eight days after the defendant's guilty plea, this Court rejected the per se inadmissibility of post-hypnotic testimony in the first Bundy case. Bundy v. State, 455 So.2d 330 (Fla. 1984). It was not until the second Bundy case that this Court adopted the per se inadmissible approach to hypnotically induced testimony. Bundy v. State, 471 So.2d 9 (Fla. 1985).

The Bundv II case became applicable on July 11 of 1985, when rehearing was denied and the case became final. The approach adopted in Bundv II does not apply retroactively to this case. This Court held that any conviction presently in the appellate process[20] involving hypnotically refreshed testimony is to "be examined on a case-by-case basis to determine if there was sufficient evidence, excluding tainted testimony, to uphold the conviction." Id. at 19.

A factual analysis of this case reveals, however, that this case does not involve "tainted" testimony. According to Detective Fiallo,[21] Ms. Perez-Vega had already provided a description of the shooter to the police prior to hypnosis (R 442). Her description of this individual during hypnosis was the same except that she was able to elaborate on her attacker's

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[20] This defendant pleaded guilty on June 13 of 1984. He was sentenced to death on February 13 of 1986, by Judge Levy. His direct appeal was filed in December of 1987. Consequently, his case was not even in the appellate process at the time Bundy II was decided.

[21] Detective Fiallo's testimony was cited by Judge Levy in his order denying the Defendant's 3.850 motion.

hairline and clothing[22] (R 442-446) information which was never elicited at the defendant's sentencing. Detective Fiallo then prepared a composite sketch of the shooter which was distributed to police agencies throughout the county. (R 445).[23] This sketch was not introduced at the defendant's sentencing.

Detective Jose Diaz, who interviewed Ms. Perez-Vega before the hypnosis session, was able to get a statement of what happened and a description of the participants from her. At no time during that statement did Ms. Perez-Vega refer to the black latin male as the shooter (R 246). The one she was able to describe in any detail was the one that shot her and her son as she had the chance to get a good look at him. (R 251-255). She was even able to describe the gun he shot her with as an automatic type with an attachment, like a silencer (R 250).[24]

In conclusion, an analysis of the facts of this case reveals that the case-by-case analysis suggested in Bundy II does not even apply to this case as this case does not involve hypnotically induced testimony. The case-by-case analysis discussed in Bundy II is to be only appled to cases involving "tainted" testimony.

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[22] According to Detective Fiallo, during the hypnosis she was simply asked to again relive the crime. (R 444).

[23] The purpose of a composite is not to identify one particular individual but rather to eliminate possible suspects. (R 450).

[24] Ms. Perez-Vega is familiar with handguns as her husband was in the military and owned many such weapons. She herself owns an automatic handgun for protection.

Assuming arguendo that Ms. Perez-Vega's testimony at the defendant's sentencing was "tainted" there is no reasonable probability that this testimony might have contributed to the defendant's conviction or sentence. There was more than sufficient evidence without the victim's identification of the defendant to sustain the outcome of this case.

Mr. Castro and Mr. Haymes knew, as any competent lawyer would, that identification was not an issue in this case in light of the defendant's confession and the corroborative physical evidence, i.e., the defendant's fingerprints at the crime scene.[25] To hope that a jury will disregard a confession corroborated by physical evidence is not an effective trial strategy. Moreover, Mr. Castro knew that the defendant's confession was reliable as his client admitted to him that he was the shooter (R 775).

This information was inconsistent with the defendant's later statements in open court and would have presented an ethical as well as evidentiary dilemna in effectively defending this murder. In fact, the only way Mr. Castro could viably challenge the defendant's confession would be to put on his client's known perjured testimony. This tactic, besides being imprudent,[26] would of course be ethically reprehensible.

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[25] The defendant's prints were found on the outside of the window that the defendant broke to get into the house (R 291). This, by the way is the same window Ms. Perez-Vega found open after her return from the airport when she found Rafael Paz's money was missing.

[26] This tactic would expose the defendant to damaging cross-examination on his credibility as he would have to concede to lying in a prior sworn statement.

It should also be noted that the defendant waived an advisory jury for the penalty phase of his case, a strategy which will be discussed in Point XVIII of this brief. Tactical decisions concerning the presentation and challenging of evidence can vary greatly depending on whether the trier of fact is a judge or a jury and a judge,

Moreover, the defendant did not make identity an issue in this portion of his case. The reliability of his confession, identifying himself as the shooter, was never challenged by evidence, i.e., testimony that it was either involuntary and/or a fabrication on his part. In light of that, challenging the victim's in-court identification of the defendant as the shooter would have been of no consequence.[27]

Finally, an analysis of the law in this area reveals that no valid legal challenge existed to Ms. Perez-Vega's testimony. Mr. Castro testified to this at the hearing to enforce or vacate the defendant's plea. Judge Levy was aware of the law in this area and specifically denied the defendant's request for relief in his 3.850 motion.

The Appellant cites several cases in his brief to support his position. These cases, however, are inapplicable to the case at bar. This case does not involve a trial on the merits. This defendant pleaded guilty to save himself from the death penalty.

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[27] It should also be noted that at the penalty phase guilt is no longer an issue. This is especially true in this case where the defendant had already pleaded guilty as opposed to having been found guilty after a trial. This Court has repeatedly held that lingering doubt is not a valid mitigating circumstance. King v. State, 514 So.2d 354, 358 (Fla. 1987).

Consequently, the victim's testimony was never presented to a jury.

The Appellant's complaint that no challenge was made to this testimony is ludricrous. No challenge was made because no trial took place. Mr. Castro had, in anticipation of trial, researched this issue and had correctly determined that the victim's testimony would have been admissible.

The defendant's guilty plea precludes the raising of claims involving the alleged deprivation of rights that preceded the plea. Only the voluntariness of the defendant's plea can now be challenged. This very issue was dealt with by the trial judge who, after a hearing, denied the defendant's motion to vacate. Additionally, this Court considered this claim on direct appeal and held that the defendant's plea was freely, voluntarily and intelligently made. Lopez v. State, 536 So.2d 226 (Fla. 1988).

In Trawick v. State, 473 So.2d 1235 (Fla. 1985), the defendant pleaded guilty to first degree murder, attempted first degree murder and armed robbery. After this plea, a sentencing hearing was held. During this hearing, the defendant's confession was read to the jury. The jury recommended death. The court agreed and sentenced the defendant to death.

Besides challenging the voluntariness of his plea, the defendant in Trawick, challenged the lower court's denial of his motion to suppress his confession. This Court held that the defendant could not properly raise such a challenge on appeal because by entering pleas of guilty, he waived his right to review the admissibility of his confession. A defendant "who

pleads guilty is not entitled to appeal the conviction entered pursuant to the plea." Only the validity of the plea can be challenged. Id. at 1239.[28] Just as in Trawick, there is no reason to make an exception and review the defendant's claim in this case.

In the very least, the defendant claims that this Court should require safeguards when dealing with the admissibility of hypnotically refreshed testimony. This is not necessary as this Court has adopted a bright line approach to this type of evidence in Bundy II. In fact, in that case this Court rejected the safeguards suggested by the Appellant.[29]

The defendant finally claims that his attorney's failure to challenge the victim's testimony at the guilt phase of his trial was ineffective assistance of counsel. The defendant claims that if he knew about the challenges to the victim's testimony he would have opted for a jury trial.

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[28] Similarly, in Tollett v. Henderson, 411 U.S. 258 (1973), the United States Supreme Court held that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Id. at 267.

[29] The safeguards proposed by the defendant are outlined in Brown v. State, 426 So.2d 76 (1st DCA, 1983), a case cited in the Appellant's brief. In Pate v. State, 529 So.2d 328 (Fla.1988), the Second District Court of Appeals refused to apply those safeguards in a situation where the victim had previously provided a description of her attacker, was not shown a picture of the defendant before hypnosis and identified the defendant from a photograph sometime after hypnosis. The Pate court found no error in admitting into evidence the victim's identification of the defendant. Id. at 330.

This Court, in Sims v. State, 602 So.2d 1253 (Fla. 1992), in dealing with this issue in the context of a jury trial, held that counsel's failure to object to the witnesses' testimony was not ineffective assistance as at the time the Florida Supreme Court had not yet decided that hypnotically induced testimony was inadmissible. Id. at 1256. Counsel, as in this case, did not have the benefit of the Bundy II decision when he concluded that the testimony was admissible. Id.[30] Way v. Dugger, 568 So.2d 1263, 1265 (Fla. 1990). Finally, continuing its analysis, this Court stated that even if counsel could be deemed ineffective for not objecting, the conviction would still stand as there was sufficient evidence to convict the defendant without the use of this testimony. Sims, 602 So.2d at 1256.

The Sims case is factually analogous to the case at bar. In that case the witnesses were hypnotized by a police officer a few days after the murder.[31] At the time of the hypnosis session, the officer did not know what the suspect looked like. The object was to get a more detailed description of the killers.

After the session, the witnesses met with a police artist in order to put composites together. It was one month later that one of these witnesses identified the defendant from a photo

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[30] Counsel is not required to anticipate changes in the law. Spaziano v. State, 489 So.2d 720 (Fla. 1986); Stevens v. State, 552 So.2d 1082 (Fla. 1989).

[31] The Reiser Screen Technique was used by this officer, the same technique used in the case at bar.

line-up. All three witnesses identified the defendant at trial. Id. at 1255.[32]

In Sims, defense counsel filed a motion to exclude the witnesses' testimony. He did not, however, follow up on these motions as his research revealed that the testimony was admissible. Mr. Castro's assessment was the same prior to advising his client on whether or not to accept the offered plea.

Finally, the challenge to the victim's testimony is an issue that is not properly before this Court as it is procedurally barred. To now raise it under the guise of ineffective assistance of counsel is an act of desperation on the part of this defendant. This Court should not consider it.

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[32] The Stokes v. State case cited by the defendant arose out of an incident that occurred after the effective date of this Court's Bundy II decision. It is, therefore, inapplicable. Moreover, the Stokes case was a circumstantial evidence case, factually different than the case at bar. See Stokes v. State, 548 So.2d 188 (Fla. 1989).

POINT V

WHETHER THE DEFENDANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL PRIOR TO AND DURING HIS GUILTY PLEA, IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

The defendant claims that Mr. Castro rendered ineffective assistance of counsel because (1) he failed to investigate mental health issues, and (2) he allowed the defendant to enter an involuntary guilty plea. A review of the record reveals, however, that both of these claims are without merit. No relief should be forthcoming. See, Blanco v. Wainwright, 507 So.2d 1377, 1381 (Fla. 1987).

The merits of the defendant's first claim that he was allowed to enter a guilty plea while incompetent was dealt with and rejected on direct appeal. Lopez, 536 So.2d at 230. As this issue was already litigated it is now procedurally barred. To try to re-raise it under the guise of ineffective assistance of counsel is improper Medina v. State, 573 So.2d 293, 295 (Fla. 1990). Moreover, a review of the record reveals that this claim is without merit.

A total of four experts were appointed to evaluate the defendant prior to his sentencing in 1985. All four, including the defendant's own expert who spent fifteen (15) hours interviewing him, found the defendant to be competent. There was never any indication that the defendant's competency should have been questioned prior to and during the defendant's plea. Id. This Court found it persuasive that the trial judge commented on the defendant's intelligence and obvious understanding of his situation. Id.

No issue as to the defendant's competency arose until after the hearing when Judge Levy denied his motion to vacate his plea. This Court remarked that rather than being incompetent, this defendant "realized at that hearing that he was in real trouble and that he might not get out of it." Id.

The defendant's dispondency about his predicament does not constitute reasonable grounds to believe he may be incompetent. Id. Mr. Castro's alleged failure to ask for a competency evaluation does not render him ineffective. Moreover, no prejudice resulted to this defendant, as subsequent competency evaluations clearly established that the defendant was competent.

The merits of the defendant's second claim that he was allowed to enter an involuntary guilty plea were also dealt with and rejected on direct appeal. Id. at 229. The defendant should not be allowed to relitigate this issue at this juncture. Moreover, a review of the record reveals that this claim is without merit.

Mr. Castro was appointed to represent the defendant on November 8 of 1983. Between November of 1983 and June of 1984, Mr. Castro diligently prepared this case. It is evident from the record that even though this case was closed with a guilty plea, Mr. Castro prepared it as if it were going to jury trial.

It was the defendant who urged Mr. Castro to pursue a plea. The defendant wanted at all costs to avoid the death penalty and it was at his insistence that Mr. Castro approached the State about a possible plea.

Judge Levy presided over a lengthy evidentiary hearing on whether to enforce or vacate this defendant's plea. As the finder of fact, Judge Levy had the opportunity to evaluate the testimony of Mr. Castro whom he found to be credible. Conversely, he rejected the defendant's testimony, finding that the defendant lied when he testified that he did not understand the plea agreement.

In denying the defendant's motion to vacate his plea, Judge Levy concluded that Mr. Castro did not mislead the defendant as alleged. He further found that the defendant understood the minimum mandatory sentence and that his confusion arose only after he willfully decided to renege on his bargain. Lopez, 536 So.2d at 229. This Court affirmed Judge Levy's findings, holding that he correctly found the defendant's plea to have been freely, voluntarily and intelligently entered.

There is no evidence that Mr. Castro was deficient in representing the defendant. Mr. Castro was following his client's wishes when he negotiated this plea (R 775). That fact that the defendant changed his mind is not attributable to Mr. Castro. Any prejudice the defendant may have suffered is a result of his own willful acts. Relief should be denied.

POINT VI

WHETHER **THE DEFENDANT WAS DEPRIVED OF THE** EFFECTIVE ASSISTANCE OF COUNSEL AT THE **PENALTY PHASE OF HIS CAPITAL PROCEEDING, IN** VIOLATION OF HIS SIXTH, EIGHTH **AND** FOURTEENTH **AMENDMENT RIGHTS**

The defendant now claims that Mr. Haymes rendered ineffective assistance of counsel at the penalty phase of his case because (1) he allowed his client's involuntary waiver of an advisory jury, and (2) he did not sufficiently investigate and develop substantial mitigating evidence. A review of the record, however, reveals that both of these claims are without merit.

This Court has said that a defendant "who asserts ineffective assistance of counsel faces a heavy burden." Blanco v. Wainwright, 507 So.2d 1377, 1381 (Fla. 1987). The defendant must establish that counsel's omissions fall "outside the wide range of reasonable professional assistance." Id.[33] "Second, a claimant must show that the inadequate performance actually had an adverse effect so severe that there is a reasonable probability that the results of the proceedings would have been different but for the inadequate performance." Id.

The merits of the defendant's first claim that his waiver was not voluntary was rejected by the trial judge and is dealt with in Point XVIII of this brief. This defendant not only volunarily waived his right to an advisory jury at sentencing,

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[33] In evaluating these claims, "courts are required to (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment with the burden on claimant to show otherwise." Id.

but was intent on having the judge alone decide his fate. (R 476). His dissatisfaction with the result of that tactical decision does not render his waiver involuntary.

The defendant's second claim that Mr. Haymes did not investigate and present sufficient mitigating evidence is also without merit. The court had more than sufficient evidence of the defendant's character and background to make an informed decision. "The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient." **Maxwell v. Wainwright,** 490 So.2d 927, 932 (Fla. 1986).

First, it should be emphasized that the defendant chose not to testify on his own behalf. When told he had a right to so testify, he told Judge Levy that not testifying was his own decision and that he was perfectly satisfied with his lawyer. (R 1366-1367). This tactical decision protected the defendant from cross-examination and the danger of opening the door to damaging rebuttal evidence.

Counsel cannot be held to be ineffective where his actions are determined or substantially influenced by the defendant's own decision. Strickland v. Washington, 466 U.S. 668, 691 (1984). A comparison of the factual material now asserted and the historical background provided to the mental health experts who evaluated the defendant prior to sentencing reveals that the defendant himself is the source of this material. The defendant's choice not to testify had a substantial impact on Mr. Haymes' presentation.

Second, Mr. Haymes did present significant evidence of mitigation through the witnesses he called on his client's behalf. The private investigator, Mr. Lopez, testified about the defendant's non-violent reputation in the community as opposed to that of his co-participant, Margarita Cantin-Garcia.

The defendant's prior supervisor and his co-employee at work testified about his good work habits and temperament. A young boy, Robert Alvarez, testified about the defendant's good nature and generosity towards children.

In addition, Mr. Haymes submitted a memorandum to Judge Levy describing his client's character and background. (SR 62, transcript of February 13, 1986 hearing). The court reviewed that information prior to sentencing this defendant and in addition, gave the defense the opportunity to present whatever other evidence they wanted.

A review of the record reveals that Mr. Haymes was not ineffective in investigating and presenting mitigating evidence on behalf of this defendant. Judge Levy had sufficient evidence of the defendant's background on which to base his decision. The defendant has not met his burden that counsel was ineffective and that a more complete knowledge of his background would have influenced the judge to impose a sentence of life imprisonment rather than death.

Mr. Haymes was appointed to represent the defendant in March of 1985. Mr. Castro had withdrawn from the case at that point as he could no longer effectively represent his increasingly uncooperative client. Mr. Haymes accepted the appointment and set on diligently acquainting himself with the case.

After the aborted depositions of the defendant, Mr. Haymes filed numerous motions on his behalf, including a motion to vacate the plea. Mr. Haymes also filed a memorandum of law in support of the motion to vacate. (R 340, 353). He then aggressively argued on the defendant's behalf at the subsequent hearing.

After the court denied the defendant's motion to vacate and granted the State's motion to enforce the plea agreement, a sentencing hearing was set. At that juncture, Mr. Haymes asked for mental health evaluations of his client (R 356-357), and investigative funds in order to prepare for the penalty phase of this case.

Mr. Haymes filed numerous motions in preparation of the penalty phase of this case. A review of these motions reveal that he had prepared the case for a jury presentation (R 365-421)[34] . It was not until his client waived his right to an advisory jury that Mr. Haymes withdew some of these motions as they were no longer applicable.

A review of the record reveals that Mr. Haymes' representation does not fall "outside the wide range of reasonable professional assistance." Blanco, 507 So.2d at 1381. Consequently, the defendant is not entitled to relief.

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[34] Mr. Haymes filed motions requesting individual voir dire and sequestration during voir dire. He also filed a packet of proposed jury instructions that the court referred to as "humongous" (SR 46, transcript of December 2, 1985 hearing).

POINT VII

WHETHER, DUE TO DEFENSE COUNSEL'S ALLEGED FAILURES, THE DEFENDANT UNDERWENT A PENALTY PHASE WHILE HE WAS INCOMPETENT AND/OR WAS DEPRIVED OF A FAIR, INDIVIDUALIZED AND RELIABLE SENTENCING IN VIOLATION OF HIS FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

The defendant claims that he was incompetent to proceed to sentencing after the court denied his motion to vacate his plea. He further claims that the mental health evaluations that were done were so deficient that he was deprived a fair sentencing. All this he argues is a result of his lawyer's failures.

The issue of the defendant's competency was raised on direct appeal and rejected. As this issue was already litigated it is now procedurally barred. To try to re-raise it under the guise of ineffective assistance does not place it properly before the court. Moreover, a review of the record reveals that the defendant was competent for the proceedings.

The trial court appointed three experts to evaluate this defendant prior to sentencing. All three experts found the defendant to be competent (SR 1-20, certified copies of psychological evaluations). Even Mr. Marquit, the expert who testified on behalf of the defendant at sentencing, found him to be competent (R 1274). In fact, this Court, on direct appeal, remarked that rather than being incompetent, the defendant was uncooperative as he realized "that he was in real trouble and that he might not get out of it." Lopez, 536 So.2d at 230.

The defendant's claim that he was denied competent mental health assistance is also without merit. There is nothing in the record to indicate that Dr. Marquit believed that he did not have

sufficient information upon which to make sound judgments regarding the defendant. In fact, just the apposite is true.

Dr. Marquit spent fifteen (15) hours evaluating this defendant. He was able to get an accurate history from him as well as administer several tests upon which he based his conclusions. (R 1251). In fact, at least twelve of the fifteen hours were spent interviewing this defendant. (R 1266).

The defendant has not established any basis for relief under this claim. The trial court was correct in denying his 3.850 motion.

POINT VIII

WHETHER THE DEFENDANT'S DEATH SENTENCE RESTS UPON AN IMPROPER AGGRAVATING CIRCUMSTANCE IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

The defendant now claims that the trial judge relied on an unconstitutional aggravating circumstance in sentencing him to death. This is an issue that should have been raised on direct appeal. As it was not, it is now procedurally barred. Bertolotti v. State, 534 So.2d 386, 387 (Fla. 1988). Moreover, a review of the evidence reveals that the trial court properly considered this aggravating circumstance.

Judge Levy found three aggravating circumstances in sentencing the defendant to death.[35] One of these was that the murder was committed during a burglary. The defendant claims that since he was charged and pleaded guilty to felony murder, this was an automatic aggravating circumstance and therefore unconstitutional.

First, the defendant's allegation that he pleaded guilty to felony murder is misleading. The indictment charged both premeditated murder and felony murder in the alternative. Second, this issue has been rejected on the merits in Lowenfield v. Phelps, 484 U.S. 231 (1988). The defendant is not entitled to relief.

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[35] The defendant challenged the finding of one of the other two aggravating circumstances on direct appeal. This clearly was an issue that could and should have been raised on direct appeal as well.

POINT IX

WHETHER THE SENTENCING JUDGE IMPROPERLY PRECLUDED THE DEFENDANT FROM PRESENTING MITIGATING EVIDENCE DURING THE PENALTY PHASE OF HIS CASE, IN VIOLATION OF HIS SIXTH EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

The defendant claims that he was improperly precluded from presenting mitigating evidence during the penalty phase of his case. This claim should have been raised on direct appeal. As it was not, it is now procedurally barred. Moreover, a review of the record reveals that it is without merit.

The defendant attempted to introduce the uncorroborated statements of nonlisted defense witnesses through a private investigator, Al Lopez. The State objected to this hearsay. Judge Levy initially granted this objection.[36]

A review of the record, however, reveals that the substance of these statements was allowed in later during Mr. Lopez' testimony (R 1197-1204).[37] Mr. Lopez was allowed to testify about the defendant's character and background, as well as the character and reputation of his co-participant, Margarita Cantin-

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[36] The case is factually distinguishable from the Skipper v. South Carolina, 476 U.S. 1 (1986), case cited by the defense. In Skipper, the defendant was precluded from presenting the direct testimony of corrections officers that would have testified that he was a good prisoner. In contrast, this defendant sought to introduce rank hearsay that could not be corroborated by the defendant or challenged by the State. See Perri v. State, 441 So.2d 606, 608 (Fla. 1983). The impact of this unreliable evidence is negligible at best. Moreover, whether or not hearsay may be admitted is an evidentiary matter subject to the judge's discretion. Sustaining a proper objection to unreliable evidence is not abuse of that discretion.

[37] According to the defendant, Mr. Lopez would have testified to the following hearsay: that Ms. Cantin-Garcia was a rough person, known to terrorize others, including men and that she was seen looking for the defendant while armed.

Garcia. Consequently, his claim that he was percluded from presenting this allegedly mitigating evidence is without merit.[38] No relief is required.

[38] Defense counsel, **Mr.** Haymes, was also permitted to file a memorandum with the judge describing the defendant's past and current circumstances (SR 68, transcript of the February 13, 1986 hearing). Judge Levy reviewed this information and offered the defendant the opportunity to present any other evidence of mitigation prior to sentencing. The defense declined to take advantage of this opportunity (SR 64, transcript of the February 13, 1986 hearing).

POINT X

WHETHER THE SENTENCING JUDGE'S FINDING THAT NO MITIGATION EXISTED VIOLATED THE DEFENDANT'S EIGHTH AMENDMENT RIGHTS

The defendant claims that the trial court erred in finding that no mitigating factors were established. The very issue was raised and rejected on direct appeal. Lopez, 536 So.2d at 230-231.[39] As it was already litigated it is now procedurally barred. A Rule 3.850 motion cannot serve as a second appeal. Relief should be denied.

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[39] This Court, in Lopez, affirmed the death sentence holding that Judge Levy's finding that the defendant had failed to establish any mitigating factors was supported by the record. Id. at 231. In its opinion, this Court recognized that findings-regarding mitigation are within the trial court's domain as it is the trial court's duty to resolve conflicts in the evidence. Id. Citing its opinion, in Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111 (1985), this Court emphasized that the trial court's determination is final when supported by competent evidence and will not be upset because the defendant draws a different conclusion. Lopez 536 So.2d at 231. In his order denying relief, Judge Levy found this issue barred (PC-R 480).

POINT XI

WHETHER THE TESTIMONY OF THE DEFENDANT'S PRIOR COUNSEL AND HIS CURRENT COUNSEL'S ALLEGED FAILURE TO OBJECT TO IT DURING THE HEARING TO ENFORCE OR VACATE THE DEFENDANT'S PLEA AGREEMENT DEPRIVED THE DEFENDANT OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The defendant claims that Mr. Castro's testimony revealing conversations with the defendant was improper and that Mr. Haymes' alleged failure to object to it deprived this defendant of the effective assistance of counsel. A review of the record reveals that this claim is without merit.

First, it should be noted that Mr. Haymes did object to the admission of Mr. Castro's testimony (R 771-75). Judge Levy overruled Mr. Hayme's objection finding that the attorney-client privilege had been waived as to matters impacting upon Mr. Castro's advise to this defendant.

The defendant filed a motion to vacate his plea claiming, among other things, that he did not understand the terms of his agreement. When he testified at the hearing, the defendant claimed that Mr. Castro had not discussed the case with him and that he lied to him by telling him that he would only serve seven years if he pleaded guilty. According to the defendant, the only thing Mr. Castro was interested in was to get the defendant to sign papers waiving his rights. (R 697, 703)

It is evident from the defendant's testimony that Mr. Castro's representation was being attacked. Therefore, 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. This defendant, by his motions and testimony, waived any attorney-client privilege concerning matters that impacted upon Mr. Castro's advise to him.

When a lawyer is accused of wrongful conduct by a client in a criminal proceeding, he may reveal protected communications when necessary to determine whether or not his conduct was proper. Turner v. State, 530 So.2d 45, 46 (Fla. 1987). The defendant's admissions to Mr. Castro affected the way in which Mr. Castro would be able to defend this murder. (R 776-7). This in turn would increase the probability of the defendant's conviction.

It should be emphasized that this defendant wanted to avoid a sentence of death at all costs. Mr. Castro expected that if the defendant was convicted he would be sentenced to death (R 777). The defendant's admissions, by limiting the available defenses, greatly impacted the likelihood of conviction and were significant factors in properly advising this defendant.

Finally, what testimony will be permitted in a court hearing is in the trial judge's discretion Welty v. State, 402 So.2d 1159, 1162-63 (Fla. 1981). The complained of court ruling could have been attacked on direct appeal. As this issue was not properly raised it is now procedurally barred. The defendant is not entitled to relief.

POINT XII

WHETHER THE ALLEGED FAILURE TO PROVIDE THE DEFENDANT WITH A QUALIFIED INTERPRETER AT ALL TIMES VIOLATED THE DEFENDANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The defendant now alleges that he was not provided with a qualified interpreter at critical stages of his proceedings. This is a claim that could have been fully litigated on direct appeal.[40] As it was not, it is now procedurally barred and, therefore, not cognizable on collateral review. Blanco v. Wainwriqht, 507 So.2d 1377, 1380 (Fla. 1987). Moreover, a review of the record reveals that this claim is without merit.

First, it should be noted that this defendant understands English and he so admitted on direct examination at the 1985 hearing to determine whether to enforce or vacate his plea (R 682). According to his own testimony he wanted an interpreter available because he wished to have a "perfect" Spanish translation (R 682). In fact, at one point, the defendant answered the prosecutor's question in English (R 709).[41]

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[40] The issue of the defendant's ability to understand English was raised on direct appeal as a basis for asserting that the court erred in not vacating his guilty plea. This Court denied relief under that claim. To now present a similar claim with a somewhat different emphasis does not properly place this issue before this Court. State v. Matera, 266 So.2d 661, 666 (Fla. 1972).

[41] Mr. Lopez, have you had a chance to review the transcript of your plea of guilty with your attorney?
A. As I said, if that is what you send me, I tore it up and I threw it in the wastebasket. I told you not to send me anything.
Do you remember?
Mr. Berk: I would like the record to reflect that Mr. Lopez said, "Do you remember," in English. (R 709)

Second, this defendant was not only provided with an interpreter during all critical stages of his proceedings but was, also, as in Blanco, appointed a Spanish speaking attorney for the guilt portion of his case. Mr. Castro represented the defendant since November 8, 1983. He was present with him during all critical stages of his case including his guilty plea on June 13 of 1984.

The trial court must afford a defendant the opportunity to fully exercise his constitutional rights. Suarez v. State, 481 So.2d 1201, 1204 (Fla. 1985). This includes access to a competent interpreter for a non-English speaking defendant. Id. This defendant cannot show that he was deprived access to an interpreter or in any way thwarted from having one available. Consequently, his claim is not just procedurally barred, it is also without merit. Relief should be denied.

POINT XIII

WHETHER THE DEFENDANT'S ALLEGED ABSENCE FROM CERTAIN COURT PROCEEDINGS VIOLATED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

The defendant claims that he was absent during critical stages of the proceedings against him. This is a claim that could have been raised on direct appeal. As it was not, it is now procedurally barred. Moreover, a review of the record reveals that the defendant's claim is without merit.

The defendant complains of two occasions when he was absent from proceedings. The first was during the hearing conducted to determine whether the plea agreement should be enforced or vacated. The second was during a calendar call when he had not yet been brought out by corrections.

During the hearing involving his plea agreement the defendant became upset with the testimony of his prior attorney, Mr. Castro, and left the courtroom after exclaiming, "I cannot stand this no **more**" (R 799). Several minutes before this outburst, the defendant had again expressed his desire to leave and was prevented by the judge (R 779-781).

During the first incident, Judge Levy thoroughly explained to the defendant his right to be present and the consequences of his absence (R 779-781). Despite this explanation, the defendant again disrupted the proceedings and got up and left (R 799).

The defendant voluntarily absented himself from his own proceedings. His actions were not the result of not knowing his rights but rather his way of expressing his contempt for the proceedings and his lack of respect for the court. As is evident

throughout this appeal, the defendant is seeking to avoid responsibility for the consequences of his own actions. This is just another example of this behavior.

The second instance that the defendant complains of is at a calendar call where his attorney advised the judge that the defendant was going to waive his right to have an advisory jury for his sentencing (SR 14, transcript of December 2, 1985 hearing). The court, noting that the defendant was not present, passed the case until later in the calendar (SR 17, transcript of December 2, 1985 hearing). When the case was recalled, Judge Levy informed the defendant of what had taken place in his absence (SR 17-18, transcript of December 2, 1985 hearing) and specifically inquired as to the voluntariness of his waiver (SR 25-30, transcript of December 2, 1985 hearing).

It should be emphasized that at the time Mr. Haymes announced to the court his client's waiver, the defendant had already executed a written waiver of jury (R 374). There is no reasonable possibility that the defendant's rights were prejudiced. Proffitt v. Wainwright, 685 F.2d 1227, 1260 (11th Cir. 1982). Consequently, he is not entitled to relief.

POINT XIV

WHETHER THE STATE WITHHELD EXCULPATORY EVIDENCE IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

The defendant claims that the prosecution deliberately withheld exculpatory evidence in violation of his due process rights and Brady v. Maryland, 373 U.S. 83 (1963). The proper standard for determining a Brady violation is whether there is a reasonable probability that the undisclosed material could have rendered a different result. Id. at 87-88. The mere possibility that the undisclosed evidence might have helped the defense or might have affected the outcome does not establish materiality. United States v. Aqurs, 427 U.S. 97, 109-110 (1976); Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988). A review of the record reveals that no Brady violation occurred.

The first alleged Brady violation is that the victim underwent a polygraph examination, a portion of which revealed inconclusive results. That defendant concedes that he was aware of this examination but was unaware that some of the results were inconclusive.

First, it should be emphasized that this case involved a guilty plea, not a trial on the merits. The defendant's guilty plea precludes the raising of claims involving the alleged deprivation of rights that preceded the plea. Tollett v. Henderson, 411 U.S. 258 (1973); Trawick v. State, 473 So.2d 1235 (Fla. 1985). Only the voluntariness of the defendant's plea can now be challenged, an issue which was raised and rejected on direct appeal. Lopez v. State, 536 So.2d 226 (Fla. 1988).

Second, there is no reasonable probability that this information could have affected the conviction in this case. Polygraph results are an investigative tool and are not admissible in court as they are considered unreliable.[42] Finally, the results complained of were "inconclusive" and would have been of no assistance to the trier of fact even if admissible in a trial on the merits.

The second Brady violation alleged by the defendant is that one of Ms. Perez-Vega's pre-hypnosis descriptions of one of her attackers, presumably the shooter, did not fit the defendant.[43] Again, assuming this is a correct interpretation of the notes in the State's file,[44] there is no reasonable probability that this information could have affected the conviction in this case.

First, the defense knew that the victim underwent hypnosis to assist the police with a composite sketch of her attackers. Second, the defendant was not identified as a result of this sketch or her description. He was identified as the shooter by Jose Hung. Third, the defendant admitted to being the only shooter in his post-Miranda confession to Detective Diaz, a fact he now chooses to ignore.

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[42] There was no stipulation to their admission in this case.

[43] The issues dealing with the hypnotically refreshed testimony are dealt with in Point IV of this brief.

[44] According to the police, the description of the shooter that Ms. Perez-Vega gave prior to hypnosis was the same as during hypnosis except that during hypnosis she was able to elaborate on his hairline and clothing. (PC-R 442-446). At no time did Ms. Perez-Vega refer to the black Latin male as the shooter. (PC-R 246).

The third Brady violation claimed by the defendant is that the victim was shown more than one photographic line-up. The fact is that Ms. Perez-Vega was shown only one line-up containing the defendant whom she immediately picked out as the shooter (PC-R 265). At no time did she positively identify anyone else as connected with this murder, nor did anyone else confess to this murder. Therefore, this claim also fails to meet the standard of reasonable probability.

Lastly, the defendant makes the unsubstantiated claim that Jose Hung made a deal with the State in exchange for his testimony. First, Mr. Hung never testified against the defendant nor did he make any deals in exchange for any future testimony.[45] His name was not even used by the police in confronting the defendant upon his arrest in an effort to get an incriminating statement.

No Brady violations occurred in the defendant's case. The prosecution did not withhold material evidence or interfere with the defendant's ability to investigate his defenses. Accordingly, the defendant is not entitled to relief.

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[45] Detective Diaz voluntarily appeared at Jose Hung's sentencing and told Detective Mastos of his cooperation (PC-R 259-60)

POINT XV

WHETHER THE AVOIDING ARREST AGGRAVATING FACTOR WAS IMPROPERLY APPLIED IN VIOLATION OF THE DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The defendant claims that the trial court erred in finding that Reimar's murder was committed to avoid or prevent arrest, one of the three aggravating factors found by Judge Levy. This issue was raised and rejected on direct appeal. Lopez, 536 So.2d at 230.[46]

Reimar Luis Perez-Vega was an unexpected obstacle for the defendant. In his own statement the defendant said that he did not expect to find any children at the house.

The defendant admitted to firing the shot that killed this child but claimed that it was an accidental killing. His claim that the murder was accidental is totally refuted by the evidence.

Ms. Perez-Vega testified that she heard one of the intruders say "kill him, kill him" before her son was shot (R 974). The child was killed by a close range bullet wound to the back of his head. Four misfired bullets were found on the bed (R 912). The medical examiner testified that the bruises on the child's body

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[46] The trial judge was aware that the proof of the intent to avoid arrest by murdering a witness must be very strong when the witness is not a police officer. (R 436), See Riley v. State, 366 So.2d 19 (Fla. 1978)) cert. denied, 459 U.S. 81 (1982). He, nevertheless, held that the State had met this burden (R 437). This Court agreed with Judge Levy, finding that the evidence in this case was sufficient to support this aggravating circumstance.

were consistent with him being held down by the armpits when he was shot. (R 437).

Finally, the defendant himself was overheard by a state witness talking to one of his co-participants about how they had to kill the child as they could not leave any witnesses behind. Lopez 536 So.2d at 230 (R 1055). There is no doubt that the murder of this child was for the purpose of avoiding arrest.

It is the trial judge's duty to weight the evidence and resolve any conflicts in it. Id. at 231. The trial court's determination is final and will not be disturbed if supported by competent evidence. Id. Judge Levy had substantial competent evidence to support his finding. Relief is not warranted.

POINT XVI

WHETHER THE DEFENDANT'S PLEA WAS INVOLUNTARY AND THE COURT'S COLLOQUY INADEQUATE, IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The defendant claims that his plea was not voluntary, knowingly or intelligently made in violation of his constitutional rights. This claim was raised by the defendant on direct appeal and rejected by this court.[47] It is now procedurally barred.

Moreover, the record reveals that the defendant's plea was voluntary. The court conducted a thorough colloquy with the defendant. During the colloquy, the court made sure that the defendant understood his plea as well as its consequences. (SR 4-17, transcript of June 13, 1984 hearing).

The defendant's claim is not just procedurally barred, it is also without merit.[48] Relief should be denied.

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[47] This Court found that the defendant's plea was entered freely, voluntarily and intelligently and that the defendant did not prove that the trial court abused its discretion in refusing to allow him to withdraw it. **Lopez,** 536 So.2d at 229.

[48] Judge Levy conducted an evidentiary hearing on whether to enforce or vacate this plea. During that hearing he heard testimony from the defendant, his prior counsel and police officers. In enforcing the plea, Judge Levy found that the defendant lied when he testified that he did not understand the consequences of his plea. The credibility of witness is in the trial court's discretion and, barring an abuse of the discretion, such findings will not be disturbed. Lopez, 536 So.2d at 229.

POINT XVII

WHETHER THE DEFENDANT WAS INCOMPETENT DURING JUDICIAL PROCEEDINGS IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The defendant claims that he was incompetent during the proceedings. This claim was raised by the defendant on direct appeal and was rejected by this Court. He cannot relitigate now as it is procedurally barred. Rule 3.850 hearings are not intended to serve as a second appeal.

Moreover, the record is clear that at no time did the defendant's competence come into question. The three doctors that examined him prior to sentencing all found him competent to stand trial. Lopez v. State, 536 So.2d 226, 230 (Fla. 1988). Even his own expert, Dr. Marquit, found the defendant to be competent. Id.[49] His claim is not only procedurally barred, it has no merit. Relief should be denied.

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[49] The defendant makes the unsubstantiated claim that Dr. Marino, one of the three doctors that had found him competent prior to his sentencing, has re-examined him and now finds him incompetent. Even assuming this is a valid evaluation, it does not speak as to his mental state in 1985, but is reflective of his current circumstances.

POINT XVIII

WHETHER THE DEFENDANT'S WAIVER OF AN ADVISORY SENTENCING JURY WAS INVOLUNTARY AND THE COURT'S INQUIRY INADEQUATE IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

On December 2 of 1985, Mr. Haymes announced to the court that the defendant wanted to waive his right to have an advisory jury for the penalty phase of his case (SR 14, transcript of December 2, 1985 hearing). A written waiver had already been executed by the defendant(R 374). when the defendant was brought out he confirmed this representation at which point Judge Levy conducted the appropriate colloquy (SR 17, trancript of Decemebr 2, 1985 hearing). The defendant was then allowed to waive jury over the State's objection. (SR 29-30, transcript of December 2, 1985 hearing).

A direct appeal from the conviction and sentence was taken in December of 1986. The voluntariness of the defendant's waiver was an issue that could and should have been raised on direct appeal. It was not. This claim is now procedurally barred and cannot be first raised in a post-conviction relief proceeding as such a proceeding may not serve as a second appeal. Medina v. State, 573 So.2d 293, 295 (Fla. 1990).

Additionally, a review of the record reveals that the defendant's waiver was indeed voluntary. His waiver was a tactical decision as the defense was concerned that the victim's tender age would so prejudice a jury that the defendant would not get a fair hearing (SR 25, transcript of December 2, 1985 hearing). This tactic was discussed with the defendant (SR 25, transcript of December 2, 1985 hearing).

Judge Levy's colloquy was more than sufficient. He thoroughly questioned the defendant to make sure that his waiver was in fact voluntary. During the colloquy, the defendant repeatedly said that he wanted this judge, not a jury, to determine his sentence. (SR 20, 21, 22, 23, transcript of December 2, 1985 hearing).

If there is any confusion, it arose because the defendant now also wanted a jury trial on the merits of his case. Once it was explained to him that his guilty plea would not be vacated and that the guilt phase of his case was over, he very clearly re-emphasized his desire to have the judge sentence him.[50]

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> THE COURT: Once again, Mr. Lopez, 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. Lopez 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

The defense obviously believed that the defendant stood a better chance of avoiding the death penalty by waiving jury.[51] Mr. Castro, the defendant's prior counsel, had concluded that if

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> waived that right and it is discretionary for the Court to set that ruling.
>
> I am going to set that ruling at this time.

(SR 29-30, transcript of December 2, 1985 hearing).

[51] In addressing the judge at the defendant's waiver hearing, Mr. Haymes said:

> 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. Lopez; 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. Lopez?
>
> 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.
>
> It is Mr. Berk's contention that he is so concerned with the defendant's rights?

(SR 24-25, transcript of December 2, 1985 hearing).

the defendant was found guilty, he would most likely be sentenced to death. Tactically, the defendant would be in a better posture if he did not have to depend on Judge Levy overriding a very likely jury recommendation for death.

This claim is not just procedurally barred, it is also without merit. Relief should be denied.

CONCLUSION

Based on the arguments and authorities presented therein, Appellee respectfully moves this Honorable Court to affirm the judgment and sentence of the trial court and deny the Appellant's request for relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Gail E. Anderson, Assistant Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301.

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