IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

EDUARDO LOPEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This case involves the appeal of a trial court's denial of Rule 3.850 relief in a capital post-conviction proceeding. The circuit court summarily denied relief, despite the showing that Mr. López was entitled to an evidentiary hearing. This appeal was then perfected.

Citations in this brief shall be as follows: the record on appeal concerning the original trial court proceedings shall be referred to as "R.__" followed by the appropriate page number. The record on appeal from the Rule 3.850 proceedings shall be referred to as "PC __." All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. López lives or dies. This Court has traditionally allowed oral argument in capital cases. A full opportunity to air the issues through oral argument is appropriate in this case, given the significance of the claims involved and the stakes at issue. Mr. López, through counsel, respecfully requests that the Court permit oral argument.

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STATEMENT OF THE CASE

On June 10, 1983, Eduardo López was indicted on one count of first degree murder and related offenses arising from an incident which occurred on January 29, 1983, in Coral Gables, Florida. María Pérez-Vega, the mother of the victim in this case, was unable to identify or descibe the three intruders who broke into her home in the early morning hours of January 29. Frustrated due to the lack of evidence in the case and the inability of Mrs. Pérez-Vega to describe her assailants, detectives had Mrs. Pérez-Vega hypnotized, at which time she provided a clearer description of the shooter. A composite drawing was completed thereafter. Mr. López was arrested on May 23, 1983.

Following his arrest, Mr. López was represented by Dade County Public Defender Brian McDonald. On October 28, 1983, the Public Defender filed a Certificate of Conflict of Interest, and the court then discharged the Office of the Public Defender from its representation of Mr. López (See R.27). On November 16, 1983, the trial court appointed William Castro to represent Mr. López.

In the ensuing months, Mr. López, through Mr. Castro, negotiated a plea arrangement with the Dade County State Attorney's Office. Under the terms of the agreement, 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. In exchange for the life sentence, Mr. López was to testify against the co-defendants. The plea agreement also specified that if Mr. López did not fulfill his part of the agreement, the guilty plea would stand, the sentence would be rescinded, and the state would be entitled to seek the death penalty.

The plea was entered on June 13, 1984. On June 24, 1984, Mr. Castro submitted a Motion and Affidavit for Attorney's Fees for Special Assistant Public Defender (R. 188-90). The last entry on the Motion was Mr. Castro's charge for conducting Mr. López's plea and sentencing (R. 189). Mr. Castro never informed Mr. López that he was discontinuing his representation, and

indeed did not formally withdraw as counsel until spring 1985 (R. 805-06). Until that time, Mr. López was under the belief that he was being represented by an attorney, and that Mr. Castro was that attorney. Keith Haymes was appointed as counsel on March 18, 1985. It was during the lapse of time between the time the plea was entered and Mr. Haymes' appointment that problems with the plea emerged. During this period, Mr. López had requested to consult with Mr. Castro; Mr. Castro was even contacted by the State Attorney's Office regarding the fact that Mr. López wished to speak with him. Mr. Castro failed to contact his client. On May 14, 1985, the state filed a motion to enforce the plea agreement because Mr. López was not cooperating with the state. The motion was granted after a hearing on August 1, 1985 (R. 861).

Pursuant to the plea agreement, the state announced its intention to seek the death penalty against Mr. López. On December 2, 1985, Mr. López waived a penalty phase jury. The penalty phase was held before Circuit Court Judge Bruce Levy from December 3 to December 6, 1985. At the penalty phase, Mrs. Pérez-Vega testified to the events that transpired on January 29, 1983, including the fact that Eduardo López was the shooter. No mention was made of the fact that her testimony was hypnotically refreshed.

On February 13, 1986, the court sentenced Mr. López to death. The judge found that "the Defendant has shown no mitigating circumstances, either statutory or non-statutory" (R. 435). The court found as aggravating factors 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 (Fla. 1988). On September 28, 1990, Mr. López filed an Amended Motion to Vacate Judgement of Conviction and Sentence pursuant to Fla. R. Crim. P. 3.850. The trial court denied

all requested relief on May 21, 1991, without the benefit of an evidentiary hearing on any of the claims. This appeal was then perfected.

SUMMARY OF ARGUMENT

1. The trial court erred in summarily denying Mr. López's 3.850 motion without first ordering state agencies to comply with public records requests made pursuant to Chapter 119, Florida Statutes, and without conducting an in camera inspection of files which were claimed to be exempt from Chapter 119.

2. The trial court erred in summarily denying Mr. López's 3.850 motion without ordering an evidentiary hearing. Mr. López is entitled to a full evidentiary hearing on all the claims raised in his Rule 3.850 motion. Mr. López pled specific, detailed claims for relief, and under this Court's case law, an evidentiary hearing was required because the files and records do not conclusively establish that he is not entitled to relief.

3. During the critical stages of his case, Mr. López was abandoned by trial counsel, William Castro, and left to deal with the prosecutors and police on his own. Mr. López, on the advice of defense counsel, agreed to enter a guilty plea to a life sentence in exchange for his providing testimony against his co-defendants. Under the terms of the plea which counsel agreed to, if Mr. López failed to cooperate with the prosecution, he would not be allowed to withdraw his guilty plea, but the state would be entitled to seek the death penalty. Due to the ever-present threat of a death sentence, the period of time during which the co-defendants' cases were being prosecuted was obviously a critical one for Mr. López. After entering the plea, however, Mr. López was completely abandoned by Mr. Castro. After the plea was entered in court, Mr. Castro filed a motion for attorney's fees, yet he never formally withdrew from his representation of Mr. López until almost a year later. He never informed Mr. López that he was discontinuing his legal representation after the plea was entered, yet this is what he did. Mr. López believed that Mr. Castro was his attorney. Mr. López had initially been cooperative with the prosecutors and the

police, but when he was approached to testify in one of the co-defendant's cases, he first wanted to speak with Mr. Castro. The State Attorney contacted Mr. Castro to inform him that Mr. López wanted to see him, reminding the attorney that his client's failure to cooperate would lead to a death sentence. Mr. Castro ignored the request and the threat. Consequently, Mr. López was left alone to deal with the police and prosecutors, as well as the attorneys for the co-defendants. After communications between Mr. López and the state had broken down, another attorney was appointed to represent Mr. López, but it was too late. The plea agreement had fallen apart, and Mr. López was subsequently sentenced to death. Counsel's abandonment of Mr. López was unreasonable attorney performance, and because counsel was totally absent, prejudice can be presumed. This claim presents issues that require evidentiary resolution, and the trial court erred in summarily denying relief.

4. The testimony of the key state witness who was present at the scene of the homicide was the product of scientifically unreliable hypnosis. María Pérez-Vega, the mother of the victim, provided the police with the decisive identification of Mr. López as the shooter. What was never elicited at any of the proceedings was that Mrs. Pérez-Vega's testimony was wholly unreliable and completely inadmissible. Immediately after the offense took place, Mrs. Pérez-Vega was unable to provide the police with any kind of meaningful description of the assailants. In fact, at one point she believed that the shooter was a black male. Only after she was hypnotized was she able to assist in constructing a composite sketch of the suspect. Counsel failed to question Mrs. Pérez-Vega regarding the effect of the hypnosis on her identification and testimony, to point out the discrepancies between her testimony and her pre-hypnosis statements, to examine the hypnotist concerning his qualifications and methods, or to present expert testimony about the hypnosis session. Most importantly, counsel failed to inform Mr. López that Mrs. Pérez-Vega's testimony was not only highly challengeable, but also inadmissible. Had counsel effectively discharged his duties and acted in a reasonably professional manner, Mr. López would not have

chosen to plead guilty, but would have insisted on going to trial. The lower court erred in summarily denying this claim, and an evidentiary hearing and relief are warranted.

5. Trial counsel's performance at the guilt-innocence stages of Mr. López's capital proceedings was deficient, and the omissions prejudiced Mr. López. Defense counsel failed to investigate mental health issues, and had no mental health evaluation performed on Mr. López prior to allowing him to enter a guilty plea. Had counsel had a thorough and professional mental health examination done, he would have discovered that his client was not competent, and lacked the requisite ability to voluntarily, knowingly, and intelligently enter a guilty plea or waive any rights. Despite the significant confusion exhibit by his client, counsel allowed Mr. López to enter the plea without even questioning his mental state. Counsel also failed to raise significant and meritorious challenges to key evidence against Mr. López, including the hypnotically-refreshed testimony of Mrs. Pérez-Vega, and statements of and the existence of secret deals involving the jailhouse informant who led the police to Mr. López. Under the circumstances, confidence is undermined in the outcome. Certainly the files and records do not conclusively establish that Mr. López is entitled to no relief. The lower court erred in summarily denying this claim without an evidentiary hearing.

6. Defense counsel rendered deficient performance at the penalty phase of Mr. López's capital proceedings. Evidence of Mr. López's character and background was largely ignored by counsel due to a failure to investigate. No evidence was adduced nor argument presented regarding the fact that the co-defendants would never be prosecuted for their involvement. Counsel also failed his client in allowing him to waive a sentencing jury, a waiver which was not voluntary, knowing, or intelligent. Confidence in the death sentence is undermined. The lower court erred in failing to permit evidentiary resolution of this claim, as the files and records do not conclusively establish that Mr. López is entitled to no relief.

7. Mr. López's mental health experts failed to provide the professionally adequate expert mental health assistance to which he was entitled. The experts' assistance was rendered ineffective by defense counsel's failure to investigate Mr. López's mental health history and

background. Counsel also failed to provide the experts with this information which was crucial for a complete and thorough mental health examination, and failed to consult with the experts or ask their opinions on relevant matters. As a result, Mr. López was denied his constitutional right to the adequate assistance of a mental health expert.

8. Mr. López's sentence of death rests upon an unconstitutional automatic aggravating circumstance. Mr. López was found guilty of felony murder, and the trial court also found the "felony murder" aggravating factor. Because this aggravating factor failed to narrow the class of persons eligible for the death penalty, the use of this aggravating factor violated the eighth amendment.

9. Mr. López was deprived of his right to an individualized and reliable sentencing determination because the trial court precluded him from presenting mitigating evidence. The lower court erred in summarily denying this claim without providing Mr. López with an evidentiary hearing.

10. The eighth amendment was violated when the trial court refused to find or consider mitigating evidence. In the face of evidence of unrebutted mitigation, the trial court found that no mitigation existed.

11. Mr. López was denied the effective assistance of counsel at the state's motion to enforce the plea agreement because prior defense counsel revealed confidential and privileged communications with Mr. López, and counsel failed to zealously protect the interests of his client at the hearing. In overruling the objection that was made, the trial court erred. Confidence in the result is undermined. Because his sixth, eighth, and fourteenth amendment rights were violated, Mr. López is entitled to relief.

12. Defense counsel failed to assure that Mr. López was provided with a continuous translation by a qualified interpreter, and was deficient in neglecting to do so. In effect, Mr. López was not present for and was unable to understand the proceedings resulting in his sentence of

death. The trial court erred in not holding an evidentiary hearing on this issue, for the files and records do not conclusively establish that Mr. López is not entitled to relief.

13. Both the trial court and defense counsel failed to assure that Mr. López was present during critical stages of his capital proceedings. Mr. López was not afforded an evidentiary hearing so that he could demonstrate that his rights were prejudiced because of his absences.

14. Material and exculpatory evidence was suppressed by the prosecution and law enforcement agencies involved in Mr. López' case, and the state's failure to disclose evidence rendered defense counsel ineffective in his representation of Mr. López, all in violation of the fifth, sixth, eighth, and fourteenth amendments.

15. The application of the "avoiding arrest" aggravating circumstance was unconstitutionally applied to Mr. López, in violation of the standards articulated by this Court as well as the eighth and fourteenth amendments to the Constitution.

16. Mr. López's decision to enter a guilty plea was not voluntarily, knowingly, or intelligently made. The trial court failed to conduct an adequate plea colloquy in order to ensure that Mr. López had adequate awareness of the circumstances of entering a plea. The lower court failed to conduct an evidentiary hearing on this issue, for the files and records do not conclusively establish that Mr. López is entitled to no relief.

17. Mr. López was unconstitutionally forced to undergo criminal judicial proceedings while not legally competent. The lower court failed to conduct an adequate competency hearing despite clear signs of incompetence exhibited by Mr. López. Evidentiary resolution of this claim was necessary, and the trial court erred in summarily denying this claim.

18. Mr. López did not make a knowing, intelligent, and voluntary waiver of his right to have a penalty phase jury, in violation of his rights under the fifth, sixth, eighth, and fourteenth amendments.

ARGUMENT I

ACCESS TO RECORDS PERTAINING TO MR. LOPEZ'S CASE IN THE POSSESSION OF VARIOUS STATE AGENTS HAS BEEN WITHHELD IN VIOLATION OF CHAPTER

119.01 El. SEQ., FLA. STAT., THE DUE PROCESS CLAUSE AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In August, 1990, counsel for Mr. López made requests, pursuant to sec. 119.01 et. seq., Fla. Stat., to the agencies who performed polygraph examinations on Mr. López and other key witnesses, as well as the state agent which performed hypnosis on the key prosecution witness, María Perez-Vega. Both agencies refused to provide any records in their possession to counsel without a court order, Further, although the Office of the State Attorney provided counsel access to its files in this case, certain portions of those files were sealed and not disclosed to counsel. Because of these agencies' noncompliance with public records requests and their refusal to allow full access to its files on Mr. Lopez and his codefendants, pursuant to section 119.01 et. seq., Fla. Stat. (1991), it was impossible for post conviction counsel to fully investigate and plead all claims, or to know whether other claims existed. The state refused to comply with existing law. Mr. Loper has been denied his right to full and fair pursuit of his post-conviction remedies.

This Court has specifically and repeatedly held that capital post-conviction defendants are entitled to Chapter 119 records disclosure. State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenrano v. Dunner, 561 So. 2d 541 (Fla. 1990). Further, this Court has extended the time period for filing Rule 3.850 motions where public records have not been properly disclosed, providing defendants with sixty (60) days to amend Rule 3.850 motions following state disclosure of withheld Chapter 119 materials. Jenninas v. State, 583 So. 2d 316 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Provenzano.

> We do, however, find merit in Mendyk's claim under chapter 119, Florida Statutes (1989), regarding the disclosure of files and records pertaining to his case in the possession of the Hernando County Sheriff's Office, the Florida Parole Commission, and the Pasco County Sheriff's Office. This Court in State v. Kokal, 562 So.2d 324 (Fla. 1990), held that the state attorney must disclose public records pertaining to a defendant's case upon the conviction and sentence becoming final. In addition, where a defendant's prior request for disclosure has been denied, such a request may properly be made as part of a motion for post-conviction relief. See Provenzano v. Dunner, 561 So.2d 541 (Fla. 1990). The State argues that Provenzano should be limited solely to the state attorney's file and that defendants seeking disclosure from other state agencies must pursue their requests through

> civil action. We decline to so limit Provenzano and thus find Mendyk's request in the instant case appropriate. To the extent the agencies at issue here have doubt as to the content of their particular files being subject to disclosure, the trial court shall hold an in camera inspection for a determination. See Kokal, 562 So.2d at 327.

Mendvk v. State, 592 So. 2d 1076, 1081 (Fla. 1992).

Mr. Lopez properly presented his claims to access under Chapter 119 in his 3.850 motion.

This Court has repeatedly upheld that it is proper to allege Chapter 119 claims in a Rule 3.850 motion. State v. Kokal; Provenzano v. Dugger; Jennings v. State; Mendyk v. State. In numerous cases, this Court has ruled that a death-sentenced petitioner may present such claims in post-conviction proceedings.

Mr. López's Amended Rule 3.850 motion stated:

> [C]ounsel have been unable to obtain certain records essential to a complete presentation of Mr. Lopez's claims. For example, as discussed in Claim I, the key State's witness in this case was subjected to hypnosis, but the hypnotist has refused to provide any records in his possession to counsel without an order from the Court. The same is true for the polygraph examiner who performed polygraphs on Mr. Lopez and other witnesses. Further, although the Office of the State Attorney provided counsel access to its files in this case under Fla. Stat. sec. 119, certain portions of those files were sealed and not disclosed to counsel. Under Kokal v. State, ____ So. 2d ____ (Fla. 1990). the Court must conduct an in camera inspection of those files to determine whether they should be disclosed to Mr. Lopez's counsel . . . Thus, Mr. Lopez's motion is incomplete and his claims have not yet been fully investigated and developed.

(PC. 29-30). Later in the Rule 3.850 motion, counsel noted the difficulty in pleading a claim when all records had not been provided (PC. 174), and stated, "Disclosure should be ordered" (Id.). The Amended Rule 3.850 motion was filed on September 28, 1990. The State did not respond to the motion until some five (5) months later, on February 21, 1991, when the State filed its "Preliminary" response. The State's response did not contest Mr. López's statements that the State and its agents had not properly disclosed their records. On that same date -- February 21, 1991 -- Mr. Lopez's case was transferred back to the original trial judge, the Honorable D. Bruce Levy. No hearings or arguments were ordered by Judge Levy, who issued an order denying relief on May 21, 1991.

The failure to provide the requested records delayed Mr. Lopez's post-conviction investigation and made it impossible for him to fully plead his cause. Until the State and its agents fully disclose these records, Mr. Lopez cannot know if other claims or additional facts supporting his present claims may exist in his case. Mr. Lopez's requests for disclosure and for leave to supplement his Rule 3.850 motion once disclosure occurred are integral to his full and fair pursuit of his post-conviction rights. Post-conviction litigation is governed by due process principles. Holland v. State 503 So. 2d 1250 (Fla. 1987). Mr. Lopez hereby requests that this Court compel production of the requested records and grant additional time to amend his motion to vacate judgment and sentence with any claims or relevant factual data which have been inaccessible due to the failure to provide the requested records. This Court has not hesitated to do so under similar circumstances. See Kokal; Provenzano. Mr. Lopez's rights to due process and equal protection in accordance with the fourteenth amendment to the United States Constitution, as well as Chapter 1 19, Florida Statutes have been violated and relief is warranted.

Mr. Lopez urges this Court to order all state officers and agencies to fully comply with Chapter 119. To the extent that an exemption is claimed, this Court has held that the agencies involved must submit the allegedly exempted material for an in camera inspection. Jennings; Mendvk. In Mr. Lopez's case, the State Attorney's Office refused to disclose certain files; under Kokal, the trial court was compelled to conduct an in camera inspection of those documents. This procedure was not complied with in this case. If the State wishes to invoke exemptions, it must submit the material, claimed to be exempt, for an in camera review. Opez should then be allowed sixty (60) days from Chapter 119 compliance in which to file an amended motion.

ARGUMENT II

THE RULE 3.850 COURT'S SUMMARY DENIAL OF MR. LOPEZ'S MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE WITHOUT AN EVIDENTIARY HEARING WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

Mr. López presented the trial court with claims for relief which required an evidentiary hearing for proper resolution. The issues presented included substantial claims of ineffective assistance of counsel, among other fact-based claims for relief. The claims presented specifically pled allegations of fact, including matters that are not of record. Nothing in the files and records refuted the allegations. This case thus involved classic Rule 3.850 evidentiary issues which have traditionally been resolved through evidentiary hearings in Florida. The error in denying an evidentiary hearing is manifest in light of the fact that valid factual prima facie claims for relief were presented, claims which were not rebutted by the files and records, and which therefore required an evidentiary hearing for proper resolution.

As this Court's precedents and Rule 3.850 itself make clear, a Rule 3.850 movant is entitled to an evidentiary hearing unless the "motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986)'; State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla, 19841; State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d. 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla, 1988). Mr. López's motion alleged facts which, if proven, would entitle him to relief. The files and records of his case did not "conclusively show that [he] is entitled to no relief," and the trial court's summary denial of his motion, without an evidentiary hearing, was therefore erroneous. Here, the trial court referred to some portions of the record in regard to some of Mr. Lopez's claims, but none of these references "conclusively show that the prisoner is entitled to no relief . . . ." Fla. R. Crim. P. 3.850. This case involves matters that are not of record, and such facts cannot now be resolved by this Court, as there is no record to review.

In O'Callaghan, this Court recognized that a hearing was required because facts necessary to the disposition of an ineffective assistance of counsel claim were not "of record." See also Vaunht v. State, 442 So. 2d 217, 219 (Fla. 1983). This Court has not hesitated to remand Rule 3.850 cases for evidentiary resolution. See, e.g., Muhammad v. State, No. 75,055 (Fla. June 11,

1992); Rose v. State, No. 74,248 (Fla. May 28, 1992); Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992); Zeialer v. State, 452 So. 2d 537 (Fla. 19841; Vaunht; Lemon; Squires; Gorham: Smith v. State, 382 So. 2d 673 (Fla. 1980). These cases clearly indicate that Mr. López was and is entitled to an evidentiary hearing, and the trial court's summary denial of the Rule 3.850 motion was erroneous.

ARGUMENT III

DEFENSE COUNSEL'S ABANDONMENT OF MR. LOPEZ DURING CRITICAL STAGES OF IN-COURT AND OUT-OF-COURT CAPITAL PROCEEDINGS DEPRIVED HIM OF THE ASSISTANCE OF COUNSEL AND THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Upon the advice of defense counsel, William Castro, Mr. López entered into a plea agreement with the Dade County State Attorney's Office. Under the terms of the agreement, 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. In exchange for the life sentence, Mr. López was to provide testimony against the other two participants in the offense. If Mr. López did not fulfill his part of the agreement, the guilty plea would stand --that is, Mr. López would forever give up his right to trial-- but the life sentence would be rescinded and the state would be entitled to seek the death penalty.' As a result of this last provision of the plea agreement, Mr. López's actions after

---

'The relevant portions of the Plea Agreement regarding Mr. Lopez's obligations provided as follows:

4. In exchange for the aforementioned plea and sentences described herein, the defendant agrees to testify truthfully and honestly on any and all occasions when called upon to do so, as to his full and complete knowledge of the facts and circumstances surrounding the crimes in which the defendant is involved, and to which the defendant has agreed to plead guilty.

5. The defendant, EDUARDO LOPEZ, agrees to take polygraph examinations whenever called upon to do so by the State of Florida or any of its agents.

6. The defendant agrees to testify truthfully and honestly in all proceedings in this case and in any other case involving accomplices, principles and accessories related to the case in which Luis Reimar Perez-Vega was shot and killed by the above-named defendant and Maria Luisa Perez-Vega was shot and seriously injured by the above-named defendant. The defendant's testimony shall include but not be limited to pretrial hearings, depositions, statements, and trial proceedings.

entering the plea would determine whether death would be a possible penalty. As far as Mr. Lopez's case was concerned, these were critical stages of the proceedings.

The plea was entered on June 13, 1984. At the conclusion of the plea hearing, the judge all but promised Mr. López that if he did not fulfill his obligations under the agreement, he would be sentenced to death:

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

(R. 124). Insofar as the plea's terms relating to Mr. Lopez's failure to comply, the agreement provided:

> 7. In the event the defendant refuses to fulfill the terms and conditions of the foregoing Plea Agreement with regard to the testimony required and set forth herein, or the polygraph examinations required and set forth herein, then the remedy to which all parties agree shall be:
>
> A. That the defendant's guilty pleas to all counts of the Indictment shall not be vacated.
>
> B. That the defendant's adjudications as to all counts of the Indictment shall not be vacated.
>
> C. That the sentence as to Count I of the Indictment shall be vacated and the State shall be permitted to ask the Circuit Court Judge having jurisdiction over this matter to impanel a jury to recommend an advisory sentence on the imposition of the death penalty and consequently seek the death penalty. Prior to the impanelment of a jury to render an advisory sentence in this cause, the State of Florida and the defendant shall exchange Statements of Particulars enumerating aggravating and mitigating circumstances respectively+

(R. 124-25).

THE COURT: Okay.

(Thereupon, the hearing was concluded.)

(Supp. R., 6/13/84 hearing pp. 16-17) (emphasis added).

After the plea was entered, Mr. López was sent to state prison. Two weeks later, on June 27, 1984, Mr. Castro submitted a Motion and Affidavit for Attorney's Fees For Special Assistant Public Defender (R. 188-90). The last entry on that motion was defense counsel's charge for conducting Mr. López's plea colloquy and sentencing (R. 189).

Several months later, Mr. Lopez was returned to Miami in order to fulfill his obligations under the plea agreement. Up to this point, Mr. López had always been very cooperative with the State Attorney and the police (see infra). However, when the state approached Mr. Lopez to testify in the co-defendants' cases, Mr. Lopez, quite reasonably, wanted to speak to his lawyer:

> I met with Eduardo Lopez on December 7, 1984. I explained to him the terms and conditions of his plea agreement. The agreement was read to him in its entirety, translated by an official court interpreter, and acknowledged by Mr. Lopez. Mr. López originally said he did not understand the 25 year minimum mandatory provision of his sentence in Count I. Following our discussion he said he understood it.
>
> Mr. Lopez told me he would not testify if the press covered Felipe's trial. I fully explained to him the law in Florida as it pertains to freedom of the press, and he indicated he understood the law. I told him if he did not agree to testify, then he would be in violation of his plea agreement. I also told him I would have his statements translated into Spanish.
>
> He requested that I contact Willie Castro, his trial attorney. I told him I would contact Mr. Castro and tell him Mr. López wished to speak to him.
>
> Mr. López advised me he was concerned for his wife and children and did not want their addresses revealed. He was also concerned with his own safety.

(Interoffice Memorandum to File from Bill Berk, Assistant State Attorney, December 13, 1984) (emphasis added).

Evidently, Mr. Castro did not contact his client, and Mr. Berk contacted Mr. Castro over two months later when the following communication was had:

> February 26, 1985
>
> William Castro, Esquire

1414 Coral Way
Miami, Florida 33 145

Re: State of Florida v. Eduardo López
CASE NO. 83-11553

Dear Mr. Castro:

This is to advise you that your client, Eduardo López, has stated he refuses to cooperate in the prosecution of Francisco Felipe and Margarita Garcia (84-15865). Mr. López refused to appear for deposition on January 29, 1985. When I visited him at the Dade County Jail on January 30, 1985, Mr. López refused to speak to me and stated that he would not talk to anybody [redacted] lawyer about anything. He considers you his lawyer. Mr. Ldpez again refused to appear for deposition on February 26, 1985.

Pursuant to the plea agreement between Mr. López and the State of Florida, Mr. López is required to assist in the prosecution of everyone involved in the Murder of Luis Reimar Perez-Vega and Attempted Murder of Marie Luisa Perez-Vega. In the event Mr. López refuses to cooperate in the prosecution of Mr. Felipe, the State of Florida will have no choice but to request the Court to vacate Mr. López' sentence and, pursuant to the plea agreement executed by all parties, ask the Court to impanel a jury to recommend an advisory sentence on the imposition of the death penalty. The State of Florida will seek the death penalty in this matter, involving the First Degree Murder of a small child.

Please advise your client of tha consequences of his failure to cooperate.

I trust you will contact me as soon as possible, because the case of the State of Florida v. Francisco Felipe and Margarita Garcia, 84-15865 is set for trial before Judge Snyder on April 29, 1985.

Sincerely,

JANET RENO
State Attorney

/s/

By: WILLIAM BERK
Assistant State Attorney

(Letter from William Berk, Assistant State Attorney, to William Castro, Esq., February 26, 1985) (emphasis added).

Although Mr. López considered Mr. Castro "his lawyer" and wanted "his lawyer['s]" assistance in fulfilling his obligations under the plea agreement, Mr. Castro had other ideas. At the hearing on the state's motion to enforce the plea agreement, Mr. Castro testified that in his view

he had no further obligations to Mr. Lopez after the plea was entered, although he filed no motion to withdraw until later:

> Q. Approximately, when did you withdraw as his counsel?
>
> A. Was it --
>
> Q. Was it contemporaneous with the filing of a statement to enforce a plea agreement at or about that time?
>
> A. Yes, it was.
>
> Before the time that he entered the plea, certainly up until the time that I presented my affidavit and the voucher for payment in this case and court appointment, there were no other matters which I had, which I was obligated to perform on behalf of Mr. Lopez. Upon finding out through other attorneys and through yourself [Assistant State Attorney Berkl regarding Mr. López' conduct in failing to allegedly cooperate with his part of the agreement, I withdrew in front of Judge Morphonius; asked to be taken off further representation and she granted the motion.
>
> Q. But that was not until the spring of 1985?
>
> A. Yes.

(R. 805-06).

> Q. Is it possible that your investigator advised Mr. López at some point subsequent to your representation of him that you were no longer actively representing him and that any further correspondence with your office would be unnecessary?
>
> A. I don't know what he may have told him. All I know is that after I finished representing him, up through the point of the sentencing, that I had no further obligations towards Mr. Lopez.

• ⊠⊠⊠

> Q. I am just trying to understand or have an explanation for why he would have ceased to contact your office in the event that he would have had threats or coercion or something happening to him of the serious degree in the prison system.
>
> A. I consider my representing of Mr. Lopez to be over upon the finalization of the plea and sentencing.

(R. 816-17).

Mr. López desired the assistance of counsel during his interactions with the state as required by the plea agreement, and believed that Mr. Castro was his attorney. Mr. López was entitled to the assistance of counsel during this period, as it obviously involved various critical

stages of the proceedings; Mr. Lopez, however, had never been informed that Mr. Castro no longer represented him, Indeed, Mr. Castro did not formally withdraw until the spring of 1985 (see R. 805-06), well after the state began approaching Mr. Lopez regarding testimony in the co-defendants' cases.

Mr. López was evidently confused regarding his status and obligations during this period. However, he had no one to advise him except prosecutors and police detectives with whom he was understandably reluctant to deal on his own. Prior to this time, Mr. Lopez had always been cooperative with the state. At the hearing on the state's motion to enforce the plea agreement, Assistant State Attorney Rabin testified that Mr. Lopez was initially cooperative in fulfilling the terms of the plea agreement:

> Q. Were there requirements of your office, such as the polygraph or coming over to see you, giving you a full statement, that the defendant did subject himself to without hesitation?
>
> A. I cannot tell you the degree to which he subjected himself to it. I know that he did assist the police in the initial phases of their investigation by providing some information and statements. Those statements subsequently became the basis of polygraph examinations.
>
> Q. And you have personal knowledge that he did go to his polygraph examination?
>
> A. Yes.
>
> Q. Was he required to give you a written or verbal proffer, at any time, which presumably would form the basis of the arrest warrants issued as to the alleged co-participants?
>
> A. His testimony came to me in the form of sworn statements from the police officers.
>
> Q. Did the police officers, at any time, indicate to you that they had a problem in obtaining the proffer as was requested?
>
> A. I do not recall whether or not that was related to me, that they had any problems.
>
> I seem to recall the first problems were after the arrest of the people in this case. That seems to be when I recall the problems being given.
>
> Q. That was roughly five weeks between the plea agreement and the arrest warrants' issuance in this case, is that what we determined?

A. June 13th or July 13th is when the warrants were issued, then July 30th, some time in July, one of them was arrested and January was the second one.

Q. So, there is clearly a time when there was no problem with his testifying in your opinion?

A. There was no problem related to me.

(R. 602-04).

Even when Assistant State Attorney Berk first approached Mr. López in early 1985 regarding his testimony in the co-defendants' cases, Mr. López did not flatly refuse to cooperate:

A. [By MR. BERK] In preparation for the prosecution of Francisco Felipe, I attempted to meet with Mr. López in the office of the State Attorney in late December/early January to review with him his statements, his testimony, and the obligations of the plea agreement.

Q. What was the purpose of doing that?

A. That was for the purpose of trial preparation.

Mr. Sharpstein represented Mr. Felipe and Mr. Sharpstein wanted to take the deposition of Eduardo López. I wanted to prepare Mr. López for his deposition by reviewing his earlier statements with him.

Q. What happened at that time?

A. At that time Mr. López expressed some reluctance about testifying, although, did not out and out refuse to testify.

(R. 655-56).

Noting Mr. López's "reluctance", Mr. Berk asked Detective Díaz, who headed the homicide investigation, to talk to Mr. López. Detective Díaz was surprised by Mr. López's turnaround:

Q. When you first met Mr. López, you said you enjoyed a good rapport from the outset, initially?

A. Yes, sir,

Q. In fact, he was helpful, at that point, in assisting in your investigation of this case?

A. Yes, sir.

* * *

Q. Do you recall, what date, what vicinity the date was where you first observed the defendant's absolute reluctance to testify or to assist you at all?

A. The date was mentioned by Mr. Berk. I believe it was in February of this year.

He mentioned a date, but I forgot. I think it was February of this year.

Q. Did this come as a surprise to you?

A. His reluctance to talk to me?

Q. Yes.

A. A little bit of a surprise, yes.

Q. In fact, that was very different from the way he had ever appeared before?

A. Yes.

Q. He had a pattern of being helpful and assisting you up until that point?

A. Yes, sir.

(R. 651-52).

Mr. López had asked to deal with the state through his attorney, and this fact had been communicated to Mr. Castro. Mr. Castro did nothing. It is patently clear that defense counsel abandoned his client when Mr. Lopez most needed help -- in fulfilling the obligations that would assure his life sentence. Because of defense counsel's abandonment of his client, Mr. Lopez was unable to follow through with the plea agreement.

Even when substitute counsel, Mr. Haymes, was appointed, it was too little too late. Mr. Haymes was appointed on March 18, 1985 (see R. 261), long after Mr. Lopez had requested the assistance of counsel. By then, the co-defendants' cases were well in progress. Indeed, at Mr. Lopez's April 16, 1985, deposition in one of the co-defendant's cases, Mr. Haymes had not yet reviewed the records of Mr. Lopez's case and because of his lack of preparation, advised Mr. Lopez not to answer any questions (R. 212). Attorneys for the co-defendants demanded that Mr. López decide for himself whether to be deposed (R. 213). The deposition then proceeded, with the co-defendants' attorneys and the prosecutor bombarding Mr. Lopez with questions regarding the

case and the plea agreement. During the deposition, Mr. Lopez clearly became more and more distraught, confused, and agitated, finally refusing to say anything more.

At the next deposition on May 3, 1985, Mr. López fared no better. Mr. Lopez repeatedly exhibited confusion, saying he did not know why he was there (R. 231), and then saying he wanted a jury to hear his testimony (R. 234, 235, 237). Defense counsel Haymes did nothing to assist or protect Mr. Lopez, and repeatedly revealed confidential communications between himself and Mr. López (See, e.g., R. 230, 231, 238, 239, 258). This deposition, too, degenerated into a free-for-all, with the co-defendants' attorneys and the prosecutor hammering Mr. López with questions. Mr. Lopez had no assistance from counsel. Finally, he gave up, saying:

> I feel sick. You're already driving me crazy. What kind of a heart one has to have to deal with people that are trying to humiliate you like this.

(R. 255). Shortly after this deposition, on May 14, 1985, the state filed its motion to enforce the plea agreement. The motion was granted on August 1, 1985 (R. 861), and Mr. López faced a death sentence. On February 13, 1986, as assured, the court imposed death.

Defense counsel's abandonment of Mr. López was unreasonable attorney performance. The sixth amendment right to counsel implicitly includes the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970); Chatom v. White, 858 F.2d 1479, 1484 (11 th Cir. 1988), cert. denied, 489 U.S. 1054 (1989); see Powell v. Alabama, 287 U.S. 45, 53 (1952). Mr. López was entitled to have the "guiding hand of counsel at every step in the proceedings against him," Powell, 287 U.S. at 69. Given Mr. López's substantial and continuing obligations under the plea agreement, and the ever-present threat of a death sentence, the assistance of his attorney was clearly a "necessit[y], not [a] luxur[y]." United States v. Cronic, 466 U.S. 648, 653 (1984) (quoting Gideon v. Wainwriaht, 372 U.S. 335, 344 (1963)). Mr. López was left to deal with the prosecutor and police alone, without the assistance of his court-appointed attorney. The sixth amendment guaranteed Mr. López "that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence

might derogate from the accused's right to a fair trial," Stano v. Dugger, 921 F.2d 1125, 1141 (1 lth Cir. 1991) (quoting United States v. Wade, 388 U.S. 218, 226 (1967) (footnote omitted)).

The unreasonableness of Mr. Castro's action is made more evident by the Florida Rules of Court and the Florida Code of Professional Responsibility. Under Fla. R. Crim. P. 3.111 (e), withdrawal of defense counsel after judgment and sentence is governed by Fla. R. App. P. 9.140(b)(3), which requires that the attorney obtain court approval for the withdrawal after filing a written motion alleging good cause for the withdrawal. Mr. Castro filed no written motion in Mr. López's case, and, indeed, only sought to withdraw after being told by the state that Mr. López believed Mr. Castro was his lawyer and needed his assistance (See R. 805-06). The Florida Code of Professional Responsibility in effect at the time of these proceedings provided:

> A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawver should protect the welfare of his client bv aivina due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm.

EC 2-32, Florida Code of Professional Responsibility (emphasis added). Mr. Castro did not give Mr. López the notice of his withdrawal, and took no steps to "protect the welfare of his client." Id. This behavior is deficient attorney performance, and was not the result of any tactic or strategy.

The prejudice resulting from Mr. Castro's omissions is evident. In Blanco v. Sinaletarv, 943 F.2d 1477 (11 th Cir. 1991), the Eleventh Circuit Court of Appeals discussed the prejudice prong[2] in ineffective assistance of counsel claims in cases where, as here, prejudice can and should be presumed. See United States v. Cronic, 466 U.S. 648 (1984). As a prelude to its analysis, the Eleventh Circuit noted that the Supreme Court in Cronic wrote that "the Court has uniformly found constitutional error without a showing of prejudice when counsel was either totallv absent, or

[2]See Strickland v. Washington, 466 U.S. 668 (1984).

prevented from assisting the accused during a critical stage of the oroceedinas." Blanco, 943 F.2d at 1496 (quoting Cronic, 466 U.S. at 659 n.25) (emphasis added). Such error occurs when "circumstances [exist] that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Cronic, 466 U.S. at 658.

In assessing the import of Cronic in this circuit, the Blanco court wrote:

> [E]xceptions to the [Washington] [prejudice] standard are appropriate only when the circumstances would offend basic concepts of due process. When such prejudicial circumstances exist, the concern is with procedural fair trial requirements, and not with whether the defendant would have been found guilty.

Blanco, 943 F.2d at 1496 (quoting Stano v. Dugger, 921 F.2d 1125, 1154 (11 th Cir. 1991) (en banc)).

Such circumstances exist in Mr. Lopez's case. Mr. López was unable to complete his obligations under the plea agreement, despite repeated requests for assistance of counsel. During this period, Mr. Castro purposely distanced himself from Mr. Lopez, and did not formally withdraw as counsel until spring 1985. Despite the continuing threat of the death penalty, Mr. Castro did not inform Mr. López that he had chosen to discontinue his representation once the plea had been signed in open court. By the time Mr. Haymes was appointed, the situation and Mr. López's mental state had deteriorated. Mr. Haymes then failed to properly prepare or advise Mr. Lopez, and the plea agreement fell apart. As he had assured, the judge then sentenced Mr. López to death. But for counsel's unreasonable actions, the guilty plea in this case would not have fallen apart.

Although this claim presents facts which are not "of record," the trial court summarily denied relief (PC-R. 475). Without conducting an evidentiary hearing the trial court determined that Mr. López had been represented by counsel throughout the proceedings (Id.). This conclusion, however, does not consider the extra-record facts proffered by Mr. López -- facts such as the documents from the State Attorney's file which reveal that when the State approached Mr. López about testifying in the codefendant's cases, Mr. López requested the assistance of counsel and believed Mr. Castro was his attorney and that Mr. Castro provided Mr. López no assistance although he had not yet withdrawn from the case. The State's dealings with Mr. Lopez were

critical stages of the proceedings which would -- and ultimately did -- determine whether Mr. Lopez's life sentence would stand, but Mr. Lopez was denied the assistance of counsel. Mr. Loper's motion also proffered that even when, much later, Mr. Haymes was appointed, through no tactic or strategy, Mr. Haymes was unprepared to represent Mr. López and, as a result, at the first deposition in the codefendant's cases advised Mr. López not to answer questions. Thus, even though counsel was present at that deposition, Mr. López was deprived of the effective assistance of an attorney who was prepared to serve Mr. Lopez's interests and preserve Mr. Lopez's life sentence. These extra-record facts, inter alia, are not conclusively refuted by the attachments to the circuit court's order. An evidentiary hearing was required.

Mr. Lopez was clearly deprived of the assistance of counsel, see United States v. Cronic, 466 U.S. 648 (1984), and of the effective assistance of counsel. See Strickland v. Washington. Such deprivations "offend basic concepts of due process," Blanco, 943 F.2d at 1496, and thereby violate the sixth, eighth, and fourteenth amendments. An evidentiary hearing and relief are warranted, for Mr. Lopez was clearly not "provide[d] the guiding hand . . . [he] needled]." Cronic, 466 U.S. at 658 (citation omitted).

ARGUMENT IV

THE USE OF UNCONSTITUTIONALLY UNRELIABLE HYPNOTICALLY- INDUCED TESTIMONY AGAINST MR. LOPEZ AT HIS CAPITAL GUILT-INNOCENCE AND PENALTY PROCEEDINGS, AND DEFENSE COUNSEL'S FAILURE TO CHALLENGE THIS EVIDENCE, VIOLATED MR. LOPEZ'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

María Perez-Vega was the key prosecution witness against Eduardo López. On the night of the offense, Mrs. Perez-Vega and her son were asleep together when three intruders entered her bedroom. When she awoke, one of the intruders put a hand over her mouth. Moments later, according to Mrs. Perez-Vega, that same intruder placed a gun next to the side of her face. She heard a shot, heard her son speaking to the intruders, and then heard two more shots. After the intruders were gone, Mrs. Perez-Vega summoned help. She had been shot in the side of the face; her son had been shot in the head and died later that morning.

At the penalty phase in Mr. López's case, Mrs. Perez-Vega identified Mr. López as the person who put his hand over her mouth (R. 970), and as the man who placed the gun next to her face (R. 972). She testified that she had provided a description of the man who had shot her and her son to the lead detective (R. 980), and that she had identified Mr. López as that man from a photographic lineup (R. 981). On cross-examination, Mrs. Perez-Vega emphasized that she had no doubt that Mr. López was the person who put the gun to her head (R. 9981.

What did not come out at the penalty phase, however, was that Mrs. Perez-Vega's testimony was thoroughly unreliable and inadmissible. Shortly after the offense and long before Mrs. Perez-Vega identified Mr. López, Mrs. Perez-Vega had been subjected to hypnosis precisely because she was unable to provide law enforcement with any detailed description of her assailant. Only after the hypnosis session were the police and Mrs. Perez-Vega able to construct a composite sketch of the suspect, Only after the hypnosis did Mrs. Perez-Vega identify a photograph of Mr. López.

Hypnotically induced testimony is per se inadmissible in Florida criminal proceedings. See Stokes v. State, 548 So. 2d 188 (Fla. 1989); Bundv v. State, 471 So. 2d 9 (Fla. 1985). The use of hypnotically-induced evidence during Mr. López's guilt-innocence and penalty proceedings thus violated the fifth, sixth, eighth, and fourteenth amendments. Additionally, defense counsel were prejudicially ineffective in failing to properly present this issue to the trial court, challenge the admissibility of Mrs. Perez-Vega's testimony, and demonstrate with readily available documentary and expert evidence the total unreliability of Mrs. Pérez-Vega's identification of Mr. López. Counsel for the guilt-innocence proceedings, William Castro, knew about the hypnosis and researched the issue, (R. 7701, but then failed to inform Mr. López that Mrs. Pérez-Vega's testimony was eminently challengeable. Had counsel done so, Mr. López would not have pled guilty and would have chosen instead to go to trial. See Hill v. Lockhart, 474 U.S. 52 (1985). Counsel for the penalty proceedings, Keith Haymes, also knew about the hypnosis of Mrs. Perez-Vega, but conducted no research or investigation, raised no challenge to the admissibility of her testimony,

and did not attack the credibility or reliability of her testimony with readily available evidence, although at the time of Mr. López's penalty phase proceedings, this Court had held that hypnotically induced testimony was per se inadmissible in Florida criminal proceedings. See Bundy. Mrs. Perez-Vega's testimony was essential to the state's case for death, and defense counsel's failures in this regard undermine confidence in the outcome of the penalty proceedings. See Strickland v. Washington, 466 U.S. 668 (1984). As a result of defense counsel's failures, the prosecution's case was never subjected to the crucible of "meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 659 (1984).

A. HYPNOTICALLY INDUCED TESTIMONY IS UNRELIABLE

As this Court has made clear, in accord with case law and the views commonly shared by mental health professionals at the time of Mr. López's trial court proceedings, hypnotically-induced testimony is inherently unreliable:

> In this case, we are concerned with the use of hypnotically refreshed testimony as evidence in a criminal trial, Accordingly, we must focus our attention on the reliability of this evidence rather than the many clinical and forensic benefits associated with hypnosis. The nature of hypnosis and memory reconstruction is such that several problems are raised by its use in court. These problems have been identified and summarized by Professor Bernard L. Diamond, M.D. in his article Inherent Problems in the use of Pretrial Hypnosis on a Prospective Witness, 68 Calif. L. Rev. 313 (1980)[hereinafter Diamond, Inherent Problems]. Dr. Diamond is a professor of law, a clinical professor of psychiatry, and a noted expert in the field of hypnosis. His article delineates several evidentiary problems associated with hypnotically manipulated recall. These concerns have been unveiled through extensive, diligent research conducted by respected members of the scientific community. First, a hypnotized person is subject to a heightened degree of suggestibility. E.g., Council on Scientific Affairs, Scientific Status of Refreshina Recollection bv the Use of Hvpnosis, 253 J. A.M.A., 1918, 1922 (1895)[hereinafter A.M.A. Council Report]; Diamond, Inherent Problems, supra, at 333. ("Hypnosis is, almost by definition, a state of increased suggestibility.").
>
> This heightened suggestibility leads to other problems which tend to render hypnotically refreshed testimony less reliable than testimony of a witness whose memory has not been refreshed through the use of hypnosis. For example, many researchers have concluded that a hypnotist, no matter how skilled, cannot avoid implanting intentional or inadvertent suggestions in the mind of the hypnotized subject. This occurs as much through nonverbal body language as through verbal cues. E. Hilgard, The Experience of Hvanosis 9 (1968); Diamond, Inherent Problems, supra, at 333. Furthermore, a hypnotic subject cannot, upon awakening distinguish between his own thoughts and feelings and those which were implanted during the hypnosis session.

> Another serious problem associated with the use of hypnotically refreshed testimony involves the tendency of the hypnotic subject to "confabulate," or invent details that he or she does not actually recall. Much research into the effects of hypnosis on the human memory has revealed that a hypnosis subject will invent or fabricate facts that he or she does not actually remember. Worse still, the subject is unable to distinguish between these confabulations and the true facts. In other words, hypnosis tends to force the subject to invent memories and to believe that they are true. Thus, neither the hypnotist nor the subject is able to separate fact from fantasy when the hypnosis session is completed. Diamond, Inherent Problems, supra, at 335-37.
>
> Perhaps the most serious evidentiary problem associated with hypnosis involves the phenomenon known as "memory hardening." Memory hardening affects one's ability to resolve doubts and uncertainties resulting in the subject becoming certain of his or her memories regardless of the accuracy of those memories. A subject becomes certain of his or her recall of the events without foundation for that confidence. This memory hardening "creates special barriers to the court's truth-seeking ability." Note, The Admissibility of Posthypnotic Testimony: Constitutional Considerations and the Defendant's Right to Testify. 16 Fla. St. U. L. Rev. 185, 189 (1988). Hypnosis tends to "bolster a witness whose credibility would easily have been destroyed by cross- examination but who now becomes quite impervious to such efforts, repeating one particular version of his story with great conviction." Orne, The Use and Misuse of Hypnosis in Court, 27 Int'l J. Clinical & Experimental Hypnosis 311, 332, (1979). Thus, a witness who has been hypnotized prior to testifying becomes very difficult to cross-examine on any subject discussed in the hypnosis session, raising questions which involve a defendant's sixth amendment right to confront witnesses against him. The defendant must face a "witness whose natural recollection may have been altered by suggestion or confabulation, but who nevertheless has a firm conviction as to its truth," Falk, Posthypnotic Testimony--Witness Competency and the Fulcrum of Procedural Safeguards, 57 St. John's L. Rev. 30, 54 (1979)(footnote omitted). The task of cross- examining such a witness therefore becomes an exercise in futility.

Stokes v. State, 548 So. 2d 188, 190-91 (Fla. 1989).

Additionally, as Stokes acknowledged, information establishing the unreliability of hypnotically-induced testimony was abundant at the time of Mr. López's 1984 plea proceedings and 1985 penalty proceedings. See Stokes, 548 So. 2d at 191-96 (discussing court opinions and scientific research regarding the use of hypnotically-induced testimony), Experts who could have established the unreliability of hypnotically-induced testimony were readily available at the time of Mr. López's capital proceedings. An eminently qualified expert in the field, Dr. Robert Buckhout, who has conducted extensive scientific studies regarding the use of hypnosis to enhance memory, had published his results demonstrating that hypnosis is not a scientifically valid technique for enhancing memory as of 1983, as had other authorities.

The medical, scientific, and psychological evidence establishing that hypnotically-generated testimony of a witness is so unreliable and fraught with dangers was easy to find, as were qualified experts in this regard. The accuracy of memories "refreshed" by hypnosis has always been a genuine concern of professionals in the field, and the dangers of suggestion, influence, and confabulation has led most professionals to reject the theory that hypnosis can be used to directly uncover previously unavailable memories. See, e.g., Orne, "The Use and Misuse of Hypnosis in Court," 27 International Journal of Clinical and Experimental Hypnosis 311 (1979); Buckhout, "State of Indiana v. Peterson: Hypnosis," 6 Social Action and the Law, 3 (1980); Gillette, "Hypnosis on Trial," 22 Cal. L. Rev. 615 (1980); Mickenburg, "Mesmerizing Justice: The Use of Hypnotically Induced Testimony in Criminal Cases," 34 Syracuse L. Rev. 927 (1983).

A definitive exposition of the current professional disrepute of hypnosis as a memory-refreshing device is contained in the American Medical Association's Council on Scientific Affairs Report "Scientific Status of Refreshing Recollection by the Use of Hypnosis," 253 JAMA 1918 (1985) [hereinafter Orne Report]. The Council's findings and conclusions unequivocally condemn the use of hypnosis to refresh the recollection:

> The council finds that the recollections obtained during the hypnosis can involve confabulations and psuedomemories and not only fail to be more accurate, but actually appear to be less reliable than non-hypnotic recall. The use of hypnosis with witnesses and victims may have serious consequences for the legal process when testimony is based on material that is elicited from a witness who has been hypnotized for the purpose of refreshing recollection.

(Id. at 1918). In fact, the Orne Report specifically condemned the "T.V. metaphor" used by the hypnotist to "refresh" Mrs. Perez-Vega's recollection. See infrp.

At the time of Mr. Lopez's capital proceedings, evidence regarding the unreliability of hypnosis was not hard to find:

> Interrogation and Discovery of Truth: Hypnosis has not been found reliable in obtaining truth from a witness. Even if it were possible to induce hypnosis against one's will, it is well documented that the hypnotized individual can willfully lie. It is of even greater concern that cooperative hvonotized subjects remember distorted versions of actual events and are themselves deceived. When recalled in hypnosis, such false memories are accompanied bv strong subjective conviction and outward signs of conviction that are most compelling to anv observer.

Encyclopedia Britannica (5th ed. 1969)(emphasis added).

Professionals in the field of hypnotism many years before Mr. Lopez's capital proceedings had expressed serious doubts about the use of hypnotically-refreshed testimony in court:

> There are as yet no criteria for the differentiation of unconscious understandings hypnotically obtained and reality facts and the courts are justifiably and properly wary of admitting such testimony for the protection of the rights of both society and the accused.

Bunn, Retrograde Amnesia in a Murder Suspect, 10 American Journal of Clinical Hypnosis 209 (1968).

Defense counsel could have shown that hypnotism itself is useless in the truth-finding process of a criminal trial, and that the techniques used by the hypnotist in this case were grossly inadequate. Many studies had debunked the popular mythology that hypnotism is a tool for retrieving completely accurate memories. Teitelbaum, Hypnosis Induction Techniques 15 (1965); Levin, Hypnosis in the Law, 1964 Ins. L.J. 97, 102 (1964) (a statement made under hypnosis does not have the degree of verity necessary for judicial proceedings).

The fundamental problem is that hypnosis is unreliable as a device for obtaining truth. Even thoroughly qualified hypnotists are trained in hypnosis for the therapeutic recall of psychological events, such as in treatment to cure neuroses. In such therapy factual accuracy is irrelevant--the therapist is after the purgative recollection of emotions surrounding the traumatic event. In such a process the recall of all the embellishments and distortions of the neurotic process is desirable; what matters is the patient's perception of events, not the phenomenological accuracy of the memories of those events. "Hence, even experienced hypnotists may be naive in their appraisal of the reality value of hypnotic recall." Diamond, 68 Cal. L. Rev. at 338. However, as a vehicle for learning truth, hypnosis cannot be relied upon:

> Given the suggestibility of hypnotic subjects, they can appear to increase their memory when actually they are responding to subtle cues by the examiner. There is a danger that witnesses hypnotized by the police will come to believe the authorities' version of the facts rather than remembering what actually happened.

Wrightsman, Psycholoav and the Legal System (1987), p. 116.

> Experts agree that
>
> subjects act the way they think a truly hypnotized individual would act. Additionally, Orne has found in his research that the material described under so-called hypnotic trances is often inaccurate and embellished with many intervening events that occur between the initial incident and the hypnotic session. It appears that hypnotic subjects may be as susceptible to distortions, suggestions, and leading questions as the eyewitnesses described in the previous chapter. Particularly if the interrogator is a police officer convinced of the powers of hypnosis, he or she is apt to inadvertently suggest events or details that were not present at the crime scene. The hypnotized witness or victim, eager to please the interrogator, can easily imagine a scene decorated with subjective fantasies and thoughts in line with the suggestions of the questioner. Under these conditions, the hypnotized subject may begin to be convinced of the accuracy and power of hypnosis to the same degree as the hypnotist. Furthermore, the subject also may become convinced of the accuracy of his or her account of the imagined scene.

Bartol, Psvcholonv and American Law (19831, p. 212. These are the precise dangers involved in this case.

Two hypnotic techniques were employed in hypnotizing Mrs. Perez-Vega: the "screen" approach and the "regression" approach. The TV or movie "screen" approach is particularly subject to distortion of memories, a fact intimately connected with the nature of memory itself. In general, the testimony of any witness is subject to the inaccuracies of observation, or the influence of personal needs, desires, and motivations existing in him or her at the time of his or her observations of an event. Bartlett, Remembering 31 (1964). At most, hypnosis can reveal only what was actually seen and neurologically processed by the subject; it cannot supply missing elements or correct what was seen.[3]

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[3]This concept was recently discussed by Justice Kogan:

> For example, the police hypnotist--who readily conceded the potential for unreliablilty in his own work--even went so far as to tell his mesmerized subjects that they could press a "zoom" button in their minds and retrieve greater details from their memories. As the expert witness noted below, human eves are not electronic aadnets that can "zoom" in this manner. And this type of "zooming" certainly cannot be done after the fact, inside the mind. To suggest the possibilitv is sheer science fiction. It endows the hypnotized witnesses with fanciful superhuman aualities and assures them that, through this device, they can "fill in" the gaps in their memories.
>
> Details retrieved by hypnotic "zoom" vision thus can be nothing but an invention, and a patently ludicrous one at that. The hypnotist might just as well have told his subjects that, like the comic-book

As Reiff and Scheerer demonstrated more than a decade prior to this trial in Memory and Hypnotic Regression (1959), memories of an event recorded in the subconscious mind may be changed or distorted by the conscious mind to fit the changing needs of a person as he or she grows older:

> The inference is therefore that for remembrance either memory traces proper change considerably, or the present personality brings them into consciousness in a changed form, e.g., by representing the past in terms of present interests, functions and needs.

Id. at 39-40. This distortion is not the result of the subject's intentional lying; the most honest person will not be able to remember a past event exactly the way it happened, though the degree of distortion varies depending upon the individual. Hypnosis, which instructs the subject to remember an event but to remain mentally in the present (hyperamnesia), may overcome the conscious distortion, but not the subconscious distortion. Id. at 34-35.

The second hypnotic technique used in this case is called regression, in which the subject is instructed to regress mentally to the time of the occurrence, and relate the event as it develops. By the time of Mr. Lopez's trial there were at least five studies which demonstrated that hypnotic regression did not exist, and that such a "state" is merely the product of the subject's dramatizing his or her self-concept at the regressed time.[4] In Mr. Lopez's case, the hypnotist's qualifications

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> character Superman, they possessed X-ray vision and could remember details they had "seen" through solid walls. The method of hypnosis used here at best was unreliable and most arobablv created false memories, false certainty, and false testimonv.

Sims v. Florida, No. 77,616 (Fla. June 11, 1992) (slip op. at 13) (Kogan, J., dissenting) (emphasis added).

'Martin Orne's The Mechanisms of Hvpnotic Aae Regression: An Exoerimental Study, 46 J. Abnorm. Soc. Psych. 213 (1951), presents one such study. Orne obtained actual drawings made by a subject on a certain day when he was six years old. The subject under hypnosis was "regressed" to that day and asked to draw the same pictures, without having seen the originals. Two weeks later, the experiment was repeated. A leading authority on childrens' drawings then evaluated the series of drawings. She described them as "sophisticated over-simplifications with only a superficial resemblance to childhood drawings." In short, the subject had drawn what an adult would believe a six-year-old child would draw.

Similarly, separate studies by Hilgard and Orne, using subjects who had not learned English until relatively late in life, presented particularly damaging evidence against regression. Hilgard

and techniques were both clearly subject to significant challenges. The hypnotist was a psychiatrist who largely used hypnosis in therapy and who employed the discredited "T.V. metaphor" and "regression" techniques.

Subconscious and conscious distortion are not the only problems that plague the accuracy of events recalled under hypnosis. These are compounded by the problems of the basic processes of memory itself. The old hypothesis that experiences are permanently stored in the memory as if they had been recorded had been increasingly discredited by 1975. The research evidence at that time supported a "reconstructive" theory of memory, in which the process of remembering involves reconstruction of events based on stored fragments of experience. Reconstructive theory also holds that even for ordinary situations, memories can be reconstructed in ways that do not correspond to actual events. Buckhout, Nearlv 2,000 Witnesses Can Be Wrong, Soc. Act. & L., May 1975, at 7.

A middle ground between simple but honest inaccuracies of recollection and deliberate lies under hypnosis is the phenomenon of "confabulation," in which the subject unconsciously creates details to fill in the natural gaps in his or her memory, or, out of a desire to comply with the hypnotist's suggestions, unconsciously creates details which he or she believes will please the hypnotist. The dangers of confabulation were well-known at the time of Mr. López's capital proceedings. In fact, the classic experiment demonstrating this sort of gap-filling was reported by Stalnaker and Riddles in 1932. The Effect of Hvpnosis on Lona-Delaved Recall, J. Gen. Psych. 429

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regressed a subject to an age at which the subject understood only Chinese; Orne did the same with a native speaker of German. Each subject not only understood the experimenter's English commands, but also related conversations he had had with relatives -- in English. See Hilgard, Hvpnotic Susceptibility 169-70 (1966); Orne, The Nature of Hvpnosis: Artifact and Essence, in The Nature of Hypnosis 99 (Shor & Orne ed. 1968). Other studies available at the time of trial also questioned the existence of regression. See Sabin, Contributions to Role-Takina Theorv, 47 Psych. Rev. 255 (1050) (suggesting role playing rather than actual regression); Young, Hvpnotic Aae Rearession: Fact or Artifact?, 35 J. Abnor. Soc. Psych. 273 (1940). These studies indicated that hypnosis cannot overcome the natural distortions of memories -- thus further questioning the accuracy of honestlv recalled memories.

(1932). Hilgard, one of the most respected figures in hypnosis research and one of its pioneers, commented on the phenomenon of confabulation:

> The subject under hypnosis is often eager to please by complying with the demand, explicit or tacit, that he produce a correct memory. Thus, unwittingly, the subject may comply by producing a memory out of fantasy, and formulating it in as realistic terms as he is capable.

Hilgard, The Experience of Hypnosis 164-75 (1968). Orne put the matter succinctly: "The significant point is that subjects in hypnotic trance show a marked tendency to confabulate with apparent verisimilitude." The Potential Uses of Hypnotism in Interrogation at 194.

Another extremely troublesome aspect of hypnosis is what follows the session -- the subject develops a virtually unshakable sense of confidence in the accuracy and validity of the material developed during the session. Hypnotically-refreshed memories are apt to be a patchwork of (1) correct recollections, (2) distorted recollections, (3) deliberate lies, (4) confabulated details, and (5) suggested responses. A witness who has been hypnotized can rarely, if ever, recognize later that a suggestion implanted intentionally or unintentionally by the hypnotist is not the product of his or her own mind. Diamond, 68 Calif. L. Rev. at 333. Indeed, hypnotically "refreshing" a witness's memory is tantamount to the destruction or fabrication of evidence: Whatever honest -- however incomplete -- memories the witness had previous to hypnosis become forever inextricably tangled with the fabrications and suggestions created during hypnosis.

A remarkable feature of hypnosis is its ability to resolve doubts and uncertainties in the subject. Most persons, when aware of the deficiencies of their recall of events, will communicate their awareness by hesitance, expressions of doubt, and body language indicating lack of self-confidence. "So important has this form of [demeanor] evidence been deemed in our system of procedure that . . . the witness is required to be present before the tribunal while delivering his testimony." Wigmore, Evidence, Section 946 (1940). Juries rely on these indications of lack of certainty of recall, and their importance in the determination of the weight of the evidence may be equal or greater than the bare substance of the testimony. But without adding anything

substantive to the witness's memory of events, hypnosis may significantly add to her confidence in recall.

This newfound confidence is so great that it can withstand the most vigorous cross-examination. This raises serious constitutional problems, because defendants have a constitutional right to confront witnesses against them. The concern here is that post-hypnotic memory will differ from pre-hypnotic memory. This memory alteration may result from the purposeful or unwitting cues given by the hypnotist, the phenomenon of confabulation, and the need for the subject to achieve some sense of certainty within her own mind. The basic problem is that if a witness sincerely believes that what she is relating is the truth, she will become resistant to cross-examination. In a sense, the witness who emerges from hypnosis is not the same witness who entered into hypnosis. Under such a circumstance there would be no real confrontation of the witness who might be the key to conviction or acquittal. The "new" witness is convinced that the newly "remembered" evidence is truthful.

Thus, both due process and confrontation rights are violated by the unreliability of hypnotically-induced testimony. In fact, the hypnosis procedure is akin to those unreliable and unnecessarily suggestive identification procedures which have been condemned as violative of due process. See, e.g., Simmons v. United States, 390 U.S. 377 (1968); Manson v. Brathwaite, 432 U.S. 116 (1977); Neil v. Binaers, 409 U.S. 188 (1972).

Obviously, the use of Mrs. Perez-Vega's hypnotically-refreshed testimony deprived Mr. Lopez of the right to meaningfully confront witnesses against him, in violation of the sixth and fourteenth amendments, Because her pre-hypnotic memory differed from her post-hypnotic memory, Mrs. Perez-Vega's memory, as it existed at the time of her observations, could not be meaningfully confronted. The use of this unreliable, unconfrontable, and unrebuttable testimony rendered the capital proceeding fundamentally unfair and unreliable.

As stated above, counsel brought none of this to the attention of the court. None of the available avenues discussed herein for challenging the admissibility or credibility of Mrs.

Perez-Vega's central testimony was employed. Her testimony was never adequately impeached. Counsel failed their client. The prejudice to Mr. Lopez was substantial -- the key evidence in the prosecution's case was left essentially unchallenged.

B. **THE TESTIMONY OF THE STATE'S KEY WITNESS WAS AFFECTED BY HYPNOSIS**

On January 29, 1983, Maria Perez-Vega gave a sworn statement to the police regarding the events that occurred in her home early that morning. On February 1, 1983, she was given a polygraph examination to determine whether her sworn statement was truthful. During the polygraph examination, Mrs. Perez-Vega was never asked to describe her assailants. She was questioned about whether she had told the truth to the police in her sworn statement and whether she had withheld any information from the police. The results of her polygraph were inconclusive.[5] On February 2, 1983, the day after she was polygraphed, Mrs. Perez-Vega was hypnotized. Immediately after the hypnosis, a detective prepared a composite sketch of the suspect from the information provided by Mrs. Perez-Vega. On May 19, 1983, Mrs. Perez-Vega picked Mr. López's picture out of a photographic lineup, Mrs. Perez-Vega's testimony during her deposition on October 17, 1985, and at the penalty phase hearing on December 3, 1985, differed significantly from her statements prior to hypnosis.

In her January 29, 1983, pre-hypnosis statement to law enforcement, Mrs. Perez-Vega could not describe her assailants:

> Q Can you describe these three individuals to the best of your recollection?
>
> A There is a mirror on my headboard, and through the mirror I could see that there were three men.

[5] In a deposition given on March 23, 1984, Detective Tom Reilly testified, however, that the results of the polygraph had been that "she was truthful in all the questions." (Deposition of Detective Reilly, March 23, 1984, at 10). Because there was no evidentiary hearing in this case, it is not known whether defense counsel had the report of the polygraph examination in order to be able to challenge these statements. It is thus unclear whether a Brady violation occurred, or whether counsel was ineffective in failing to challenge the detective's untruthful information.

Q Do you recall what they were wearing?

A No. Nothing at all.

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Q Do you recall any description of their clothing?

A No because I was facedown all this time. . .

Q Now. . . were all three of the men armed?

A No. I didn't see any of them armed at all. I don't even know when the gun came to be except when it was put right next to my head.

(Statement of María Perez-Vega, 1/29/83, pp. 2-3) (emphasis added).

Q Do you recall anything else?

A No, no. Nothing at all.

Q Before this happened, you had never seen these individuals?

A No.

Q You don't remember what they looked like with the exception that they were Cubans, two white and one was black?

A No, I don't really remember anvthina else.

Q The two white individuals, do you remember if they had black hair, blonde hair, blue eyes--

A I iust saw them fraction of a second.

Q Then you were facedown on the bed?

A Then I was facedown on the bed.

(Id. at 11) (emphasis added).

Notes located in the State Attorney's Office files reveal that one of Mrs. Perez-Vega's pre-hypnosis descriptions of the shooter fit anyone but Eduardo Loper. In a conversation between detectives and Mrs. Perez-Vega, she clearly indicated that the intruder that was nearest to her--the shooter--was a black Latin male [B/L/Ml, who "was standing almost next to" Mrs. Perez-Vega on the "right side of the bed." The second individual was at the foot of the bed, while the third individual was at the "center of the bed searching thru drawers." The notes go on to reveal that

the "B/L/M put [his] hand over her mouth." Mrs. Perez-Vega then bit the hand. Either the second or third intruder told the black male to "shoot her." According to Mrs. Perez-Vega, the black male held her face with his hand, and she felt the gun barrel next to her temple. The gun went off, and the black male said, "I killed her." One of the others said, "Kill him too," referring to the victim. It is clear that the man who Mrs. Perez-Vega identified as the shooter was a black Latin male, a group of which Eduardo López is not a member.'

Because of Mrs. P&et-Vega's inability to provide any details regarding her assailants' appearances, law enforcement arranged for her to be hypnotized. According to the hypnotist, Dr. Pedro Rodriguez, the purpose of the hypnosis was to attempt to get a better description of the intruders from Mrs. Perez-Vega (Deposition of Dr. Pedro Rodriguez, 5/29/84, p. 44). Before the hypnosis, Mrs. Perez-Vega "admitted her memory was light or was very poor," (id. at 49), and was "aware" that the purpose of the hypnosis was to obtain a better description of the assailants (Id. at 50). According to Dr. Rodriguez, "[t]here were certain particular parts in which [the law enforcement officers1 were more interested in. I believe, of course, features and the appearance" (Id. at 38).

The fact that Mrs. Perez-Vega's memory was poor prior to being hypnotized was corroborated by many of those involved in the investigation. Mrs. Perez-Vega herself admitted that her recollection was poor:

> it's very difficult because I saw them all a fraction of a second, being awakened from a deep sleep under those circumstances, and somebody right next to me who immediately put their hand over my face and brought my head down, so it's what I managed to see in split second, yeah.

(Deposition of María Perez-Vega, June 21, 1985, in State v. [Margarita Cantinl Garcia, at 16). Detective Tom Reilly, who accompanied Mrs. Perez-Vega to the polygraph examination, testified at a deposition:

'Again, it is unclear whether defense counsel was aware of this critical information. Because no evidentiary hearing was conducted, it is unclear whether this is a Bradv violation or whether counsel was ineffective in this regard.

Q [by Mr. Castro1 Did she have any difficulty in recalling the details of the incident?

A I never discussed it with her. Just comments -- I never questioned her about the incident.

Q Like which comments?

A Like what I told you -- that, "I wish I could have seen them better", or something -- "Three Latin males," "Put their hand to mv mouth." But never went bevond that.

Q Do you specifically recall her saying she wishes she could have seen the three males better?

A Something to that effect. I can't say that's exactly what she said.

Q But something to the effect that would convey that meaning to you?

A Yeah.

Q And was that prior to the hypnosis, after the hypnosis, prior to the polygraph, or was that something that was consistent throughout?

A No. That was only -- I believe onlv initially. She might have made that comment once. That was about it.

Q In reference to the polygraph examination and hypnosis, can you tell me when in the time frame could she have made that statement regarding her wishing that she could have had a better look at the assailant in the case?

A The very beginning. Would have been maybe the very first day that I met her.

Q Would that be prior to the hvpnosis?

A Yes.

(Deposition of Detective Reilly, March 23, 1984, at 1 l-l 2) (emphasis added). Detective Jose Diaz, the lead detective in the case, gave a deposition in co-defendant Felipe's case, and also recognized the extraordinary and difficult circumstances facing Mrs. Perez-Vega at the time she "saw" her assailants. It is important to note that the following conversation revolved around whether Mrs. Perez-Vega was able to make the distinction between a male and a female, certainly an easier identification to make under stressful situations than one of a specific person:

Q [Was it] a man or a woman's voice?

A Well, she is, you know, she says that a man said it, you know, I have to put myself more or less like in her place and try to imagine if I woke up at 1 o'clock in the morning from a deep sleep and somebody had a hand over my nose and mouth, would I have the presence of mind to take all these details down, you know, I don't know.

Q All right, now I understand what you are saying but let's look--

A Like I said, Margarita [Cantin Garcia] has been known to pass herself as a man before.

Q All of this is speculation, what we have just been indulging in, correct?

A Yes, well, speculation that a person who is wakina from a deer, sleep, you know, mav not have all the wits to sav it was definitelv a man or a woman.

(Deposition of Detective Diaz, November 1, 1984, in State v. [Francisco] Feline, at 50-51) (emphasis added). Even the polygrapher, Pedro Rodriguez, testified that Mrs. Perez-Vega's pre-hypnotic recollection of her assailants was poor:

Q Would it be safe to say that the best description she gave of the assaiiants was that there were three Latin males, one was White, and that was basically it, or did she give any further physical description of any of the assailants?

A I remember --

Q And I'm referring now to the pre-hypnosis session.

A Oh, no. On the are-hvanosis session, she was not reallv remembering much except perhaps for what you said.

(Deposition of Dr. Pedro Rodriguez, May 29, 1984, at 27) (emphasis added).

Q How much time did you spend with Mrs. Perez-Vega in your pre-hypnosis session?

A Pre-hypnosis session, around forty-five minutes, forty minutes.

Q And during that time, you were only able to obtain the minimal description of the assailants which we alluded to earlier, right?

A I do not recall even that, at this point, you know, I'm going to --

Q You do recall that the descriptions given by Mrs. Perez-Vega of the assailants in this case were minimal at best?

A Verv vaaue. Yes, was minimal.

(Id. at 44).

As stated above. Mrs. Perez-Vega underwent hypnosis on February 2, 1984. After the hypnosis session, Detective Diaz, who initiated the hypnosis and was present during the session, reported:

> On Wednesday, February 2, 1983, at 4:00 P.M., MS, PEREZ-VEGA was placed under hypnosis by DR. PEDRO RODRIGUEZ in his office at 151 Majorca Avenue in Coral Gables. DETECTIVE R. FIALLO and this detective were present during the hypnosis session. While under hypnosis, MS. PEREZ-VEGA was able to recall more details about the incident and provided a better physical description of the subject who did the shooting. She described that subject as a Cuban male between the ages of 40 and 50, short and slim, who was wearing a beige short sleeve shirt and blue jeans. His hair is brown, combed towards the back and thinning some in the front. His eyes were described as small, dark and narrow.
>
> MS. PEREZ-VEGA recalls the black male subject as being dressed in a light blue shirt and blue pants, and acting like he was scared or surprised of what was taking place in the bedroom at that time. The black male was also Cuban because of his Cuban accent when he spoke Spanish to the other two subjects. MS. PEREZ-VEGA could not remember the third subject who was giving the orders very well except for the description she had previously given. Immediately after the hypnosis session, DETECTIVE FIALLO prepared a composite of the shooter with the information provided by MS. PEREZ-VEGA.

(Supplementary Report, 2/23/83, Det. Jose A, Diaz, pp. 6-7) (emphasis added). According to all reports, Mrs. Perez-Vega's memory before the hypnosis was poor, and under hypnosis she "was able to recall more details about the incident and provided a better physical description of the subject." (Id.). A composite sketch of the intruder was done after the hypnosis. Then, on May 19, 1983, Mrs. Perez-Vega identified Mr. Lopez as the intruder from a photographic lineup.[1]

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[1] The files and records of this case also indicate a substantial contradiction regarding exactly how many photo lineups were shown to Mrs. Perez-Vega. According to Mrs. Perez-Vega, she "was presented with one photo lineup with six pictures on it." (Deposition of Maria Perez-Vega, June 21, 1985, at 32) (emphasis added). According to Detective Diaz, she was shown "one and only one" photo display. (Deposition of Detective Jose Diaz, November 8, 1985, at 45) (emphasis added).

The records disclosed by the State Attorney's Office and the Metro-Dade Police Department, however, reveal otherwise. In a police report, Detective Diaz reports:

> During the afternoon of February 1, 1983, MS. PEREZ-VEGA was shown numerous photographs of Latin males involved in robberies and drug rip-offs, as well as photographs of numerous Cuban males who arrived in this country from Mariel in 1980 and are now involved in criminal activities in Dade County. MS. PEREZ-VEGA did not identify any photograph as being one of the subjects who committed this homicide.

The hypnosis session also had an effect on Mrs. Perez-Vega's subsequent testimony. During her October 17, 1985 deposition, Mrs. Perez-Vega claimed to have had a clear view of Eduardo López:

> Q The person that you identified, [Eduardo López], how long in terms of seconds or minutes would you say you had the opportunity to observe his face?
>
> A I couldn't answer that. I have no way of--i know I saw him as soon as the lights came on in my room and I was awakened, and I when I looked up, it

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(Supplementary Report, February 23, 1983, at 5). It was later that afternoon that Mrs. Perez-Vega was polygraphed. Again, around that same time, Detective Diaz reports:

> On Monday, January 31, 1983, the body of RUBEN MERIDA, W/M/ Cuban, D.O.B. 9-6-40, M.D.P.D. I.D. number 280564, was discovered in the trunk of his car in a parking lot here in Dade County. The homicide is believed to be drug-related and has now been assigned to DETECTIVE R. FIALLO of the CENTAC 26 Unit for follow-up investigation under Case Number 38390-D. Victim MERIDA has a striking resemblance to the composite of the shooter in this case and a physical description matches the one provided bv MS. PEREZ-VEGA. A photo line-up of RUBEN MERIDA was shown to MS. PEREZ-VEGA, but she did not identify him as being the shooter. Subseauent conversations with MS. PEREZ-VEGA on Februarv 22, 1983, at 1:00 P.M. revealed that she was not sure if MERIDA was the shooter or not, but he looked very much like the shooter as far as facial features, hair stvle, and age. RUBEN MERIDA'S body was decomposed when discovered, and the medical examiner could not determine if he had a bite mark on either one of his hands. His fingerprints were compared to the latents lifted from the scene, but no comparison was made. The possibilitv that MERIDA was one of the subjects has not been discarded comoletelv and this detective will monitor DETECTIVE FIALLO'S investiaation of MERIDA'S homicide in case anv connection between the two cases can be established.

(Id. at 7) (emphasis added). Detective Fiallo, however, testified at a deposition that his only involvement in the case was to transport Mrs. Perez-Vega to the polygrapher's office on February 2, 1983.

Again, notes to Detective Diaz from Bob Strong, Investigator, located in the Metro-Dade Police files reveal that Mrs. Perez-Vega was shown yet another line-up on February 8, 1983:

> ON FEB. 8, 1983, VICTIM VEGA VIEWED THE PHOTO LINE-UP AND WAS UNABLE TO PICK THE SUBJECT THAT WAS AT HER HOUSE THE NIGHT OF THE INCIDENT EVEN THOUGH SHE SAID SHE HAS SEEN SUBJECT #6 BEFORE AND HAS SEEN THE PHOTOGRAPHS OF SUBJECT #3 AND 5 AT AN EARLIER TIME.

(Miami Dade Police Department notes). Because there was no hearing held in this case, it is unclear what happened with this information. What is clear is that no one was telling the truth about the number of photo line-ups that Mrs. Perez-Vega was shown, and that there was indeed a suspect that she identified as the possible shooter. Whether this was a Bradv violation or ineffective assistance of counsel, the bottom line is that this information would have prevented Mr. Lopez from entering a plea, and he would have gone to trial.

was his face that I saw right next to mv bed. And then when he held the gun next to mv temple, and I could see from the corner of mv eve it was him that I saw. I wouldn't be able to tell you a time.

(Deposition of María Perez-Vega, 1 O/l 7/85, p. 39) (emphasis added).

Q Can you describe why the other two faces you had no opportunity to observe?

A Because as I was awakened--I sleep face down, and I was awakened. I, of course, thought it was my children and I turned around to face the door and I was--I could see him and the other two fiaures. I iust saw figures. I saw the other two individuals but iust as finures.

Q Was light a problem in ascertaining the facial features of the other two persons?

A No. Because the light was bright but I was just awakened and it was--his face is the one that I focused on as I awakened.

(Id. at 40) (emphasis added).

I didn't feel anyone else next to me other than the one person, whom I could barely see from the corner of mv eve and I could distinguish as being the same one who had oriainallv held mv nose and mouth and thrust my head forward.

(Id. at 44) (emphasis added).

Finally, during her penalty hearing testimony on December 3, 1985, Mrs. Perez-Vega stated that she had had a clear, direct and positive view of Eduardo López:

Q What happened?

A I awakened. I immediately looked toward the door and I saw three individuals entering my bedroom,

(R. 969).

Q Were you able to get a look at the man who put his hand over your mouth and on your head?

A From the corner of mv eve, I looked up. I could see his face.

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Q Who was the man who had his hand over your mouth?

A The man that I later came to know as Eduardo López.

Q Do you see him in the courtroom today? Look all the way around.

A Yes, that is him right there.

(R. 970) (emphasis added).

Q Who was holding the gun?

A Eduardo López.

(R. 972) (emphasis added). Mrs. Perez-Vega also testified that when she spoke to Detective Diaz on the day of the offense, she told him "[e]xactly what I have told you" (R. 978). Then she testified that a few months after the offense, when Detective Diaz showed her a photographic lineup, she identified Mr. Lopez (R. 980-81). The photographic lineup was admitted into evidence (R. 982).

On cross-examination, Mrs. Pérez-Vega insisted that her identification of Mr. Lopez was accurate:

> Q Why is it that you would be so able to identify this defendant, yet the other two people you gave no description?
>
> A Because I did not see the other two persons. This is the man who put his hand over my mouth and who I could see directly face to face. As I turned my face his face was directly right above mine.

(R. 992) (emphasis added).

> Q What were the factors aside from just being woken up that made it difficult or impossible for you to identify those other two persons?
>
> A I just saw them for a fraction of a second and immediately as I awakened, like I repeat from a deep sleep and then there is some bright light. I saw three figures and immediately Eduardo Lopez came to my bed and put his hand over my mouth and other hand on my head and pulled my face down.

(R. 994-95)

> A No, I do not know where he took [the gun] from, but the barrel was against my temple. I looked up. The barrel was here and I went like this (indicating).
>
> I saw Mr. López' face right above me.

(R. 998) (emphasis added).

> Q It is unmistakable that you saw Mr. López's face when you looked up?

A There is no doubt in mv mind.

(R. 999) (emphasis added).

Remarkably, defense counsel did not ask Mrs. Perez-Vega even one Question regarding the fact that she underwent hypnosis in order to be able to provide a description of her assailants. Inexplicably, counsel also failed to use many of the prior statements of Mrs. Perez-Vega which clearly indicated that her pre-hypnotically-refreshed memory was poor, and that her subsequent recollections were not as unmistakable as she testified. Prior to hypnosis, Mrs. Perez-Vega had no recollection of seeing Eduardo Lopez "face to face," Prior to hypnosis, she could remember very little of the incident. After she was hypnotized, however, her story crystallized and her "memory" hardened.

C. DEFENSE COUNSEL WERE INEFFECTIVE

Mrs. Perez-Vega's memory was unquestionably altered by hypnosis, and her subsequent identification of Mr. Lopez and her testimony were wholly unreliable. Any information obtained from Mrs. Perez-Vega after the hypnosis should not have been used for any purpose -- either as a basis for accepting a guilty plea or as penalty phase evidence. See Bundy; Stokes; Sims v. Florida, No. 77,616 (Fla. June 11, 1992) (Kogan, J., dissenting). Despite the clear inadmissibility of Mrs. Perez-Vega's testimony and the readily available challenges to its reliability, defense counsel Castro failed to inform Mr. López of these factors prior to the guilty plea, and defense counsel Haymes failed to investigate the issue, question Mrs. Perez-Vega, or present it to the court at all during the penalty phase. Counsel's actions were unreasonable and substantially prejudiced Mr. López -- Mrs. Perez-Vega's testimony was the key to the guilty plea and to the prosecution's case for death.

Information demonstrating the unreliability of Mrs. Perez-Vega's testimony was readily available to defense counsel. See Supra. Such information would have discredited the use of hypnosis to enhance memory, and demonstrated the unreliability of a "memory" produced and influenced by hypnosis. Moreover, this type of information would have shed a revealing light on the invalid and improper procedures utilized in the hypnosis of Mrs. Perez-Vega, and would have

demonstrated that hypnosis had an undeniable effect on her subsequent identification of Mr. López and on her testimony.

Both defense attorneys knew about the hypnosis session, but without a strategic or tactical reason, inexplicably and unreasonably failed to present the issue to the court and failed to impeach the reliability of Mrs. Perez-Vega's account even with the single fact that she had been hypnotized. At the hearing on the state's motion to enforce the plea agreement, defense counsel Castro, who had represented Mr. López prior to and during the plea proceedings, testified that he was aware of the hypnosis, had researched the issue, and had even discussed the issue with the prosecutor (R. 769-71). At the same hearing, the state argued that the plea agreement should be enforced in part because of the difficulties the state would encounter in presenting Mrs. Perez-Vega's testimony at a trial, indicating that the prosecution was aware of the potentially inadmissible testimony of its key witness:

> I cannot say what will happen, whether all [Mrs. Perez-Vega's] testimony will be excluded or whether any of her testimony will be excluded. The law with respect to hypnotic testimony has changed specifically in the State of Florida since the time this defendant entered this guilty plea. That will be a significant issue in a trial on the merits.
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> • ⊠
>
> [T]he case by virtue of its age, would not be as prosecutable as it was at the time that Mr. Lopez entered into this plea.
>
> The State, therefore, would be prejudiced and are urging the Court to find that the defendant freely, knowingly, and intelligently entered into his plea.

(R. 860-61).

Despite their knowledge of the hypnosis session, defense counsel failed to pursue the issue. Even the state agreed that hypnosis would be a "significant issue" at trial. Yet, defense counsel Castro failed to inform Mr. Loper of this "significant issue," and defense counsel Haymes failed to pursue the issue at all.

Mr. López's guilty plea proceedings occurred on June 13, 1984, and his penalty phase was in early December, 1985. At the times of both proceedings, extensive information discrediting the

use of hypnosis in the truth-finding function was available. See Section A, supra. Indeed, at the times of both proceedings, Florida case law recognized the inherent unreliability of hypnotically-refreshed testimony. On May 9, 1985, this Court issued its opinion in Bundy, holding that hypnotically-refreshed testimony is per se inadmissible in Florida criminal trials. Bundy, 471 So. 2d at 18. In Stokes v. State, 548 So. 2d 188 (Fla. 1989), this Court reiterated that "[a]ny hypnosis session shall act as a time barrier, after which no identifications or statements may be admitted." Stokes, 548 So. 2d at 196. The reason for holding post-hypnotic testimony inadmissible, as the Court explained in detail, is the unreliability of memory produced by hypnosis. Id. at 195. Both Bundy and Stokes made clear that scientific data and caselaw had discredited the use of hypnosis in criminal proceedings for some time. Thus, at the time of Eduardo López's penalty phase hearing, the law in Florida reflected "a growing recognition that hypnosis is not widely accepted by psychiatrists and psychologists as a consistently reliable method of refreshing or enhancing a person's memory of past perceptions and experiences." Bundy, 471 So. 2d at 13.

In Bundy, the Court rejected the safeguards approach of attempting to insure the reliability of post-hypnotic testimony. Bundy, 471 So. 2d at 13. The safeguards method was employed in Florida at the time that the trial court accepted Mr. López's guilty plea. This method was discussed in Brown v. State, 426 So. 2d 76 (1 st DCA 1983). Brown permitted the use of post-hypnotic testimony in a criminal case if scientifically approved safeguards were in place at the time of the hypnosis and if the party seeking to introduce the hypnotically-refreshed testimony could establish admissibility by clear and convincing evidence. Brown, 426 So. 2d at 91 (citing State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981)).

The safeguards required by Hurd and approved by Brown include:

1) The use of a neutral and detached hypnotist;

2) The session be conducted at a neutral location, such as a doctor's office;

3) Only the subject and the hypnotist be present in the room where the session is held;

4) Prior to the hypnosis, the hypnotist examine the subject/witness to determine every possible detail recalled, and that this pre-hypnosis session be recorded;

5) Prior to the hypnosis, the witness be examined to determine that s/he had no mental or physical problems that might affect the results;

6) The session be recorded, preferably on videotape;

7) The hypnotist avoid reassuring comments that might affect the witness.

Brown, 426 So. 2d at 91-93. These scientifically and legally approved safeguards were not followed during the hypnosis of Mrs. Perez-Vega. The only record of the hypnosis session that is presently available to counsel is the transcript of the May 29, 1984, deposition of Pedro Rodriguez, M.D., the hypnotist. According to his testimony, Dr. Rodriguez's hypnosis of Maria Perez-Vega was seriously deficient under the safeguards approach outlined in Brown. Two Metro-Dade police officers were present in the room during the session, and contributed questions to the process (Deposition of Pedro Rodriguez, M.D., pp. 28, 36, 38). No video or audio recording was done during either the pre-hypnosis or hypnosis session (Id. at 29). Dr. Rodriguez was given detailed information by the police -- not by the witness -- regarding the crime (Id. at 24). Mrs. Perez-Vega was severely depressed and suffering from a psychotic disorder at the time of the hypnosis, and her condition affected the hypnosis (Id. at 49, 61-62). Mrs. Perez-Vega's pre-hypnosis comments were vague; she recalled minimal details and had a very poor memory of her assailants; however, during the hypnosis session, she was able to comment on many details concerning facial features, hair and clothing of her assailants (Id. at 27, 44, 47, 49). Under the Brown safeguards approach, Mrs. Perez-Vega's identification and testimony were clearly inadmissible as being totally unreliable.

Other factors also demonstrate that the hypnosis of Mrs. Perez-Vega was improperly conducted. Although Dr. Rodriguez is a psychiatrist, as required by the Brown criteria, he testified at his deposition that "forensic[s] is not my field. I do hypnosis a lot for other psychiatric problems" (Deposition of Pedro Rodriguez, M.D., p. 15). As noted in Section A, supra, when hypnosis is used for therapy, as Dr. Rodriguez was accustomed to using it, the accuracy of recall is not important. Further, Dr. Rodriguez employed the "T.V. metaphor" in conducting the hypnosis

(Deposition of Pedro Rodriguez, M.D., pp. 18, 29, 35, 43), a method which has been thoroughly discredited by the scientific community, See Section A, supra. Dr. Rodriguez also employed the "regression" technique, stating that ha "attempt[s] to get [the subject1 back into the hour that it happened" (Deposition of Pedro Rodriguez, M.D., pp. 18-19) and "create the illusion that she's visualizing her life on that particular day" (Id. at 35). This method also has been completely discredited. See Section A, supra.

Dr. Rodriguez also testified that his purpose as a hypnotist is to attempt "to create a split between the emotional content and the visualization" (Deposition of Pedro Rodriguez, M.D., p. 33). According to Dr. Rodriguez, this approach, in conjunction with the "T.V. screen" technique and "regressing" to the time of the event, produces a "memory . . . that is not impaired by any anxiety or any visualizations or anything" (Id. at 43). Thus, Dr. Rodriguez, who uses hypnosis in psychiatric therapy, which is concerned with the purgative recollection of emotions, believed that memory and emotions can be separated, a belief contrary to all recognized scientific thought. See Section A, supra.

Finally, Dr. Rodriquez also admitted that he focused Mrs. Perez-Vega on certain parts of the offense during the hypnosis -- those parts in which law enforcement were most interested. As Mrs. Perez-Vega was relating what she saw on the "T.V. screen," Dr. Rodriguez said to her, "We're going to freeze the screen at this point and I want you to concentrate exactly on what you see and describe it. Tell me what you're seeing." (Deposition of Pedro Rodriguez, M.D., p. 44). Dr. Rodriguez told Mrs. Perez-Vega to do this "when the face of the subject came into whatever view she had of the situation." (Id. at 45). At those points he told her to "[f]reeze the image and concentrate on the visualization" (Id.). Even Dr. Rodriguez recognized the effect such a procedure would have on Mrs. Perez-Vega: "The only times that I recall freezing the screen, of course, were the times that the images of the characters would come into view and the obvious connotation of that was that's the reason the patient was brought to me." (Id. at 48-49). As Dr. Rodriguez recognized, such a procedure has the effect of telling the hypnotized subject what was important

and thus of encouraging the subject to confabulate in order to provide the important information. Such procedures have been soundly condemned. See Section A, supra.

As is apparent, defense counsel could have thoroughly impeached Mrs. Perez-Vega's identification of Mr. Lopez and her testimony. Ample evidence was available that the hypnosis session was improperly conducted. As is discussed in Section B, supra, it is also unquestionable that Mrs. Perez-Vega's memory was altered by hypnosis and that her subsequent identification and testimony were unreliable. Defense counsel, however, filed no motion to suppress the identification on the basis of the hypnosis, did not inform Mr. Lopez of the significant attacks available to impeach Mrs. Perez-Vega's testimony, and failed even to mention the hypnosis when Mrs. Perez-Vega testified at the penalty phase. This is deficient performance and cannot be the result of any reasonable strategy or tactic

Counsel's deficiencies were also substantially prejudicial to Mr. López. Defense counsel Castro never informed Mr. Lopez of the unreliability and inadmissibility of Mrs. Perez-Vega's identification and testimony. This failure "affected the outcome of the plea process," for had Mr. López been so informed, "he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58-59 (1985).

Defense counsel Haymes failed to raise any issue regarding the hypnosis at the penalty phase, a failure which was also prejudicial. Mrs. Perez-Vega's testimony was essential to the state's case for death and went entirely unchallenged, Thus, the trial court extensively relied upon Mrs. Perez-Vega's account in the sentencing order, referring at one point to her "unrefuted testimony" (See R. 530-42). Mrs. Perez-Vega's thoroughly unreliable testimony was used to establish aggravating circumstances and to sentence Mr. López to death.

In Bundy, this Court held that hypnotically-induced testimony is per se inadmissible in Florida. In later developments in that case, the Eleventh Circuit Court of Appeals, while holding that neither the confrontation clause nor the due process clause require that hypnotically-induced testimony be per se inadmissible, outlined the factors to consider in determining whether a

confrontation or due process violation occurred. Bundy v. Dugger, 850 F.2d 1402 (11 th Cir. 1988). The Eleventh Circuit found that defense counsel's cross-examination of a witness whose memory had been refreshed by hypnosis provided sufficient information with which to assess the witness' credibility and that therefore the confrontation clause was not violated. Id. at 1415-16. Here, unlike Bundy, the court never learned that the key state witness had been the subject of hypnosis. Under the Eleventh Circuit's analysis, defense counsel's failure to challenge Mrs. Perez-Vega's hypnotically-induced testimony deprived Mr. López of his rights under the confrontation clause:

> We thus examine whether, on the facts of the present case, a Confrontation Clause violation occurred. "The sixth amendment confrontation clause is satisfied where sufficient information is elicited from the witness from which the jury can adequately gauge the witness[']credibility." United States v. Burke, 738 F.2d 1225, 1227 (11 th Cir. 1984). Such information was elicited here. In particular, Anderson [the hvonotized witness1 admitted that the hypnotic sessions he underwent, to some dearee, had an effect on the testimonv he was aivinq. Moreover, defense counsel explored . . . the discrepancies between Anderson's trial testimonv and his statements prior to hvonosis. The record does not demonstrate that the trial court impermissibly limited the cross- examination of Anderson. In addition, Bundv examined the two hvpnotists concerning their qualifications. Finally, the tape recordings of the two sessions were played to the iurv, each iuror received a transcript of those sessions, and Bundv presented an expert witness who addressed what he i characterizedh as the flaws in those sessions. e s e facts, Bundy certainly had the opportunity for effective cross-examination and no Confrontation Clause violation occurred.
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>
> We also cannot say that the hypnotically enhanced details of Anderson's trial testimony were the product of impermissible suggestions or techniques by the hypnotist. Indeed, the jury heard tapes of the two sessions, received transcripts of those sessions, and heard testimonv of an exuert witness who addressed what he characterized as the flaws in those sessions. Cross- examination was the avenue with which to attack Anderson's testimonv. We have held above that an opportunity for effective cross-examination was available here. That holding buttresses our conclusion that Anderson's testimony was not so unreliable as to violate Bundy's due process right to a fair trial.

Bundy, 850 F.2d at 1415-20 (footnotes omitted) (emphasis supplied).

Unlike the accused in Bundy, Mr. López had no opportunity to cross-examine Mrs. Perez-Vega and no opportunity to demonstrate the unreliability of her trial testimony. Defense counsel was wholly unprepared and did not even present the issue, As a result, Mr. López was denied an

opportunity to, inter alia, question Mrs. Perez-Vega regarding the effect of hypnosis on her identification and testimony, to point out the discrepancies between her testimony and her pre-hypnosis statements, to examine Dr. Rodriguez concerning his qualifications and methods, or to present expert testimony about the hypnosis session, precisely the factors noted by the federal appeals court as sufficient to cure the harm in Bundy. Counsel's inaction deprived Mr. López of his fundamental constitutional rights to confrontation and to due process. Id. Counsel did not even preserve the issue for appellate review. Prejudice is more than obvious.

D. CONCLUSION

Mr. López was entitled to effective assistance of counsel at both the guilt and penalty phases of his capital proceedings. Strickland v. Washington, 466 U.S. 668, 686 (1984). At both phases counsel has "a duty to bring such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. The key to effective assistance involves counsel's duty to fully and properly investigate and prepare. See, e.g., Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); O'Callaghan v. State, 461 So. 2d 1154 (Fla. 1984); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Middleton v. Duaaer, 849 F.2d 491 (11th Cir. 1988); Kimmelman v. Morrison, 106 S. Ct. 2574, 2588-89 (1986); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1984); Kinn v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 19841; Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978); Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985); Jones v. Thineen, 788 F.2d 1101, 1103 (5th Cir. 1986), rehearing denied with opinion, 795 F.2d 521 (5th Cir. 1986). Where, as here, counsel fails to investigate, develop, or present important guilt-innocence and penalty phase defenses and/or challenges to state evidence, and has no tactical or strategic reason for such omissions, counsel violates the duty to render effective assistance, and a petitioner is entitled to post-conviction relief.

Of course, a petitioner must also demonstrate prejudice, that the decision reached would reasonably likely have been different absent the errors of counsel. A reasonable likelihood is

demonstrated when the petitioner shows that counsel's errors undermine confidence in the results of the original proceedings. Strickland, 466 U.S. at 690; Michael, 530 So. 2d at 930. Based on the foregoing discussion and argument, Mr. López has established both deficient performance and prejudice.

Althought Mr. López's Rule 3.850 motion proffered extensive non-record facts in support of this claim, the trial court summarily denied relief (PC-R. 474). The trial court's order does not discuss the non-record facts proffered by Mr. Lopez, including the scientific evidence demonstrating the unreliability of hypnotically induced testimony, the scientific evidence establishing that the techniques employed in the hypnosis of Mrs. Perez-Vega were highly discredited, and the police reports showing that Mrs, Perez-Vega could not describe the assailants before the hypnosis session but "recalled" substantial details during hypnosis. Without examining these factual proffers, the trial court simply concluded that after hypnosis Mrs. Perez-Vega only "elaborated on a description of her assailant that she had already provided to the police" (PC-R. 474). This conclusion is contrary to Mr. Lopez's factual proffers, which are not conclusively refuted by the attachments to the trial court's order. As support for its conclusion that Mrs. Pérez-Vega only elaborated upon a previous description after hypnosis, the trial court attached depositions of two police officers in which the officers discuss Mrs. P&et-Vega's description of the assailants. It is clear from the officers' testimony, however, that before hypnosis Mrs. Perez-Vega only provided vague descriptions. The majority of the officers' testimony discusses Mrs. Pérez-Vega's post-hvpnosis description, These attachments thus support Mr. Lopez's claim and do not conclusively refute that claim.

Singificantly, the trial court's order does not discuss Mr. Lopez's claim that defense counsel were ineffective in failing to challenge Mrs. Perez-Vega's identification of Mr. López on the basis of the hypnosis. Mr. López's Rule 3.850 motion contended that substantial evidence existed upon which to base such a challenge and that defense counsel, without a tactic or strategy, unreasonably failed to raise the challenge. The Rule 3.850 motion also contended that if Mr. López

had been told about the unreliability of hypnotically-induced testimony, he would not have pled guilty and that the failure to raise such a challenge undermines confidence in the outcome of the penalty proceedings. Mr. López thus presented a facially sufficient ineffective assistance of counsel claim which is not conclusively refuted by the record. An evidentiary hearing is required.

ARGUMENT V

MR. LOPEZ WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS CAPITAL GUILT/INNOCENCE PROCEEDINGS, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. INTRODUCTION: EVALUATING MR. LOPEZ'S CLAIM

Defense counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 688 (1984) (citation omitted). Strickland requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See Workman v. Tate, 957 F.2d 1339 (6th Cir. 1992); Chambers v. Armontrouf, 907 F. 2d 825 (8th Cir. 1990)(en banc). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) ("[a]t the heart of effective representation is the independent duty to investigate and prepare"). In order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his or her client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

The Strickland test applies to cases in which the defendant pleads guilty:

> We hold, therefore, that the two-part Strickland v. Washinston test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the Strickland v. Washinaton test is nothing more than a restatement of the standard of attorney competence already set forth [above]. The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of

> the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). The circumstances of the instant case satisfy this test.

Each of trial counsel's errors is sufficient, standing alone, to warrant relief. Each undermines confidence in the fundamental fairness of the guilt-innocence determination. The allegations were and are more than sufficient to warrant an evidentiary hearing, see O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1987); see also Code v. Montgomery, 725 F.2d 1316 (11 th Cir. 1983), and the trial court erred in summarily denying Mr. López's request for an evidentiary hearing. See Argument II, supra.

B. DEFENSE COUNSEL'S UNREASONABLE ERRORS AND OMISSIONS

After his arrest on May 23, 1983, Mr. Lopez was initially represented by Brian McDonald, Assistant Public Defender. On October 28, 1983, the Public Defender filed a Certification of Conflict of Interest, and the court discharged the Public Defender from representing Mr. López (See R. 27).

Subsequently, on November 16, 1983, the court appointed William Castro, Esq., to represent Mr. Lopez. Mr. Castro represented Mr. Lopez through his guilty plea proceedings on June 13, 1984. Mr. Castro unreasonably failed to conduct necessary investigation and preparation, failed to have any mental health evaluation of Mr. Lopez done prior to the plea proceedings, failed to provide Mr. López with accurate information regarding the effects of the guilty plea, and rushed Mr. López into entering a plea which he did not understand. But for counsel's unreasonable omissions, Mr. López would not have pled guilty and would have insisted on going to trial.

1. Defense Counsel Failed to Investigate Mental Health Issues

Although representing a client facing a capital charge and potential death sentence, defense counsel conducted no investigation into Mr. Lopez's background and had no mental health evaluation of Mr. Lopez performed prior to permitting him to enter into the plea. Had counsel conducted even a minimal background investigation, he would have bean alerted to the necessity for a mental health evaluation. Had counsel had a thorough and professional mental health evaluation performed, he would have discovered that Mr. Lopez was not competent and lacked the ability to voluntarily, knowingly, and intelligently enter a guilty plea or waive any rights.'

Mr. Lopez's history clearly pointed to the need for a thorough mental health evaluation. Such an evaluation, including extensive neuropsychological, intellectual, and personality testing, has since been performed, and establishes that Mr. López was incompetent' and was unable to voluntarily, knowingly, or intelligently enter a guilty plea or waive any rights. Mr. López's intellectual functioning is in the borderline range, with a full scale I.Q. of 79. The results of his neuropsychological testing reveal brain damage. Further, Mr. Lopez suffers from a narcissistic personality disorder and a borderline personality disorder, and exhibits schizoid and paranoid features in his thinking. The narcissistic personality disorder tends to mask his borderline functioning, such that Mr. López presents himself as functioning better than borderline. His borderline functioning and personality disorders interfere with his decision-making and he is unable to analyze situations or options rationally. Because of his disorders, he was not competent and was unable to understand what rights he was giving up in entering a plea, the conditions of the plea agreement, or the ramifications of not complying with the plea.

"The background history which counsel would have developed with minimal investigation is outlined in Argument VI, infra. In sum, that history shows that Mr. Lopez grew up in Cuba in abject poverty, suffered violent episodes of seizure-like symptoms as a young child, experienced extreme mood wings ranging from hyperactivity to total withdrawal and depression, lost his ability to speak for a time after his brother's suicide and his father's death, suffered at least two serious head injuries, and had relatives who suffered from mental illness.

[9]See Arguments XVI, XVII and XVIII.

All of these conclusions demonstrate that Mr. López does not function voluntarily, knowingly, or intelligently. The confusion that Mr. López exhibited at the time of the plea hearing, see infra, was genuine and a result of his mental disabilities. Mr. López's plea was therefore not entered voluntarily because his compliance was the product of his mental disabilities. Nor was the plea entered knowingly, as Mr. López does not make decisions rationally. Nor was it entered intelligently, because Mr. López did not understand what he was doing, and he was unable to explain his confusion.

Had defense counsel effectively discharged his duties, this information would have been discovered. Counsel's failures were unreasonable and were not based upon any tactic or strategy. Mr. López was substantially prejudiced, for had counsel fulfilled his responsibilities to investigate and prepare, there would have been no guilty plea.

2. Defense Counsel Allowed Mr. López to Plead Guilty Despite Clear Indications That Mr. López Was Not Voluntarily, Knowingly, and Intelligently Entering the Plea

Prior to and during the plea proceedings conducted on June 13, 1984, Mr. López clearly exhibited confusion regarding the plea and its consequences. Despite these clear indications that Mr. López did not understand the proceedings, defense counsel allowed the plea to go forward. Counsel's omissions in this regard were deficient performance and resulted in Mr. López entering an involuntary plea. On the day of the plea hearing, prior to the plea colloquy, the following exchange occurred:

> THE COURT: Eduardo López.
>
> CORRECTIONAL OFFICER: Do you want him up front, Judge?
>
> THE COURT: Yes.
>
> MR. RABIN: Sam Rabin and William Berk, Assistant State Attorney, on behalf of the State. Also present in court are the two lead detectives on behalf of the State; Detective Jose Díaz and Detective Tom Mylinige; one of the victims and her family are also present in the courtroom.
>
> MR. CASTRO: William Castro on behalf of the defendant. The defendant is present.

MR. RABIN: Judge, I am advised by Mr. Castro that he wants to pass this for a moment.

THE COURT: What is the problem, Mr. Castro?

MR. CASTRO: I just want to finish some final discussions with the defendant. I apologize to the Court on behalf of my client.

THE COURT: All right. I will pass it for a couple of minutes; but I set this at your request.

MR. CASTRO: I understood that, Judge.

(R. 761-62) (emphasis added).

Later, after conducting other matters, the court again inquired about the situation with Mr. López, who was apparently conferring with defense counsel in the courtroom:

THE COURT: What is going on over there, gentlemen?

MR. CASTRO: Just havina some problem at this time.

THE COURT: Are you all going to be able to take care of this today?

MR. CASTRO: I don't think so.

THE COURT: I suggest that you get a hold of Mr. Rabin and let me know at once.

MR. CASTRO: Yes, Judge.

(R. 763) (emphasis added).

The matter then came up again:

THE COURT: Where did Mr. López and Mr. Castro go?

MR. RABIN: They are on the Bridge, I guess.

CORRECTIONAL OFFICER: I took them over there and put them over there where they could talk.

THE COURT: What do you want me to do?

MR. RABIN: Wait for some word from them.

THE COURT: I am going to tell you what I am going to do. I am going to take about a ten minute break, and I suggest, Mr. Rabin, you find out the status, and we will come back and take care of Mr. Gray, and we will find out the status of Mr. López.

(R. 764). These exchanges certainly indicate that the plea had not yet been fully explained to Mr. López and that he was having difficulties regarding the plea.

That Mr. López was confused about the plea, and that defense counsel was ineffective in allowing the plea to go forward, is made even more evident by the testimony at the hearing on the state's motion to enforce the plea agreement. This testimony establishes that Mr. Ldpez was indeed confused, that attempts to urge him to go forward with the plea only increased his confusion, and that defense counsel ultimately pushed the plea through because he was worried about being "embarrassed" (R. 800) in front of the judge and because he was "disgusted" with Mr. López (R. 801).

At the hearing on the motion to enforce the plea agreement, defense counsel testified that on the day of the plea hearing, Mr. López had given him a written list of questions regarding the plea agreement (R. 793). For example, Mr. Ldpez asked defense counsel "[i]f the sentences will run concurrent" (R. 795), "[h]ow many years is a life" (R. 795), and "[i]f he was eligible for parole" (R. 797). Mr. López also asked:

> If I am sentenced under the new law, approximately what is the maximum time that I will spend in prison taken into account that I am going to observe my good conduct, I am going to work, study and assist or participate in a rehabilitation program?

(R. 799). All of these questions obviously involved the length of time Mr. López would spend in prison. Mr. Ldpez testified that he understood he would only serve seven years and that he did not understand the phrase "minimum mandatory" (R. 703-04). Despite Mr. López's many questions at the time of the plea hearing regarding this very subject, defense counsel assumed that Mr. López was "pulling my leg" (R. 797), and that his questions were "repetitive" (R. 799). In response to all of these questions, defense counsel referred to the "25-year minimum mandatory" (R. 799), although Mr. Ldpez obviously did not understand that concept. Defense counsel thought that Mr. López "was really being evasive" (R. 800), regarding "his alleged lack of understanding" (R. 801).

After going over these questions somewhat in the courtroom, defense counsel allowed Detective Díaz, the police officer who had arrested and interrogated Mr. López, to speak to Mr.

Ldpez about the terms of the plea agreement (R. 800). Defense counsel testified that he "really was not listening" (R. 801) to the conversation between Detective Díaz and Mr. López: "I think that I started to walk around the courtroom because at that point I was a bit disgusted." (Id.). Defense counsel was also concerned with what the judge would think about him: "I also recall being somewhat embarrassed about being before the Court and the Court would have no other idea other than to think that I haven't properly prepared Mr. Ldpez for the colloquy, and I felt embarrassed." (R. 8001.

The discussion then was continued in the holding cell (R. 801). Rather than a calm, private meeting between attorney and client, the discussion in the holding cell turned into a virtual Babel. Present in addition to Mr. López were defense counsel, Detectives Díaz and Riley, and Assistant State Attorney Rabin, each "taking turns talking to him and explaining to him from their perspective, either why he should or should not enter the plea or why he should or what he was getting involved in" (R. 600). Mr. López "was having reservations about what he was getting involved in" (id.), and "everybody was explaining to him what was going on." (Id.).

Throughout all this, defense counsel simply ignored the very real confusion Mr. Ldpez was demonstrating:

> Q What was it that expressly Mr. Ldpez did or said that made you feel that there would not be a plea entered on that day?
>
> A The questions regarding the sentences running concurrent, and the minimum mandatory running concurrent. He seemed to understand, and then not understand.
>
> When I say not understand, I thought he understood all along; and when it came down to entering the plea, he iust didn't want to go throuah with it; but I believe that he understood.

(R. 815) (emphasis added).

After bringing Mr. López into the courtroom for the plea colloquy, defense counsel did not even inform the court regarding Mr. López's confusion:

> Q [by Mr. Haimesl Okay. One last thing.

Did you ever advise the Court on that day, and you didn't that I am aware of, did you ever advise the Court of this letter or of the confusion that was going on, at least outwardly with your client, and did you ever caution the Court regarding his misunderstandings?

MR. BERK: What letter?

MR. HAIMES: The letter marked as State's Exhibit Two.

THE COURT: The questions.

A [by Mr. Castro1 I tried to relate to the Court based on what segments that he appeared to be quoting me that there were some problems. I didn't specifically relay to the Court what they were. However, other parties involved, including the State Attorney and the detectives, were aware of the problems and --

BY MR. HAIMES:

Q They were a least as conversant with the defendant and his problems as you were?

A Absolutely.

(R. 817-18) (emphasis added). Defense counsel's testimony clearly reveals that he did not bring Mr. López's confusion to the court's attention, assuming that the detectives' and prosecutor's knowledge of the problem was somehow sufficient to protect his client's rights.

Defense counsel's actions in allowing the plea to go forward were unreasonable. Counsel had a duty to ensure that Mr. Lopez's plea was entered voluntarily, knowingly, and intelligently, and he failed to fulfill that duty, No tactic or strategy can account for such an omission. Had counsel performed reasonably and effectively, Mr. Lopez would not have entered the plea.

3. Other Failures

Before entering plea negotiations, defense counsel also failed to raise significant challenges to key evidence against Mr. Lopez -- his statement to Detective Díaz on the day of his arrest and Mrs. Perez-Vega's identification of him. Counsel filed only boilerplate motions to suppress these pieces of evidence, and set no hearings on the motions. Additionally, counsel failed to investigate the existence of secret deals between the prosecution and Jose Hung, the jailhouse informant who provided key and damaging testimony against Mr. Lopez. Had counsel effectively discharged his

duties, he would have discovered these secret deals. Most importantly, had counsel informed Mr. López of this situation, Mr. Ldpez would not have entered a guilty plea and would have insisted on going to trial. When Mr. Hung failed to answer questions at his deposition, counsel did nothing to compel the witness to provide a statement and did not inform Mr. Ldpez that Hung's refusal to answer questions substantially impeached Hung's prior statements to police. This is clearly unreasonable attorney performance, and the fact that Mr. López entered the guilty plea and received a death sentence is the resulting prejudice.

Significant attacks on these pieces of evidence were readily available. As discussed in Argument IV, the identification was the product of hypnosis and was thoroughly unreliable. As discussed in Section 1, supra, and in Arguments VI, VII, and XVII, significant mental health evidence was available to challenge the admissibility of Mr. López's statement. Counsel failed, through no tactic or strategy, to raise these significant issues before the court. Had counsel done so and informed Mr. López of these issues, no guilty plea would have been entered.

C. CONCLUSION

The lower court summarily denied this claim (PC-R. 474) ruling that the claim was procedurally barred and failed to recognize or consider the non-record factual allegations presented in the claim. However, the specific attorney errors and omissions and the resulting prejudice discussed herein were and are sufficient to require an evidentiary hearing. The files and records of this case do not conclusively demonstrate that Mr. López is entitled to no relief. See Lemon v. State, 498 So.2d 923 (1986). The errors and omissions discussed above prejudiced Mr. Ldpez, relief is warranted. See Strickland v. Washington. But for counsel's errors, Mr. López would not have pleaded guilty, and would have insisted on going to trial. Hill v. Lockhart., 474 U.S. 52, 58-59 (1985).

ARGUMENT VI

MR. LOPEZ WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL PROCEEDINGS, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. INTRODUCTION: EVALUATING MR. LOPEZ'S CLAIM

Beyond guilt-innocence, defense counsel must also discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. In a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). The Supreme Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (19761; Woodson v. North Carolina, 428 U.S. 280 (1976).

Trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. Bates v. Dugger, ___ So. 2d ___, No. 74, 972 (Fla. July 23, 1992); Mitchell v. State, 595 So. 2d (Fla. 1992); State v. Lara, 581 So. 2d 1288 (Fla. 1991); Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929, 930 (Fla. 1988); O'Callaghan v. State, 461 So. 2d 1154, 1155-56 (Fla. 19841; Blanco v. Sinaletarv, 943 F.2d 1477 (11 th Cir. 1991); Horton v. Zant, 941 F.2d 1449 (11 th Cir. 1991); Cunninaham v. Zant, 928 F.2d 1006, 1016 (11 th Cir. 1991); Eutzv v. Dugger, 746 F.Supp. 1492 (N.D. Fla. 1989), aff'd, No. 89-4014 (1 1 th Cir. 1990); Harris v. Duaaer, 874 F.2d 756 (1 1 th Cir. 1989); Middleton v. Dugger, 849 F.2d 491, 493-94 (1 lth Cir. 1988); Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989) (at a capital Penalty phase, "[d]efense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the jury on any mitigating factors"); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991) (an attorney is charged with knowing the law and what constitutes mitigation); Kenlev v. Armontrout, 937 F.2d 1298, 1304

(8th Cir. 1991) ("[c]ounsel's performance may be found ineffective if s/he performs little or no investigation);

Mr. López's court-appointed counsel failed in his duty. The wealth of significant evidence which was available and which should have been presented never got to the court. Counsel operated through neglect. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991); Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). Mr. Lopez's sentence of death is the resulting prejudice. It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trial would have been different if mitigating evidence had been presented to the sentencer. Strickland v. Washinnton, 466 U.S. at 694. The key aspect of the penalty phase is that the sentence be individualized, focusing on the particularized characteristics of the individual. Gregg v. Georgia, 428 U.S. 153 (1976). Here the sentencer was given no information to aid him in making such an individualized determination.

B. **DEFENSE COUNSEL'S FAILURE TO INVESTIGATE AND DEVELOP SUBSTANTIAL MITIGATING EVIDENCE.**

Evidence of Mr. Lopez's character and background, his early life in Cuba marked by parental loss and economic hardship, his desire to better himself in a free society, serious mental health disabilities and their effects on his behavior throughout his life and at the time of the offense, and his limited intellectual capacity were largely ignored by trial counsel at the penalty phase of Mr. Lopez's capital proceedings. Mr. López was sentenced to death by a judge who knew very little about him. As the evidence discussed below demonstrates, counsel simply failed his client, and his client was sentenced to death as a direct result of counsel's failures. Because of counsel's deficiencies, confidence is undermined in the outcome of these sentencing proceedings -- under such circumstances, relief is appropriate. See Michael, 530 So. 2d at 930; Strickland v. Washington.

Had defense counsel conducted even a minimal investigation of Mr. Loper's life history and simply contacted Mr. Lopez's family, he would have discovered substantial evidence in mitigation. Additionally, this evidence regarding Mr. Lopez's history would have provided information necessary to a thorough and professional mental evaluation of Mr. Lopez. Counsel failed in his duty, to Mr. Lopez's substantial prejudice.

Investigation into Mr. Lopez's life in Cuba would have revealed a compelling history. Family members relate that Eduardo López was born in the small, economically depressed town of Manzanillo, located in a remote rural area on Cuba's eastern coast. He was the seventh child of ten born to María Corrales Domínguez and Enrique López Chavez. His family life and the political upheaval in pre- and post-Castro Cuba, with its attendant social chaos, conspired to diminish Eduardo's chances for a normal, healthy environment in which to develop.

Eduardo was born at home, just like all his brothers and sisters. He was a religious child, who made his first communion. His family was a large extended family. Today, Eduardo's mother has fourteen great-grandchildren. Eduardo has four children. Eduardo's brothers and sisters, Enrique (until his suicide in 1959), Rafael, María Magdalena, Emma, Jose Manuel, Isabel, Olga, Osvaldo and Beatriz, have lived in Cuba all of their lives.

For most of their lives, the family members lived in a small adobe house, on a plot given to them by Eduardo's grandmother. The house was crudely built on a cluttered hill, overlooking the central part of the small town. Eduardo's father built the house, even though he had no experience as a construction worker. Outside and inside walls were bare of paint, and because the family was so poor, they could not afford much furniture. All twelve family members lived in three small rooms. Eduardo's father had a small shoemaking store in the back of the house, where he and his wife worked.

Eduardo's childhood was marked by poverty. The poverty the family experienced was typical of the immense poverty that overwhelmed the entire town. The family diet was inadequate

and barely enough to keep them fed. Their income was just enough to keep them clothed. Eduardo's father was a strict disciplinarian who did not hesitate to hit the children with a belt. In spite of such conditions and the backdrop of an impending revolution, Eduardo was a well-behaved and diligent student. He applied himself to his studies with great enthusiasm, although his limited intellectual capacity inhibited his achievement. Even though he was shy, he was well-liked because he was always ready to help his friends. He was especially liked by the parents of his school friends.

While Eduardo was in school in 1958, heavy fighting broke out in the Manzanillo area. Batista and Castro forces engaged in a long and bloody conflict that brought horror to Eduardo's life. A climate of terror permeated Eduardo's life. The following year, another tragedy struck the Lopez family. Enrique, Sr., was stricken by a painful ailment subsequently diagnosed as cancer. In March of the same year, Enrique, Jr., committed suicide by stabbing himself repeatedly in front of young Eduardo and other members of the family. Twenty days later, in April, Enrique, Sr., died.

As a young child, Eduardo had suffered violent episodes of seizure-like fits and tantrums. His hands and face would turn purple in color. His moods would swing from extreme hyperactivity to total withdrawal and depression. A doctor treated him and prescribed medication for the seizures and his mental problems. He had to see the doctor as often as three times a week, for long periods of time. Eduardo was a very sensitive child, given to long spells of crying. At other times, he would laugh inappropriately until he choked. As a young man, Eduardo continued to have long spells of crying and depression."

Predictably, the deaths of his father and brother had a profound effect on Eduardo's personality and behavior. He became even more withdrawn and depressed and began having stomach ulcers. For a time, he even lost his ability to speak. His nervous condition was

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[10]Eduardo has an aunt and an uncle, on his mother's side of the family, who also had mental problems. The aunt was also given to long periods of depression and crying. She spent several months under treatment in Holguin, a city several hundred kilometers from Manzanillo. She had to go back to Holguin for more treatment several times.

exacerbated by these events. A short time after his father and brother died, Eduardo was hit by a bus or a car while he was riding his bicycle. He was seriously injured and hospitalized because of the accident.

Eduardo continued to attend school and was promoted every year. In 1960, when he was fourteen years old, he volunteered to go to the mountains in Cuba, the Sierra Maestra, as part of a literacy campaign started by the new government to teach reading and writing to Jamaican immigrants who moved to Cuba after the Revolution. He was involved in the campaign for several years. Upon returning to Manzanillo, he was given a scholarship to attend school in Havana. He studied in the Cuidad Libertad school in Havana for several years before returning home.

In 1963, as a result of the nationalization of all private business and industry, the family was forced to close up the shoemaking shop. Maria, Eduardo's mother, was forced to work at a factory in Cienfuegos, sewing men's clothing. Isabel cared for Eduardo and the other young brothers and sisters, while María and the oldest children went out to work.

As Eduardo grew older, he became more dissatisfied with the political climate. While all the brothers and sisters became integrated into the new social, political and economical order, Eduardo did not, As an adolescent, he began smoking marijuana and abusing alcohol. Eduardo worked at many jobs, in spite of his rejection of the new government, which became his employer. After the closing of the shoemaking shop, Eduardo worked as a cashier, a bus dispatcher and an entertainer. Eduardo sang on the radio by himself, in a quartet and in a trio. He also sang in nightclubs, at weddings, private parties and on the yearly local town holiday. One of Eduardo's favorite jobs was when he moonlighted as a singer of serenades. The López family was very proud of the way Eduardo could easily pick up a tune and perform with little or no rehearsal. They have fond memories of a particular time when the scheduled singer had to bow out of his performance and Eduardo was asked, right before show time, to stand in. Without any rehearsal, Eduardo took the stage and rendered a wonderful performance.

Eduardo always had ideas that did not follow government dogma. He wanted to have his own business and improve his lot in life. He liked to dress up and spoke of having nice things for himself and his family. Considering his dissatisfaction with the government in Cuba, the rumors about how great life was in America fell on fertile ground. Eduardo longed for a chance to come to the United States. When Eduardo heard about the Mariel boatlift in 1980, he went to Havana to request permission to leave Cuba. When his mother found out what he was doing, she followed him to Havana to try to stop him from leaving. She arrived too late, as Eduardo's departure had been authorized and he was on his way to Miami.

On May 14, 1980, Eduardo arrived at Key West. He was interviewed by officers from the Immigration and Naturalization Service and the Federal Bureau of Investigation. He was screened by these officers and after they determined that Eduardo had not come from prison or a mental institution, he was released that very same day to a cousin in Miami who was Eduardo's sponsor.

Eduardo, now free to pursue his dreams in Miami, saved enough money to buy a small coffee shop in Little Havana and for a while he struggled to keep his shop open. Unfortunately, he became dazzled by some unsavory characters who claimed to know the way to the money Eduardo needed to keep the coffee shop. Eduardo began drinking and smoking marijuana once again. He was easily influenced by his friends and was always trying to please everyone. Soon he was arrested for possession of marijuana and later charged and convicted of the incident that eventually lad to his death sentence.

All of this evidence is classically mitigating. None of it was presented to Mr. López's sentencing judge. However, defense counsel's unreasonable omissions did not end with the failure to investigate and present the evidence related above -- more compelling mitigating evidence never made its way to the judge because of defense counsel's omissions. For example, defense counsel never argued that the court should consider the fact that the codefendants would never be prosecuted for their roles in the offense. Moreover, had defense counsel conducted a reasonable

investigation and effectively employed expert mental health assistance, he would have developed substantial mental health mitigating evidence.

Dr. Dorita Marina, a clinical psychologist with extensive experience evaluating Mariel refugees, reviewed background materials regarding Mr. Lopez and conducted a thorough psychological evaluation. Dr. Marina concluded that Mr. López is of borderline intellectual functioning, shows indicia of organic brain damage, experiences severe bouts of depression, exhibits schizoid and paranoid features in his thinking, and suffers from borderline and narcissistic personality disorders. As a result of his disabilities, Dr. Marina's opinion is that Mr. Lopez suffered from an extreme mental or emotional disturbance at the time of the offense" and that Mr. López's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.[12] Dr. Mari's review of Mr. López's social history, outlined above, also establishes numerous nonstatutory mitigating factors.

Presentation of the information outlined above would have made a difference in the outcome of the penalty proceedings. Counsel presented none of this compelling mitigating evidence. Had counsel conducted the requisite investigation and provided the necessary background materials to a mental health expert, a wealth of statutory and nonstatutory mitigation would have been developed.

C. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE REGARDING THE WAIVER OF A PENALTY PHASE JURY.

Florida's capital sentencing statute provides every capital defendant the right to have a jury at the penalty phase. Fla. Stat. § 921.141(1). The nature of Florida's capital sentencing process ascribes a role to the sentencing jury that is central and "fundamental", Riley v. Wainwrinht, 517 So. 2d 656, 657-58 (Fla. 1988). A Florida sentencing jury's recommendation of life is entitled to "great weight," and can only be overturned by a sentencing judge if "the facts suggesting a

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[11] See Fla. Stat. § 921.141(6)(b).

[12] See Fla. Stat. 4 921.141(6)(f)).

sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). This standard has been recognized by the United States Supreme Court as a "significant safeguard" provided to a Florida capital defendant. Spaziano v. Florida, 468 U.S. 447, 465 (1984).

Defense counsel did not inform Mr. López about the "significant safeguard" provided by a Florida capital sentencing jury. Had he done so, Mr. López would not have waived the jury. Indeed, as discussed below, throughout the proceedings in this case, including the hearing on the jury waiver, Mr. López repeatedly stated that he wanted a jury to hear the facts, and at the waiver hearing, he also stated that he wanted the judge to sentence him. This is precisely the procedure provided for under the capital sentencing statute: the jury hears the facts and returns a verdict; then the judge imposes sentence. This is what Mr. López wanted, but defense counsel's inadequate explanations and advice deprived Mr. López of his right to a jury. Had the jury's sentencing role been properly explained, Mr. López would not have waived the jury.

Additionally, defense counsel allowed Mr. López to enter a waiver which was not voluntary, knowing, or intelligent. 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, Moreover, Mr. López suffers from substantial mental health disabilities which rendered him incapable of entering a voluntary, knowing, and intelligent waiver. Had counsel properly investigated Mr. López's history and effectively employed the assistance of mental health experts, counsel would have known about Mr. López's disabilities. See Arguments VII, XVII, and XVIII. Furthermore, Mr. López was unfamiliar with the American jury trial system, having recently emigrated from Cuba where juries are not involved in legal proceedings. See Argument XVII.

The transcript of the waiver hearing itself demonstrates that Mr. López did not know what he was waiving and that the waiver should never have been allowed to proceed. At the beginning

of the hearing, Mr. López was not even present, see Argument XIII, and once Mr. Lopez was present, it is not clear that a qualified interpreter was present. See Argument XII.

Once the colloquy between the judge and Mr. López began, it is clear that Mr. Lopez did not understand what he was doing and that he never unequivocally waived his right to a jury:

> [THE COURT:] Let me find out from Mr. Lopez, 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. Lopez, 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 ambinuity.
>
> 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. Lopez 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. Lopez: 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.
If it is for sentencing, I want you to be the one.

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

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 riaht to have a iurv 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. 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.

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. Lopez, 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 aive you the priority.

If the iurv is going to listen to all that is alleged and all the proof in the case. then let the iurv sentence me. If there is a priority that the iurv is going to listen and thev are aoina to be able to analyze and thev are going to be able to know mv innocence, inside that, I give all the facts.

If thev are not aoina to hear it out, if thev 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 imoression that the facts are going to come out at this hearing that he does not want a iurv 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 ambinuitv in his responses and his attitude towards sentencing, that vou iust 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. 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 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. Lopez's lack of understanding and that, in fact, what he truly wanted was to have a jury for the penalty phase. Rather than assure that Mr. López understood the proceedings and was making a voluntary waiver, defense counsel interrupted continually, giving the judge his interpretation of what Mr. Lopez was saying. Given Mr. Lopez's obvious confusion, in addition to his mental health disabilities, defense counsel's actions were unreasonable, based upon no tactic or strategy, and substantially prejudiced Mr. Lopez. But for counsel's deficient performance, there would have been no waiver. A reasonable probability exists that had a jury heard all the mitigation available in this case which a reasonable defense counsel would have prepared and presented, that jury would have reached a verdict of life.

D. CONCLUSION

As explained above, additional mitigating evidence could have and should have been presented at Mr. Lopez's penalty phase. This evidence would have established recognized mitigating factors.[13] The prejudice to Mr. Lopez resulting from counsel's deficient performance is also clear. Confidence is undermined in the outcome. Mr. López's sentence of death should not be permitted to stand under the sixth, eighth, and fourteenth amendments.

ARGUMENT VII

MR. LOPEZ'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WERE VIOLATED BECAUSE DEFENSE COUNSEL FAILED TO ASSURE THAT THE APPOINTED MENTAL HEALTH EXPERTS CONDUCTED PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATIONS, FAILED TO PROVIDE THE EXPERTS WITH THE INFORMATION NECESSARY TO PERFORMING APPROPRIATE EVALUATIONS, AND FAILED TO ASK FOR RELEVANT OPINIONS FROM THE EXPERTS, RESULTING IN CAPITAL PROCEEDINGS AT WHICH MR. LOPEZ WAS INCOMPETENT AND IN THE LACK OF A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION.

A criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to guilt/innocence or sentencing. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11 th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's

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[13] Significant substance abuse is a mitigating factor. See Savage v. State, 16 F.L.W. 647 (Fla. 1991); Cooper v. State, 581 So. 2d 49 (Fla. 1991); Downs v. State, 574 So.2d 1095 (Fla. 1991); Carter v. State, 560 So. 2d 1166 (Fla. 1990); Pentecost v. State, 545 So.2d 861 (Fla. 1989); Masterson v. State, 516 So. 2d 256 (Fla. 1987); Hansbrounh v. State, 509 So. 2d 1081 (Fla. 1987).

Evidence that a defendant is a caring family person is also mitigation. See Bedford v. State, 16 F.L.W. 665 (Fla. 1991); Dolinski v. State, 576 So. 2d 271 (Fla. 1991); Harmon v. State, 527 So. 2d (Fla. 1988); Perry v. State, 522 So. 2d 817 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987); Rogers v. State, 511 So. 2d 526 (Fla. 1987); Kokal v. State, 456 So. 2d 444 (Fla. 1984).

Evidence of a disadvantaged childhood has also been deemed mitigating evidence. See Heawood v. State, 575 So. 2d 170 (Fla. 1991); Carter v. State, 560 So. 2d 1166 (Fla. 1990); Brown v. State, 526 So. 2d 903 (Fla. 19881; DuBoise v. State, 520 So. 2d 260 (Fla. 1988).

mental health background, see, e.g., O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel; Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11 th Cir. 1984). See also Cowley v. Stricklin, 929 F.2d 640 (1 lth Cir. 1991); Kenly v. Armontrout, 937 F.2d 1298 (8th Cir. 1991).

The experts appointed in this case failed to provide the professionally adequate expert mental health assistance to which Mr. Lopez was entitled. The evaluations were, in fact, grossly inadequate. No adequate testing was performed. No background information was investigated or reviewed. A cursory interview and pro forma presentation of opinions based solely on what little was gleaned from such an interview is all the mental health "assistance" that Mr. López received. This is by no means enough, Mason v. State, 489 So. 2d at 735-37, and falls far short of what the law and the profession mandate.

The fourteenth amendment mandates that an indigent criminal defendant be provided with an expert who is professionally fit to undertake his or her task, and who undertakes that task in a professional manner. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). Accordingly, an appointed psychiatrist must render "that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances." Fla. Stat. § 768.45(1) (1983). See also Olschefskv v. Fischer, 123 So. 2d 751 (Fla. 3d DCA 1960). The experts who evaluated Mr. López did not exercise, nor even approximate, the requisite professional level of care, skill or treatment.

Florida law also provides, and thus provided Mr. Lopez, a state law right to professionally adequate mental health assistance. See, e.g., Mason: cf. Fla. R. Crim. P. 3.210, 3.211, 3.216; State v. Hamilton, 448 So. 2d 1007 (Fla. 1984). Once established, the state law interest is protected against arbitrary deprivation by the federal due process clause. Cf. Hicks v. Oklahoma, 447 U.S. 343, 347 (1980); Vitek v. Jones, 445 U.S. 480, 488 (1980); Hewitt v. Helms, 459 U.S.

460, 466-67 (1983); Meachum v. Fano, 427 U.S. 215, 223-27 (1976). In this case, both the state law interest and the federal right were arbitrarily denied.

Florida law made Eduardo Lopez's mental condition relevant to criminal responsibility and sentencing in many significant ways: (a) competency at plea and sentencing; (b) statutory mental health related aggravating factors and mitigating factors contained in Fla. Stat. §§ 921.141(6)(b), (e), and (f); and, (c) myriad nonstatutory mitigating circumstances relevant at sentencing. Mr. Lopez was entitled to professionally competent mental health assistance on these issues. However, he never received the assistance to which he was entitled under professionally recognized standards of care. Where, as here, a complete evaluation is never conducted, it cannot be used to form an opinion as to competency to stand trial or statutory and nonstatutory mitigation.

Generally-agreed upon principles require that the proper method of assessment include an accurate medical and social history. Because "[i]t is often only from the details in the history" that organic disease or major mental illness may be accurately differentiated from personality disorder, R. Strub and F. Black, Organic Brain Syndromes, 42 (1981), the history has often been called "the single most valuable element to help the clinician reach an accurate diagnosis." Kaplan and Sadock at 837. The experts who evaluated Mr. Lopez failed to seek out and discover critical information about his background. For example, Mr. López suffered extreme poverty, physical and emotional abuse by his parents; he witnessed his brother's suicide and his father's death of cancer. He suffered seizures, depression and ulcers. The experts knew none of this. Defense counsel did not even contact the experts appointed to evaluate competency, much less provide them with the background information necessary to a thorough evaluation.

Historical data must be obtained not only from the patient, but from sources independent of the patient. It is well recognized that the patient is often an unreliable data source for his own medical and social history. Kaplan and Sadock, Comprehensive Textbook of Psychiatry (4th ed. 1985) at 488; Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal

Process: The Case for Informed Speculation, 66 Va. L. Rev. 427 (1980). In fact, a thorough review of background information and collateral data is most critical in forensic cases, especially in cases involving mentally ill clients. As is obvious, the client's mental illness will invariably preclude any ability to accurately relay facts. Mason v. State, 489 So. 2d at 737. Defense counsel did not provide, and the experts did not seek out or use, critical and available background information. They failed to undertake the procedures necessary to an adequate evaluation.

Information regarding the patient's past and present physical condition should be reviewed. See, e.g., Kaplan and Sadock at 544, 837-38 and 964. Any past or present somatic complaints should be considered as should any evidence of odd or unusual behavior. In this regard, it is especially important that the mental health professional consider the patient's history of head injury as well as alcohol and/or drug abuse. Here, such factors as seizures and child abuse were ignored. Had adequate information been obtained, Mr. López's history of physical and mental disorders would have been revealed. Again, the experts failed to obtain or assess this information.

Appropriate diagnostic studies must be undertaken in light of the history and physical examination. The psychiatric profession recognizes that psychological testing is indispensable to an adequate evaluation. Previous testing and the results thereof must be reviewed. Proper testing of the patient's mental state at the time of the evaluation as well as at all periods of time relevant to the evaluation should be conducted. Thereafter, the results of proper testing must be considered and reviewed alongside information concerning the patient's mental health background and history, In short, psychological testing is critical to an adequate evaluation. See Kaplan and Sadock, pp. 547-48. Adequate testing was not conducted in this case. The experts evaluating competency conducted no testing.

With regard to each of these established standards, the experts failed to meet the professionally recognized standard of care. Mr. López has now had a professionally adequate evaluation. Dr. Dorita Marina, having been provided the relevant and necessary background information which is required for an adequate evaluation, has found that Mr. Lopez suffers from

mental disabilities which rendered him incompetent at the time of trial and which establish significant mitigating evidence. See Arguments VI and XVII.

The professional inadequacies in Mr. López's trial level evaluation are clear. Indeed, Dr. Marina simply received an order from the court, conducted a one hour evaluation, submitted a report, and never even knew who Mr. López's defense attorney was. A review of available information, had counsel provided it, would have demonstrated that Mr. López, as a result of his mental illness, was not competent to stand trial and that a plethora of mitigating circumstances were more than readily available.

Dr. Marina's evaluation, which included a review of background information and the conducting of adequate testing, has revealed that Mr. López suffers and suffered from extreme emotional disturbances including borderline personality disorder, dysthymia, narcissistic personality disorder and borderline intelligence. It is clear that Mr. López was not competent to stand trial, that he could not have related to his attorney or aided in his defense. He lacked the requisite mental state to undergo a criminal prosecution. He lacked the requisite mental state to waive constitutional rights. Mr. López displays and displayed disturbed thought processes and could not distinguish between information that would be pertinent and information that would be irrelevant. His judgment, abstract reasoning, and memory were impaired by his drug abuse, low intelligence and mental disorders.

Investigation into Mr. López's life in Cuba would have revealed the history necessary to a professionally complete evaluation. This history is detalied in Argument VI, supra. After reviewing this history and conducting a thorough evaluation, Dr. Marina concluded that Mr. López is of borderline intellectual functioning, shows indicia of organic brain damage, experiences severe bouts of depression, exhibits schizoid and paranoid features in his thinking, and suffers from borderline and narcissistic personality disorders. As a result of his disabilities, Dr. Marina's opinion is that Mr. López suffered from an extreme mental or emotional disturbance at the time of the offense and that Mr. López's capacity to appreciate the criminality of his conduct or to conform his

conduct to the requirements of law was substantially impaired. Dr. Marina's review of Mr. López's social history also reveals numerous nonstatutory mitigating factors.

A thorough psychological evaluation would also have revealed that Mr. López's inability to relate to others in a reasonable, rational way was further exacerbated by language and cultural barriers. One who cannot communicate with others is patently incompetent to stand trial or be sentenced. Mr. Lopez's inability to understand English and his inability to appreciate nuances in everyday American behavior severely limited his ability to comprehend his situation or assist his attorneys. More importantly, Mr. Lopez did not understand the legal process in which he found himself involved. The legal system in Cuba, with which Mr. Lopez had experience, is vastly different from the United States system.

Here, defense counsel neither obtained nor provided any expert with any background information whatsoever. Counsel failed to take the steps necessary to assure that his client would receive the expert mental health assistance to which he was entitled. Mr. López was thus denied his fifth, sixth, eighth, and fourteenth amendment rights. The evaluations conducted in this case were not professionally adequate. Counsel failed to assure that they would be, and the experts failed in their task. The professional inadequacies of the mental health professionals whom he saw resulted in the abrogation of Mr. Lopez's right to a reliable competency hearing and to not undergo a criminal prosecution when he was mentally unfit to proceed. See Pate v. Robinson, 383 U.S. 375 (1965). At sentencing, a professionally adequate evaluation would have made a significant difference: substantial mitigation would have been established, and aggravating factors would have been undermined. Again, when compared to the paucity of mitigation presented at sentencing, the substantial prejudice suffered by Mr. Lopez is more than plain. A professionally adequate evaluation would have assured that the court would have known that Mr. Lopez was not fit to communicate with counsel and understand the proceedings of the court. Confidence in the outcome of the proceedings is undermined, and this sentence of death is not sufficiently reliable to

satisfy the fifth, sixth, eighth, and fourteenth amendments. An evidentiary hearing and relief are proper.

ARGUMENT VIII

MR. LOPEZ'S SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTRIGHT, GHITCOCK 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. Lopez was convicted of one count of first-degree murder, with burglary being the underlying felony. The trial court found the "felony murder" aggravating circumstance. The court found that the burglary served as the underlying felony to satisfy the "felony murder" aggravating circumstance. (R. 436). The death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding 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, 1 12 S. Ct. 1 130 (1992). Strinaer is new 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. Everv 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," fant 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." Mavnard v. Cartwriaht,

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; this aggravator did not narrow and channel the sentencer's discretion as it simply repeated elements of the offense. Strinner, 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 because use of such an aggravating factor does not narrow the class of person eligible for death.

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 thus unconstitutional. Enaberg, 820 P. 2d at 92. Because Florida's capital sentencing statute requires a weighing process, this 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.

Strinaer, 112 S. Ct. at 1137.

This claim is cognizable in these proceedings on the basis of Strinaer v. Black. Mr. López was denied a reliable and individualized capital sentencing determination, in violation of the sixth, eighth, and fourteenth amendments. Relief is proper at this time.

ARGUMENT IX

THE SENTENCING COURT PRECLUDED MR. LOPEZ FROM PRESENTING AND THE SENTENCING COURT FROM CONSIDERING EVIDENCE OF MITIGATION, IN DEROGATION OF MR. LOPEZ'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE

CAPITAL SENTENCING DETERMINATION AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The proceedings resulting in Eduardo López's sentence of death violated a clear constitutional mandate. Mr. López's sentencer never heard compelling mitigating evidence which would have demonstrated that a sentence less than death was proper. When counsel sought to present it, the trial court ordered that he not do so, precluded consideration of mitigating evidence. As the United States Supreme Court, the Eleventh Circuit, the Federal District Courts, and this Court have made clear, such judicial actions or instructions, precluding a capital sentencer's consideration of evidence in mitigation of sentence, starkly violate the eighth amendment.[14]

In Lockett the United States Supreme Court held that "the sentencer [must] not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604 (emphasis in original). The Court held in Hitchcock that "the exclusion of (nonstatutory] mitigating evidence . . . renders the death sentence invalid." 107 S. Ct. at 1824 (emphasis added).

During Mr. Lopez's capital sentencing proceeding, defense counsel tried to present mitigation. Private investigator Al López, a former police officer, was a defense witness who was prepared to testify to conversations that he had in the course of his investigation. Fluent in Spanish, Al López had interviewed some of Eduardo López's local friends and acquaintances. He was also prepared to discuss what he had learned about co-defendant Margarita Cantín García.

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[14] See Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Hitchcock v. Dunner, 107 S. Ct. 1821 (1987); Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L.Ed.2d 1 (1986); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978); Messer v. Florida, 834 F.2d 890 (llth Cir. 1988); Hararave v. Duaaer, 832 F.2d 1528 (1 lth Cir. 1987); Magill v. Dunner, 824 F.2d 879 (11 th Cir. 1987); Stevens v. State, 552 So. 2d 1082 (Fla. 19891; Hall v. State, 541 So. 2d 1125 (Fla. 1989); Rilev v. Wainwriaht, 517 So. 2d 656 (Fla. 1987); Thompson v. Duaaer, 515 So. 2d 173 (Fla. 1987); McCrae v. State 510 So. 2d 874 (Fla. 1987); Perri v. State, 441 So. 2d 606 (Fla. 1983); Fla. Stat. § 921.141(1) (19891.

However, the court precluded Al Ldpez from presenting any testimony except diluted reputation testimony (R. 1 193-99). The court obviously misunderstood the requirements of Fla. Stat. § 921 .141(1), and denied Eduardo Ldpez his constitutional rights. None of the mitigation known to Al López was properly presented. The judge knew nothing of Eduardo López's family history, or of the circumstances of his life in Miami and the details of his co-defendant's participation in the crime.

Early in Al López's testimony, he stated that he had interviewed Luis Maldanado (R. 1 192). The state objected on hearsay grounds to defense counsel's question regarding what Maldanado had said (id.), and the court sustained the objection. Defense counsel ineffectively failed to proffer the answer to his question, and thus failed to preserve the issue for appeal. However, had he been allowed to answer the question, Al López would have provided significant mitigating evidence regarding co-defendant Margarita Cantín Garcia which would have supported the defense argument that Mr. López was under the domination of others during the offense. Luis Maldanado had told Al López that García was a very rough character, known to terrorize others, including men. This evidence was certainly relevant to the circumstances of the offense, and should have been admitted.[15]

The court also prohibited Al Ldpez from testifying regarding his interview of Esperanta Rodriguez (R.1195-96). Again, defense counsel ineffectively failed to proffer the testimony. Had Al Ldpez been permitted to testify, he would have related that Mrs. Rodriguez had known Mr. López for some time and found him to be a very decent person who was kind to others and about whom no one had anything bad to say. Al López could also have related an incident in which Margarita García came to Mrs. Rodriguez's house looking for Mr. López. García had a gun, appeared angry, and was talking in a bad tone of voice. Had Mr. Ldpez been there, Mrs. Rodriguez

[15]The type and extent of information that could have been presented by the investigator is an issue that should have been the subject of an evidentiary hearing. See Argument II.

believed García would have shot him. This testimony, too, was relevant and admissible, relating to the character of the defendant and the circumstances of the offense."

The court's rulings were error under Lockett and its progeny, as well as incorrect statements of Florida law. Florida law provides that hearsay is admissible at a penalty phase proceedings. Perri v. State, 441 So, 2d at 608 (emphasis added).

Evidence offered by a capital defendant during the penalty phase is relevant if it either rebuts an aggravating circumstance or if it constitutes a mitigating factor. Skipper, 476 U.S. 1. A mitigating factor is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddinas v. Oklahoma, 455 U.S. 104, 110 (1982) (quoting Lnckett, 438 U.S. at 604). See also Penrv v. Lynaugh.

There can be no question that the evidence offered by Al López was precisely the type of mitigating evidence contemplated by Lockett, as it directly related to the "defendant's character or background" and the "circumstances of the offense." 438 U.S. at 650. Similarly, there can be no doubt that here, as in Skipper and Hitchcock, the sentencer was precluded from hearing and considering compelling nonstatutory and statutory mitigating evidence. Lockett, Eddinns, and Hitchcock teach that evidence relating to the defendant's character and background and/or the circumstances of the offense is relevant to the sentencing decision. The trial court nonetheless refused to allow the evidence discussed herein, evidence unarguably relating to Mr. Lopez's character and background and the circumstances of the offense, to be considered as mitigation. The trial court's ruling contradicts long-established eighth amendment jurisprudence. Eddinns, 455 U.S. at 114-15 (sentencer may not refuse to consider relevant mitigating evidence).

"Again, it is unclear exactly what information could have been presented, as the trial court denied Mr. López's request for an evidentiary hearing. See Argument II.

In Mr. Lopez's case, the court simply refused to hear the mitigation. The constitutional error was and is apparent; indeed, it could not be more so under Hitchcock. The judge refused to admit mitigating factors which may have called for a sentence of life.

Mr. López was thus deprived of an individualized and reliable capital sentencing proceeding, and his resulting sentence of death violates the eighth and fourteenth amendments. An evidentiary hearing and relief are proper.

ARGUMENT X

FLORIDA LAW AND THE EIGHTH AMENDMENT WERE VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

Pursuant to the eighth and fourteenth amendments, a state's capital sentencing scheme must establish appropriate standards to channel the sentencing authority's discretion, thereby "eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U.S. 1242 (1976). On appeal of a death sentence, the record should be reviewed to determine whether there is support for the sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 791 F.2d 1438, 1449 (1 lth Cir. 1986). Where that finding is clearly erroneous, the defendant "is entitled to resentencing." Id. at 1450.

The sentencing judge in Mr. Lopez's case found no mitigating circumstances (R. 539). Finding three aggravating circumstances, the court imposed death (R. 541). The court's conclusion that no mitigating circumstances were present, however, is belied by the record. Nonstatutory mitigating circumstances were reflected in the record. "Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence." Santos v. State, 591 So. 2d 160, 164 (Fla. 1991) (citing Hardwick v. State, 521 So. 2d 1071, 1076 (Fla.), cert. denied, 488 U.S. 871 (1988)).

The court not only refused to find mitigation but failed to even consider it: "Initially, it must be stated that defendant has shown no mitigating circumstances, either statutory or non-

statutory." (R. 539). The trial record, however, clearly reflects the presentation of mitigation evidence. Private investigator Al López was permitted to testify to Mr. Lopez's reputation in the community (R. 1197-1219). He stated that Mr. Lopez had a reputation as a loving father, a man concerned with and loved by his family and people in general, a man who was remorseful, and one who had no history of violence. This evidence was ignored by the sentencing court in its findings, despite the fact that such evidence is mitigating."

Mr. Lopez's former co-workers, Nelson Delgado and Antonio Vega, also testified that he was a man who loved his family, and not a person whom they feared or who expressed violence (R. 1228-40). Mr. Delgado, who supervised Mr. Lopez, spoke of his being a fast learner on the job, and a worker who was given increasing responsibility (R. 1228-29).[18]

Young Robert Alvarez, whose parents were good friends with Mr. Lopez, testified that he and his friends were invited to visit Mr. López's cafeteria, and they would often rely upon Mr. Lopez's generosity in providing them with food and drink. Robert further testified that Mr. Lopez would advise him to mind his parents and take care of his mother (R. 1240-42).

Finally, Syvil Marquit, Ph.D., spoke of his evaluation of Mr. Loper. Dr. Marquit found that Mr. López was not a man with any violent habits or propensities, that he had below average intelligence, and that he had remorse for his participation in the crimes. He verified that Mr. López was a man to whom family means a great deal, and a man who likes people and who is liked in return. Finally, corroborating the testimony of Mr. López's co-workers, Dr. Marquit spoke of how Mr. López enjoys working.

"Evidence that a defendant is a caring family person is mitigation. Bedford v. State, 16 F.L.W. 665 (Fla. 1991); Dolinski v. State, 576 So. 2d 271 (Fla. 1991); Perry v. State, 522 So. 2d 817 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987); Rogers v. State, 511 So. 2d 526 (Fla. 1987); Kokal v. State, 456 So. 2d 444 (Fla. 1984); Washinaton v. State, 432 So. 2d 44 (Fla. 1983); Jacobs v. State, 396 So. 2d 713 (Fla. 1981).

[18]"Evidence of positive employment history is also mitigating evidence. See Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987); Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Buckrsm v. State, 355 So. 2d 111 (Fla. 1977).

The trial court made no mention of any of this evidence in its findings. The court's refusal to consider mitigating evidence is clearly error. This Court has recognized that trial courts "continue to experience difficulty in uniformly addressing mitigating circumstances." Camobell v. State, 571 So. 2d 415, 419 (Fla. 1990). Because of this, the Court, citing Eddinas v. Oklahoma, 455 U.S. 104, 114-115 (1982), suggested that capital defendants may have been deprived of their fundamental eighth amendment right to have all relevant mitigation considered by the capital sentencer. Moreover, this Court noted that the failure to set forth specific findings concerning all aggravating and mitigating circumstances could prevent it from adequately carrying out its responsibility of providing the constitutionally required meaningful appellate review, including proportionality review. Camobell, 571 So. 2d at 419-420; State v. Dixon, 283 So. 2d at 9. Indeed, lack of uniformity in the application of aggravating and mitigating circumstances invariably would result in the arbitrary and capricious imposition of the death penalty. Furman v. Georaia, 408 U.S. 238 (1972); see Grossman v. State, 525 So. 2d 833, 850 (Fla. 1988) (Shaw, J., concurring). Therefore, in Campbell, this Court set out detailed requirements for sentencing courts to follow in making findings with respect to mitigating circumstances. Camobell, 571 So. 2d at 419-20. The trial court's treatment of the mitigation advanced by Mr. López is clearly inconsistent with Camobell and Eddings. See also Nibert v. State, 574 So. 2d 1059, 1061-63 (Fla. 1990). Here the trial court refused to even consider, much less find, the mitigating factors demonstrated in the record.

The sentencing order states that the court found no mitigating circumstances (R. 539). Federal constitutional law, however, dictates that any mitigating circumstance is applicable if it relates to "any aspect of a defendant's character or record and any of the circumstances of the offense." Eddings, 455 U.S. at 110 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)) (emphasis added). The trial court's consideration of mitigating fails to meet the requirements of Campbell. There is no way to tell if the court found 1) that the proposed mitigating factors were not mitigating in nature, or 2) that the proposed mitigating factors were not "reasonably

established by the evidence." Campbell, 571 So. 2d at 419-20. The lack of any factual findings or reasons for the court's conclusions regarding many of the proposed nonstatutory mitigating factors falls far short of the stringent requirement set forth in Campbell that a trial court make specific findings concerning each proposed mitigating circumstance, including the weight to be accorded to each factor. Id. Such omissions are intolerable in a case involving life or death.

A court cannot refuse to acknowledge the presence of mitigating evidence and then refuse to weigh it. Campbell; Eddinns. See also Parker v. Dugger, 111 S. Ct. 731 (1991).

In the face of unrebutted evidence of mitigation, the trial court declared that no mitigation existed. Under Eddinns, Magwood, Santos, Campbell, and Roaers, the sentencing court's refusal to accept and find all of the undisputed mitigating circumstances was error. Mitigating circumstances that are clear from the record must be recognized or else the sentencing is constitutionally suspect. Magwood v. Smith, 608 F. Supp. 218, 229 (D.C. Ala. 1985). Mr. López is entitled to relief.

ARGUMENT XI

MR. LOPEZ WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE HEARING ON THE STATE'S MOTION TO ENFORCE THE PLEA AGREEMENT BECAUSE PRIOR DEFENSE COUNSEL REVEALED CONFIDENCES AND SECRETS, VIOLATED HIS DUTY OF LOYALTY, AND OPERATED UNDER A FUNDAMENTAL CONFLICT OF INTEREST, AND BECAUSE DEFENSE COUNSEL AT THE HEARING FAILED TO OBJECT TO THIS PROCEDURE OR TAKE ANY ACTION TO FORESTALL IT, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

During the hearing on the state'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. He was waived his attorney-client privilege as to those matters.

(R. 768-69) [emphasis added). Defense counsel Haymes made no further objections, despite the fact that Mr. Castro proceeded to reveal all manner of information regarding the preparations he made in Mr. López's case.

At the hearing, Mr. Castro revealed his discussions with Mr. López well before the subject of a plea came up, his discussions with Mr. Lopez regarding Mr. Lopez's version of the offense, and Mr. Castro's views of the case against Mr. Lopez:

> Q [by Mr. Berkl 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 throuahout the oroceedinas at the pretrial stage, which encompasses the takina of depositions and investigative work that I cause tobe performed, Mr. Lopez 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. Lopez 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. Lopez 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. Lopez in an event of their seeking his death by electrocution?
>
> A I was aware of it, and, yes, they were.

Q Based upon Mr. Lopez'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. Lopez 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 [redacted] point that he was innocent.

Q Did there come a point in time when Mr. Lopez 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. Lopez -- 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. Lopez.

THE COURT: Overruled.

BY MR. BERK:

Q Did he later amend that particular statement?

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

Subsequently, I got a further revised statement, which I first heard about through the detectives. and then it was confirmed later by Mr. Lopez, 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. Lopez 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. Lopez, 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. Lopez was "pulling my leg" (R. 797) and "being evasive" (R. 800)

Mr. Lopez was deprived of his sixth amendment right to counsel, for in defending himself, Mr. Castro operated under a conflict of interest and thus "breach[ed] the duty of loyalty, perhaps

the most basic of counsel's duties." Strickland, 466 U.S. at 656. Mr. Lopez 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. Wainwriaht, 714 F.2d 1532 (1 lth 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. Lopez 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). 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 15th 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). Mr. Lopez is entitled to relief.

ARGUMENT XII

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 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 suffers from mental health disabilities, and was not physically present for at least two critical stages of the proceedings. See Argument XIII. 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, equal protection and due process. These absences from the capital proceedings violated Mr. López's fifth, sixth, eighth and fourteenth amendment rights.

Additionally, because of defense counsel's failures to ensure continuous translation by a qualified interpreter, Mr. López was deprived of the effective assistance of counsel. Defense counsel's failures were unreasonable and prejudiced Mr. López in the most basic fashion -- Mr. López was not present for and was unable to understand the proceedings resulting in his sentence of death. Mr. López's claim that counsel was ineffective in failing to ensure that he was provided with translation required an evidentiary hearing. Menendez v. State, 562 So. 2d 858 (Fla. 1st DCA 1990). See Argument II.

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. . . . [Al 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, the 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. Wainwrinht, 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. 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. Lopez 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. Lopez 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. Defense counsel did not make a formal request for the appointment of an interpreter, and the court did not enter any order making such an appointment. See Blanco; Suarez.

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. Lopez was a witness (R. 682). An interpreter was sworn for Mr. Lopez'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. Lopez 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. Lopez "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 (11 th 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. Lopez 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 (11 th Cir. 1982). u c h a

possibility, as the gravity of the proceedings discussed above demonstrates. An evidentiary hearing and relief are warranted.

ARGUMENT XIII

THE TRIAL COURT'S AND DEFENSE COUNSEL'S FAILURE TO ASSURE MR. LOPEZ'S PRESENCE 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. Wainwrinht, 685 F.2d 1227 (1 1th 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. Lopez 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. Lopez'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 agrsement 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. Lopez 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. Lopez has expressed his desire to leave the courtroom and has left the courtroom.

(R. 799). No inquiry was made by the trial court, defense counsel said absolutely nothing, and the examination of the witness continued. Mr. Lopez was then absent for the remainder of Mr. Castro's testimony, including the cross-examination by the defense.

Mr. Lopez'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. Lopez 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 absence, he is entitled to relief. Proffitt, 685 F.2d at 1260 (I 1 th Cir. 1982). There is such a possibility, as noted above. Defense counsel was ineffective for unreasonably failing to ensure Mr. López's presence at all proceedings, to Mr. López's substantial prejudice. Mr. López was entitled to the opportunity to prove at a hearing, that there was a "reasonable possibility" that his rights were prejudiced because of his absences. See Proffitt, 685 F.2d at 1260; see also Ester v. United States, 335 F.2d 609, 618 (5th Cir. 1964). See Argument II. Relief is warranted.

ARGUMENT XIV

THE STATE'S WITHHOLDING OF MATERIAL, EXCULPATORY EVIDENCE VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Exculpatory information withheld by the prosection violates due process of law under the fourteenth amendment. If there is a reasonable probability that the withheld information could have affected the conviction, a new trial is required. United States v. Baalev, 105 S. Ct. 3375 (I 985). The prosecutions's deliberate suppression of material, exculpatory evidence violates due process. Bradv v. Marvland, 373 U.S. 83 (1 967); Aaurs v. United States, 427 U.S. 97 (1 976); United States v. Bagley, supra. The prosecutor must reveal to the defense any and all information that is helpful to the defense, regardless of whether defense counsel requests the specific

information, See Bagley. It is of no constitutional significance whether the prosecutor or law enforcement is responsible for the nondisclosure. Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984). Where the prosecution suppresses material exculpatory and impeachment evidence, due process is violated whether the material evidence relates to substantive issue, Alcorta v. Texas, 355 U.S. 28 (1957), the credibility of a state witness, Naeue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. at 154, or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967).

In Mr. López's case, critical exculpatory and impeachment evidence was withheld from defense counsel. The key prosecution witness, Maria Perez-Vega, was administered a polygraph examination on February 2, 1983. The results of this polygraph examination were never disclosed to defense counsel. Instead of getting the results from the report itself, counsel had to ask witnesses giving depositions regarding the polygraph examination. Detective Tom Reilly testified at his deposition that the Mrs. Perez-Vega was "truthful in all the questions." (Deposition of Detective Reilly, March 23, 1984, at 10). Therefore, counsel was under the impression that Mrs. Perez-Vega had passed the polygraph. The polygraph report, since disclosed, in fact reveals that, in response to questions to determine whether Mrs. Perez-Vega had told the truth to the police and whether she had withheld anything from the police, the results were inconclusive. The truthfulness of Mrs. Perez-Vega was critical in this case, and the prosecution wrongfully suppressed the polygraph report.

Other critical exculpatory evidence was also withheld from defense counsel. Notes located in the State Attorney's Office files reveal that one of Mrs. Perez-Vega's pre-hypnosis descriptions of the shooter fit anyone but Eduardo López. In a conversation between detectives and Mrs. Pérez-Vega, she clearly indicates that the intruder that was nearest to her--the shooter--was a black Latin male [B/L/MI, who "was standing almost next to" Mrs. Perez-Vega on the "right side of the bed." The second individual was at the foot of the bed, while the third individual was at the "center of the bed searching thru drawers." The notes go on to reveal that the "B/L/M put [his] hand over her

mouth." Mrs. Perez-Vega then bit the hand. Either the second of third intruder told the black male to "shoot her." According to Mrs. Pérez-Vega, the black male held her face with his hand, and she felt the gun barrel next to her temple. The gun went off, and the black male said, "I killed her." One of the others said, "Kill him too," referring to the victim. It is clear that the man who Mrs. Perez-Vega identifies as the shooter is a black Latin male, a group of which Eduardo Lopez is not a member. The importance of this information is evident, yet it was not disclosed to defense counsel.

The files and records of this case also indicate a substantial contradiction regarding exactly how many photo lineups were shown to Mrs. Perez-Vega. According to Mrs. Perez-Vega, she "was presented with one photo lineup with six pictures on it." (Deposition of María Perez-Vega, June 21, 1985, at 32) (emphasis added). According to Detective Diaz, she was shown "one and onlv one" photo display. (Deposition of Detective Jose Diaz, November 8, 1985, at 45) (emphasis added),

The records disclosed by the State Attorney's Office and the Metro-Dade Police Department, however, reveal otherwise. In a police report, Detective Diaz reports:

> During the afternoon of February 1, 1983, MS. Perez-VEGA was shown numerous photographs of Latin males involved in robberies and drug rip-offs, as well as photographs of numerous Cuban males who arrived in this country from Mariel in 1980 and are now involved in criminal activities in Dade County. MS. Perez-VEGA did not identify any photograph as being one of the subjects who committed this homicide.

(Supplementary Report, February 23, 1983, at 5). Again, around that same time, Detective Diaz reports:

> On Monday, January 31, 1983, the body of RUBEN MERIDA, W/M/ Cuban, D.O.B. 9-6-40, M.D.P.D. I.D. number 280564, was discovered in the trunk of his car in a parking lot here in Dade County. The homicide is believed to be drug-related and has now been assigned to DETECTIVE R. FIALLO of the CENTAC 26 Unit for follow-up investigation under Case Number 38390-D. Victim MERIDA has a striking resemblance to the composite of the shooter in this case and a physical description matches the one provided bv MS. Perez-VEGA. A photo line-up of RUBEN MERIDA was shown to MS. Perez-VEGA, but she did not identify him as being the shooter. Subseauent conversations with MS. Perez-VEGA on Februarv 22, 1983, at 1:00 P.M. revealed that she was not sure if MERIDA was the shooter or not. but he looked verv much like the shooter as far as facial features, hair stvle, and age.

> RUBEN MERIDA'S body was decomposed when discovered, and the medical examiner could not determine if he had a bite mark on either one of his hands. His fingerprints were compared to the latents lifted from the scene, but no comparison was made. The possibility that MERIDA was one of the subjects has not been discarded comoletelv and this detective will monitor DETECTIVE FIALLO'S investigation of MERIDA'S homicide in case any connection between the two cases can be established.

(Id. at 7) (emphasis added). This police report was never disclosed to defense counsel, Not only did it reveal that yet another photo line-up was shown to Mrs. Perez-Vega, but it disclosed the existence of another suspect and would have provided counsel with substantial impeachment of the police officers and detectives. Detective Fiallo, however, testified at a deposition that his only involvement in the case was to transport Mrs. Perez-Vega to the polygrapher's office on February 2, 1983. (Deposition of Officer Fiallo, February 28, 1984, at 14). He certainly did not testify to the existence of another suspect, a suspect who was identified by Mrs. Perez-Vega as the potential shooter. Moreover, Detective Diaz testified at deposition that there were no suspects in the case until Jose Hung came forth with Eduardo Lopez's name. (Deposition of Det. Jose Diaz, November 1, 1984, at 21).

Again, notes to Detective Diaz from Bob Strong, Investigator, located in the Metro-Dade Police files reveal that Mrs. Perez-Vega was shown yet another line-up on February 8, 1983:

> ON FEB. 8, 1983, VICTIM VEGA VIEWED THE PHOTO LINE-UP AND WAS UNABLE TO PICK THE SUBJECT THAT WAS AT HER HOUSE THE NIGHT OF THE INCIDENT EVEN THOUGH SHE SAID SHE HAS SEEN SUBJECT #6 BEFORE AND HAS SEEN THE PHOTOGRAPHS OF SUBJECT #3 AND 5 AT AN EARLIER TIME.

(Miami Dade Police Department notes). Because there was no hearing held in this case, it is unclear what happened with this information. What is clear is that no one was telling the truth about the number of photo line-ups that Mrs. Perez-Vega was shown, and that there was indeed a suspect that she identified as the possible shooter. Moreover, she was able to recognize several people in the photo line-ups that she was shown.

As noted above, a man named Jose Hung provided police detectives with Mr. Lopez's name. Notes located in various state agency files reveal the existence of deals between Hung and the prosecution, deals which secured Hung's cooperation in testifying against Mr. López. None of

this, however, was disclosed to defense counsel. Critical exculpatory and impeachment evidence was suppressed by the prosecution in order to secure a conviction.

There can be no doubt about Mr. López's entitlement to relief. Rule 3.220 of the Florida Rules of Criminal Procedure provides in pertinent part:

> (a) Prosecutor's Obligation.
>
> (1) After the filing of the indictment or information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:
>
> (i) The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.
>
> (ii) The statement of any person whose name is furnished in compliance with the preceding paragraph. The term "statement" as used herein means a written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement . . . .
>
> • • •
>
> (2) As soon as practicable after the filing of the indictment or information the prosecutor shall disclose to the defense counsel any material information within the State's possession or control which tends to negate the guilt of the accused as to the offense charged.

Failure to honor Rule 3.220 requires a reversal unless the state can prove that the error is harmless. Roman v. State, 528 So, 2d 1169 (Fla. 1988). Here, exculpatory evidence and statements material to the defendant's case were undisclosed. Clearly, the undisclosed statements negate the guilt of Mr. Lopez. Certainly Rule 3.220(a) was violated. Evidence which "tend[ed] to negate the guilt of the accused as to the offense charged" was undisclosed. This evidence was "within the State's possession or control." It was in the possession of the law enforcement agency investigating the homicide. The nondisclosure cannot be found to be harmless.

The prosecution's suppression of evidence favorable to the accused violated due process. United States v. Bagley. The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the misconduct. Williams v. Griswald, 743 F.2d 1533, 1542 (11 th Cir. 1984). The Constitution provides a broadly interpreted mandate that the state reveal anything that benefits the accused, and the state's withholding of information such as the sworn statements here renders a criminal defendant's trial fundamentally unfair. Bradv v. Marvland, United States v. Baalev; Aranao v. State, 497 So. 2d 1161 (Fla. 1986). See Dennis v. United States, 384 U.S. 855, 874 (1966) ("In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts"). A defendant's right to present favorable evidence is violated by such state action. See Chambers v. Mississippi, 410 U.S. 284 (1973); see also Giglio v. United States, 405 U.S. 150 (1972). The resulting unreliability of a conviction or sentence of death derived from proceedings such as those in Mr. Lopez's case also violates the eighth amendment requirement that in capital cases the Constitution cannot tolerate any margin of error. See Beck v. Alabama, 447 U.S. 625 (1980). Here, these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were abrogated.

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Gorham v. State, No. 77,366 (Fla., March 19, 1992); Smith v. Wainwright, 799 F.2d 1442 (11 th Cir. 1986); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984); Brady. The Bagley materiality standard is met and reversal is required once the reviewing court concludes that there exists "a reasonable probability that had the (withheld1 evidence been disclosed to the defense, the result of the proceeding would have been different." Baalev, 473 U.S. at 680; Jacobs v. Sinoletary, 952 F.2d 1282, 1289 (11 th Cir. 1992). Such a probability

undeniably exists in this case. Had this evidence been disclosed, there would have been no conviction, and no death sentence.

In United States v. Cronic, 466 U.S. 648 (1984), the United States Supreme Court explained that the purpose of the right to counsel was to assure a fair adversarial testing. The Court noted that, despite counsel's best efforts, there may be circumstances where counsel could not insure a fair adversarial testing, and thus where counsel's performance is rendered ineffective.

Here, exculpatory evidence did not reach defense counsel. Either the state unreasonably failed to disclose its existence, or defense counsel unreasonably failed to discover it. Counsel's performance and failure to adequately investigate was unreasonable under Strickland v. Washinaton. Moreover, the prosecution interfered with counsel's ability to provide effective representation and ensure an adversarial testing. The prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation to the jury. As a result, no adversarial testing occurred. Confidence is undermined in the outcome. There is a reasonable probability of a different outcome. Mr. Lopez was convicted without the effective assistance of counsel. His trial was "a sacrifice of [an] unarmed prisoner [] to gladiators." United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), cert. denied sub nom.; Sielaff v. Williams, 423 U.S. 876 (1975). Accordingly, Mr. López's conviction must be vacated and a new trial ordered.

ARGUMENT XV

THE AVOIDING ARREST AGGRAVATING FACTOR WAS IMPROPERLY APPLIED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In sentencing Mr. Lopez to death, the trial court found the aggravating factor of avoiding arrest (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. Lopez 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. Lopez's case, however, demonstrate that the court relied upon the intent of the coparticipants 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 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 ir her assailant is insufficient to prove intent to kill to avoid lawful arrest. Perry v. State, 522 So. 2d 817, 820 (Fla. 1988). As in Jackson v. State, 17 FLW S268 (Fla. April 30, 19921, "[t]here is no direct evidence of [Mr. Lopez's] motive for killing the [victim], and the circumstantial evidence was insufficient to prove that [he] killed the [victim] to eliminate [him] as [al witness[]. Id. at S239.

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 trial court did not apply the Court's limiting construction of this aggravating circumstance. The application of this factor thus violated the eighth amendment and rendered the death sentence unreliable and arbitrary. Strinaer v. Black. The factor was applied overbroadly, directly contrary to the statute and the settled standards articulated by this Court, Godfrev: Cartwright. Relief is warranted.

ARGUMENT XVI

MR. LOPEZ'S GUILTY PLEA WAS NOT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY ENTERED, AND THE PLEA COLLOQUY CONDUCTED BY THE TRIAL COURT WAS CONSTITUTIONALLY INADEQUATE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. López's decision to enter a guilty plea on June 13, 1984, was not voluntarily, knowingly, or intelligently made. A guilty plea "must be voluntarily made by one competent to know the consequences of that plea and must not be induced by promises, threats or coercion." Mikenas v. State, 460 So. 2d 259, 361 (Fla. 1984). Mr. Loper was coerced into entering the plea, did not understand the terms of the plea agreement, did not comprehend the rights he was foregoing by entering the plea, and was unable to make a rational decision which was in his own best interests.

Mr. López suffers from serious mental health disabilities, see Arguments V, VI, and VII, yet defense counsel conducted no investigation into Mr, López's history and had no mental health evaluation performed before the plea proceedings. See Argument V. Had counsel done so, he would have discovered that Mr. López was not competent to enter a plea, and thus was certainly not able to voluntarily, knowingly, and intelligently waive fundamental rights, for such a waiver requires an even higher level of understanding and cognition than that required for a finding of competency. Becuse he was not legally competent, Mr. López was incapable of making "an intentional relinquishment of a known right or privilege." Horace v. Wainwrisht, 781 F.2d 1558,

1563 (11 th Cir. 1986) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). As the Eleventh Circuit recently discussed:

> In order for a guilty plea to be entered knowingly and intelligently, the defendant must have not only the mental competence to understand and appreciate the nature and consequences of his plea but he must also be reasonably informed of the nature of the charges against him, the factual basis underlying those charges, and the legal opinions and alternatives that are available. See Bovkin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Gaddy v. Linahan, 780 F.2d 935 (11 th Cir. 1986). A defendant must receive "real notice of the charge against him," rather than a rote recitation of the elements of the offense. Henderson v. Morgan, 426 U.S. 637, 96 S. Ct. 2253, 49 L.Ed.2d 108 (1976); Gaddy v. Linahan, supra. Although the defendant must be informed about the nature of the offense and the elements of the crime, he need not receive this information at the plea hearing itself. Rather, a guilty plea may be knowingly and intelligently made on the basis of detailed information received on occasions before the plea hearing. See Gaddy v. Linahan, supra; Moore v. Balkcom, 716 F.2d 1511 (11th Cir. 1983), cert. denied, 465 U.S. 1084, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984).

LoConte v. Duaaer, 847 F.2d 745, 751 (11th Cir. 1988).

Further, the plea colloquy in Mr. Lopez's case was thoroughly inadequate to establish that Mr. López was proceeding voluntarily, knowingly, and intelligently, Rather than asking questions of Mr. Lopez designed to elicit a narrative statement of his understanding, the trial court simply elicited pro forma answers to pro forma questions. The judge asked Mr. Lopez questions designed only to elicit a "yes" or "no" answer. The court engaged in no discussions with Mr. Lopez which demonstrated Mr. López's level of understanding of the proceedings. Even Mr. López's "yes" or "no" responses to the judge made little, if any, sense (See, e.g., Supp. R., 6/13/84 hearing, pp. 8, 12).

In short, Mr. Lopez's guilty plea was not voluntarily, knowingly, and intelligently entered, in violation of the fifth, sixth, eighth, and fourteenth amendments. A guilty plea "'not only must be voluntary but must be [a] knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances and likely consequences.'" Stano v. Duaaer, 921 F.2d 1125, 1140 (11th Cir. 1991) (quoting Bradv v. Unites States, 397 U.S. 742, 747-48, 90 S. Ct. 1463, 1468, 25 L.Ed.2d 747 (1970)). "Because a guilty plea is equivalent to a conviction, the trial court's determination of voluntariness must consider that 'lilgnorance, incomprehension, coercion, terror, inducements,

subtle or blatant threats might be a perfect coverup of unconstitutionality.'" Id. at 1141 (quoting Bovkin v. Alabama, 395 U.S. at 242-43). Clearly, both the trial court and defense counsel failed to assure that Mr. Loper was constitutionally able to enter a guilty plea. An evidentiary hearing and relief are warranted.

ARGUMENT XVII

MR. LOPEZ'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS ALTHOUGH HE WAS NOT LEGALLY COMPETENT.

Mr. Lopez's fifth, sixth, eighth, and fourteenth amendment rights were abrogated because he was not legally competent when the trial proceedings at issue were conducted. Those rights were also violated because defense counsel failed to advocate the issue of competency, although much more than sufficient evidence existed to establish Mr. López's incompetence. At the time of his trial, Mr. López was plagued by his longstanding mental disorders, including borderline personality disorder, narcissism, paranoia, diminished intellectual and emotional functioning, and drug and alcohol abuse. All of these mental disabilities were exacerbated by cultural and language barriers. Because of his disorders he could not deal with counsel, aid in his defense, or understand what the proceedings transpiring before him were truly about.

Dr. Dorita Marina's full and professional evaluation of Mr. López, an evaluation which included the administration of psychological and neuropsychological tests and the review of critically important background materials, concludes that Mr. Lopez was not competent to stand trial. Specifically, she has found that his paranoia, narcissism and borderline intellectual functioning created great difficulty in trusting and relating to others. These mental disabilities, in combination with cultural and language barriers, made it impossible for him to have a rational understanding of the complex legal issues which he faced, communicate with his attorney, and make rational decisions in his own best interest. Indeed, the trial record bears witness to Mr. López's confusion and distrust,

One who cannot communicate with others is patently incompetent to stand trial or be sentenced. Mr. López's inability to understand English and his inability to appreciate nuances in everyday American behavior severely limited his ability to comprehend his situation or assist his attorneys. More importantly, Mr. Lopez did not understand at all the legal process transpiring before him. The legal system in Cuba, with which Mr. Lopez had had experience, is vastly different from the United States system. The Cuban legal system is inquisitorial, not adversarial as is the system in the United States. In serious criminal cases in Cuba, the proceedings begin when the police refer a file to a judge of instruction, who informs the defendant of the charge, takes the defendant's deposition, and conducts further proceedings to determine whether the case should go to trial. All of the participants in the proceedings, the defense lawyer as well as the judge and the prosecutor, are expected to aid in the discovery of truth. The privilege against self-incrimination does not exist. The judge of instruction may infer guilt from the defendant's silence. The trial begins with the deposition of the accused. As in the proceeding before the judge of instruction, the defendant's failure to testify is an indication of guilt. Other witnesses then give their depositions to the court. Finally, the police appear to ratify the report which has been submitted. It is the defendant's burden to overcome the presumption of correctness which attaches to the official statements and actions of the police and the prosecution. Because criminal cases are tried before judges, not a lay jury, the Cuban legal system does not include the safeguards of fair trials which the American legal system provides. The vast differences between the Cuban legal system and the legal system which exists in the United States make the experience of an American jury trial bewildering to the average person recently emigrated from Cuba. A recent emigre would be unlikely to understand the confidential relationship between the lawyer and his client, or the adversary relationship between counsel for the defense and counsel for the prosecution. Such a person would be unlikely to understand that the judge in an American trial is the impartial arbiter of the proceedings, rather than an inquisitor charged with issuing a report of his findings. Nor would such a person be likely to understand the importance of the jury's decisionmaking role. Capital

punishment exists in Cuba; however, it is imposed at the discretion of the judges. Lay jurors play no part in sentencing. There is no separate trial or hearing to determine the appropriate punishment. Nor does Cuban law provide the kind of standards for the imposition of capital punishment which are mandatory in the United States.

These cultural differences and Mr. López's mental disabilities rendered Mr. López incompetent to stand trial. The evidence before the trial court in the form of Mr. López's confusion, lack of understanding and paranoia raised substantial doubts about Mr. López's competency, clearly established a reasonable probability that Mr. López was incompetent, and provided innumerable concrete examples of Mr. López's incompetency.

Just as defense counsel made no attempt to provide any background information to experts evaluating Mr. López's competency, counsel made no attempt to advocate the competency issue. When the competency issue was called up before the court, defense counsel had not even read the reports submitted to the court on the issue of competency. After a recess to read the reports, counsel "stipulated" to the reports (Supp. R., 9/5/85 hearing, pp. 4-5). Pro forma evaluations were adopted by the court in a pro forma proceeding. No attempt was made by counsel to advocate for his client either before or during the so-called competency proceedings.

Dr. Marina's findings demonstrate that had Mr. López been adequately and professionally tested and assessed prior to his capital proceedings by a qualified expert, and had trial counsel effectively represented his client by fully investigating his client's mental health background and effectively presenting the competency issue, the court would not have allowed Mr. López to proceed to trial. Had counsel submitted the wealth of available evidence demonstrating his client's lack of competency to the court and to the experts, or had those experts performed in a professional manner by seeking out, recognizing, and considering that evidence, or by adequately testing and evaluating Mr. López, an incompetent defendant would not have entered a guilty plea and been sentenced to death.

The conviction of an incompetent defendant denies him or her the due process of law guaranteed in the fourteenth amendment. Pate v. Robinson, 383 U.S. 375 (1966). "A defendant's allegation that he or she was tried while incompetent therefore claims that the state, by trying him or her for and convicting him or her of a criminal offense, has engaged in certain conduct covered by the Fourteenth Amendment, namely without due process of law." James v. Sinsletarv, 957 F.2d 1562, 1573 (1 1 th Cir. 1992). Mr. Lopez was denied his constitutional right not to be tried while incompetent. Further, the trial court's erroneous failure to conduct an adequate competency hearing despite the numerous indicia of incompetency and defense counsel's ineffectiveness in failing to advocate the competency issue deprived Mr. López of the adversarial competency hearing to which he was entitled. Pate. An evidentiary hearing and relief are proper.

ARGUMENT XVIII

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. Lopez on December 2, 1985, was not voluntarily, knowingly, or intelligently made. Mr. Lopez 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.

Mr. Lopez suffers from serious mental health disabilities, see Arguments VI, VII, and XVII, supra, yet defense counsel conducted no investigation into Mr. López's history and had no mental health evaluation regarding Mr. Lopez's ability to waive fundamental rights performed before the waiver. See Argument VI. Had counsel done so, he would have discovered that Mr. López was not competent, see Argument XVII, and thus was not able to voluntarily, knowingly, and intelligently waive fundamental rights, for such a waiver requires an even higher level of understanding and cognition than that required for a finding of competency.

Further, 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.

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 Argument XIII, and once Mr. López was present, it is not clear that a qualified interpreter was present. See Argument XII. 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 (See Supp. R., 12/2/85 hearing, pp. 20-30).

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, in addition to his mental health disabilities, it is clear that the waiver was not voluntarily, knowingly, and intelligently entered, in violation of the fifth, sixth, eighth, and fourteenth amendments. An evidentiary hearing was required in order to resolve the issues raised in this claim, as the files and records of the case by no means conclusively established that Mr. López was not entitled to relief.

CONCLUSION

On the basis of the arguments presented herein, Mr. López respectfully submits that he is entitled to an evidentiary hearing and the trial court erred in summarily denying his claims without a hearing. Mr. López respectfully urges this Honorable Court to remand to the trial court for such a hearing, and that the Court set aside his unconstitutional conviction and death sentence.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 10, 1992.

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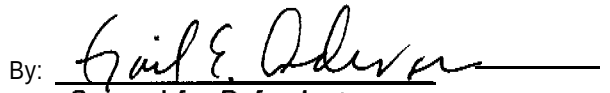
By: 
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