IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,228

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Mr. Lopez stands by his Statement of the Case as presented in his Initial Brief. To the extent that the Statement of the Case and Facts in Appellee's Answer Brief contains argumentative, unsupported, extra-record allegations, Mr. Lopez objects to Appellee's statement of the case, and would point to the need for evidentiary resolution of the unresolved factual allegations raised by Appellee.

In this Reply Brief, because of page restrictions imposed by this Court, Mr. Lopez offers argument in reply only for Arguments I, II, III, IV, VI, XI, and XVI. As to these and the remaining arguments, Mr. Lopez relies on the arguments in the Initial Brief. By not offering argument in reply on certain claims Mr. Lopez in no way waives any issue relating to those arguments.

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.

ARGUMENT IN REPLY

INTRODUCTION

Appellee's Answer Brief repeats some arguments several times regarding several of Mr. Lopez's claims. This introduction is presented in order to reply to those arguments in one place rather than repeatedly throughout this brief.

Appellee repeatedly argues that Mr. Lopez's guilty plea forecloses the presentation of any claims regarding events preceding the plea (See, e.g., Answer Brief at 15, 29, 52). This argument is flatly wrong, reflecting Appellee's failure to consider relevant case law. In numerous guilty plea cases, this Court has addressed claims arising from events preceding the plea in post-conviction proceedings. See Quince v. State, 592 So. 2d 669 (Fla. 1992); Agan v. State, 560 So. 2d 222 (Fla. 1990); Daugherty v. State, 533 So. 2d 287 (Fla. 1988); Stano v. State, 520 So. 2d 278 (Fla. 1988); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Daugherty v. State, 505 So. 2d 1323 (Fla. 1987). The Supreme Court of the United States has recognized that a defendant who pled guilty may raise post-conviction challenges regarding events preceding the plea, Hill v. Lockhart, 474 U.S. 52 (1985)(ineffective assistance of counsel), as have the federal circuits. See Agan v. Dugger, 835 F.2d 1337 (11th Cir. 1987). Mr. Lopez's claims are properly presented, as the relevant case law which Appellee does not discuss demonstrates.

Appellee also repeatedly argues that Mr. Lopez may not raise claims under the "guise" of ineffective assistance of counsel

(See, e.g., Answer Brief at 32, 33, 40). An ineffective assistance of counsel claim is not a "guise." Mr. Lopez was entitled to the effective assistance of counsel at his capital guilt and penalty proceedings. Strickland v. Washington, 466 U.S. 668 (1984). Ineffective assistance of counsel occurs when counsel makes an error which is unreasonable and which prejudices the defendant. Id. Counsel may be ineffective for a variety of reasons, including a failure to investigate guilt/innocence or penalty defenses, see Strickland; Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), a failure to know relevant law, see Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989), a failure to object to prejudicial error, see Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991), or for abandoning his duty of loyalty to the defendant. See Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988). Mr. Lopez's ineffective assistance of counsel claims are properly presented.

Finally, Appellee repeatedly argues that Mr. Lopez's presentation of claims in his Rule 3.850 motion and this appeal is an effort to "delay" (See, e.g., Answer Brief at 12, 15, 32). Mr. Lopez has a right to file a Rule 3.850 motion, see Fla. R. Crim. P. 3.850, has a right to due process in Rule 3.850 proceedings, see Holland v. State, 503 So. 2d 1250 (Fla. 1987); Rose v. State, 17 F.L.W. 319, 320 (Fla. 1992), has a right to the effective assistance of counsel in post-conviction proceedings, see Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988), and has a right to appeal the lower court's decision. See Fla. R. Crim. P.

3.850. Mr. Lopez has simply exercised these rights, presenting numerous substantial claims involving the deprivation of constitutional guaratees. These claims require serious consideration regardless of Appellee's desire to dismiss them as "delay."

ARGUMENT I

ACCESS TO RECORDS PERTAINING TO MR. LOPEZ'S CASE IN THE POSSESSION OF VARIOUS STATE AGENCIES HAS BEEN WITHHELD IN VIOLATION OF CHAPTER 119.01 ET. SEQ., FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Appellee correctly states that Mr. Lopez "wants this Court to order the production of the withheld documents or order the trial court to conduct an in camera hearing to determine if the undisclosed portions were properly withheld." (Answer Brief at 12). Mr. Lopez seeks this relief from this Court because the trial court summarily denied his requests, and this is the remedy afforded by the law. See Mendyk v. State, 592 So. 2d 1076 (Fla. 1992); State v. Kokal, 562 So. 2d 324 (Fla. 1990).[1]

Appellee first argues that this Court should conclude that Mr. Lopez somehow waived his right to proper public records disclosure because Mr. Lopez's "cryptic reference to the

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[1]Appellee repeatedly argues that the fact that Mr. Lopez is seeking the relief to which he is entitled is "nothing more than a delay tactic." (Answer Brief at 12). Appellee's opinion regarding Mr. Lopez's right to appeal the circuit court's summary denial of his claim is of no consequence, as this Court has repeatedly recognized that public records issues are properly brought in a Rule 3.850 motion. See Mendyk. Certainly Mr. Lopez has the right to appeal an adverse ruling from the court below.

undisclosed materials in the defendant's Amended Rule 3.850 motion did not properly bring this complaint to the trial court's attention." (Answer Brief at 12). Appellee goes on to conclude that because the "alleged non-compliance was not specifically brought to the attention of Judge Levy it should be deemed waived by this Court." (Id.).

Besides reaffirming the fact that there are still undisclosed records, Appellee's position regarding the "cryptic" nature of Mr. Lopez's request is belied by a review of the request made in the Rule 3.850 motion:

> [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). Appellee fails to explain how this request is "cryptic" or was not "specifically" brought to the trial court's

attention.[2] The request is clear and cites the appropriate caselaw.[3]

Appellee also argues that Mr. Lopez is not entitled to an in camera hearing regarding the documents withheld by the Dade County State Attorney's Office. Appellee recognizes that State v. Kokal, 562 So. 2d 324, 327 (Fla. 1990), provides that, to the extent that a state agency has a doubt as to the content of its particular files being subject to disclosure, the trial court shall hold an in camera inspection for a determination. See Mendyk, 593 So. 2d at 1081. Appellee contends, however, that because the state attorney in Mr. Lopez's case had no such doubt, no in camera inspection was required. This is a complete misconstruction of Kokal, as well as this Court's rulings in this regard. To argue that certain documents can be properly withheld because the state attorney "had no doubt" that they should be withheld is a patent subversion of the spirit and intent regarding this Court's jurisprudence on public records issues. To allow the state attorney to unilaterally decide that documents

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[2]If Appellee was referring to the request regarding the state attorney files, it is simply incongrous to argue that documents were properly withheld without the necessity of an in camera hearing, yet expect Mr. Lopez to specify exactly which ones were improperly withheld without such a hearing. Mr. Lopez has no idea of the exact nature of the documents withheld by the Dade County State Attorney's Office, but the fact that documents continue to be withheld and the reasons therefore require a hearing to determine the propriety of the non-disclosure.

[3]Moreover, after the case was transferred to Judge Levy the circuit court held no hearings of any kind regarding the Rule 3.850 motion. Thus, Mr. Lopez was not provided any opportunity to argue the propriety of his Chapter 119 requests.

can be withheld, and not provide the requesting party the opportunity to request that the court conduct an in camera inspection, evicerates the law in this regard.

Regarding the files and records of the polygrapher, Mr. Slattery, and the hypnotist, Dr. Rodriguez, Appellee first contends again that somehow Mr. Lopez has also waived this issue, arguing that "there is nothing in the record to suggest that the defendant made these requests except for the allegation in the brief that such requests were denied." (Answer Brief at 13).[4] Because Mr. Slattery and Dr. Rodriguez would not comply with Mr. Lopez's requests without a court order, Appellee argues that somehow Mr. Lopez did not "follow the proper course of action to secure these records," (Answer Brief at 13), and urges this Court to rule that Mr. Lopez is procedurally barred from litigating this issue in this or in future appeals. (Id.).

It is unclear how Mr. Lopez failed to timely make or preserve his requests. The issues regarding the non-compliance as well as the need for a court order were properly and explicitly presented in his Rule 3.850 motion to the trial court. Again, Appellee contends that Mr. Lopez's reference to the non-compliance was cryptic and did not bring the non-compliance to

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[4]Appellee appears to be contesting the allegation that requests of the polygrapher and hypnotist were denied. Of course, the allegations presented in Mr. Lopez's Rule 3.850 motion must be taken as true. Moreover, Mr. Lopez has been provided no opportunity to establish that he was denied access to public records, as no hearing has been held. At such a hearing, Mr. Lopez can and will establish he was denied access to public records and that he is entitled to these records.

the trial court's attention. The Rule 3.850 motion explicitly stated:

> 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.

(PC. 29-30). If the court was not aware of the public records situation in this case, it is not due to any lack of specificity of the allegations. The lower court held no hearings or arguments at all on the Rule 3.850 motion.

Appellee also argues that the above-quoted passage did not provide adequate notice to Mr. Slattery and Dr. Rodriguez, writing that "Mr. Slatery and Dr. Rodriguez are asked to turn over information and when they allegedly refuse to do so without a court order, the state is then accused of withholding information from the defendant." (Answer Brief at 14).[5] Appellee goes on to conclude that because the state, i.e. the state attorney's office, has no more access to Mr. Slattery's or Dr. Rodriguez's files than Mr. Lopez does, (id.), this somehow exonerates all state agencies and agents thereof from public records disclosure. While the state attorney's office may not have custody or control over these documents, as Appellant claims, they are in the possession of state agents and are

[5]Appellee repeatedy uses the word "allegedly" throughout the argument on this claim, indicating that Appellee does not accept that facts as alleged in the Rule 3.850 motion as true. Appellee is therefore also of the opinion that there are substantial facts in dispute regarding this issue, thereby conceding that evidentiary resolution of this issue is required.

therefore subject to disclosure.[6] Kokal. This Court has recently stressed the pivotal role that state attorney's offices have in securing public records from other agencies:

> We emphasize, however, that all public records in the hands of the prosecuting state attorney are subject to disclosure by way of motion under Florida Rule of Criminal Procedure 3.850 even if they include the records of outside agencies. Likwise, the public records of the local sheriff and any police department within the circuit that was involved in the investigation of the case may also be obtained in the manner outlined in Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990).

Hoffman v. State, No. 78,686, slip. op. at 3 (Fla. Dec. 10, 1992). Moreover, this Court has "encourage[d] state attorneys to assist in helping defendants obtain relevant public records from such outside agencies so as to facilitate the speedy disposition of postconviction claims." Id. at 2.

Mr. Lopez, in requesting these documents, followed the procedure as outlined by this Court in Mendyk, that is, by way of a Rule 3.850 motion. In Hoffman, this Court ruled that if public records have no connection with the state attorney, requests for public records should be pursued as outlined in Chapter 119, Hoffman, slip op. at 2, noting that the Court was receding from Mendyk in this regard. Id. To the extent that Mr. Lopez must now seek relief as outlined in Chapter 119, he requests that this Court remand the instant proceedings to the lower court in order

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[6]Mr. Slattery's battery of polygraph examinations and Dr. Rodriguez's hypnosis sessions were done at the behest and under the direction of the law enforcement agencies which handled the investigation and therefore are subject to disclosure. Mr. Slattery and Dr. Rodriquez were acting as agents of the State, and their files are thus public records.

to permit him to initiate proceedings as outlined by this Court in Hoffman and in Chapter 119. Under either the Mendyk or Hoffman rationale, however, Mr. Lopez is entitled to a remand for Chapter 119 compliance.[7]

After arguing that the trial court properly ignored Mr. Lopez's public records requests and that the "record" reveals that this claim is meritless (Answer Brief at 12), Appellee goes on to make extra-record allegations regarding the content of the documents claimed not to be under the control of the state:

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

(Answer Brief at 14) (emphasis added).[8] Appellee later re-emphasizes that "[t]here is nothing in those reports to even hint at the existence of a Brady claim," (Answer Brief at 14), and that "none of the material sought is of any consequence to the disposition of his appeal." (Answer Brief at 15).

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[7]In that Appellee filed a Notice of Supplemental Authority in this Court on December 31, 1992, serving notice of intention to rely on Hoffman, it is clear that the state's position is that Mr. Lopez must seek relief by way of an action as provided in Chapter 119.

[8]Appellee's contention that public records are required to be disclosed only to determine if a Brady claim exists is incorrect. Chapter 119 requires disclosure of public records and does not require that a person requesting disclosure demonstrate any particular reason for requesting disclosure. Information contained in public records may be relevant to any number of issues, and disclosure may not be limited by Appellee's misconstruction of Chapter 119.

It is difficult to understand how the determination that none of the requested documents is "of any consequence" to his appeal can be made without both disclosure to Mr. Lopez of these documents and then an evidentiary hearing, yet Appellee urges that this claim is meritless and can be decided without either providing the information or the benefit of an evidentiary hearing. For example, Appellee argues that nothing in Mr. Slattery's reports to the state attorney indicates the existence of a Brady claim. However, there is no way to know -- without disclosure -- what might be in Mr. Slattery's records that may not be in his reports. Appellee further argues that Dr. Rodriquez's files need not be disclosed because a detective testified about the hypnosis session. However, without disclosure, there is no way to know precisely what happened during the hypnosis session that the detective may not have remembered or may not have recognized as significant. Moreover, Chapter 119 gives Mr. Lopez (or any citizen) the right to request disclosure of public records and does not require that he demonstrate the content of those records or the relevance of those records before disclosure is required. Of course, Mr. Lopez cannot know the contents or relevance of those records until they are disclosed.[9]

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[9]Appellee's contentions that the instant appeal is a "means through which to file additional Rule 3.850 motions beyond the two year limit," (Answer Brief at 15), and that Mr. Lopez now wants this Court to order an in camera inspection to determine if the undisclosed portions were properly withheld (Answer Brief at 12), are correct in the sense that these are the remedies

(continued...)

In sum, Mr. Lopez properly presented his requests to the trial court in his Rule 3.850 motions. He has not waived them, and, contrary to Appellee's opinion, the law affords him the right to appeal the Rule 3.850 denial. Appellee concedes that there are undisclosed documents from the state attorney files. The trial court ignored this. Appellee argues that none of the undisclosed extra-record documents are of any consequence to Mr. Lopez's appeal, yet argues that the "record" reveals that this claim is meritless, and therefore a hearing is not required.

Mr. Lopez urges this Court to order all state officers, agencies and agents to fully comply with Chapter 119. To the extent that an exemption is claimed, those agencies must submit that material to the trial court for an in camera inspection. If Mr. Lopez must now seek redress pursuant to the procedure outlines in Chapter 119 in order to obtain the files of Dr. Rodriguez and Mr. Slattery, as Hoffman indicates and Appellee urges, then this Court must remand this proceeding to the lower court. This is the law as established by this Court, and the remedy which Mr. Lopez now seeks due to the improper withholding of public records in this case.

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[9](...continued)
afforded by law for failure to disclose documents pursuant to Chapter 119 or when exemptions are claimed. See Hoffman; Mendyk; Kokal; Provenzano.

ARGUMENT II

THE TRIAL 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.

In the Answer Brief, Appellee argues in the alternative that all of Mr. Lopez's arguments are procedurally barred or without merit. However, Appellee fails to accept as true the allegations contained in the motion to vacate. Whether the allegations are in fact true requires a factual determination. Such a determination is impossible to make without a full and fair evidentiary hearing. Mr. Lopez has alleged extra-record information. Accepting these allegations, an evidentiary hearing was and is required.

Regarding this issue and throughout the Answer Brief, Appellee neglects to mention any of the extra-record facts proffered in Mr. Lopez's Rule 3.850 motion or discuss how those extra-record facts are conclusively refuted by the record. Indeed, Appellee seems not to understand that in Rule 3.850 motions, it is proper to allege extra-record facts. Rather, Appellee seems to believe that a Rule 3.850 motion must "prove" those facts (See, e.g., Answer Brief at 12, 13, 14, 18, 34, 43, 46, 52, 53, 54, 58). For example, Appellee argues that Mr. Lopez's allegation that Dr. Marina's pretrial evaluation was inadequate because she was not provided necessary information and was not asked relevant questions is "unsubstantiated" (Answer Brief at 58 n. 49). However, Mr. Lopez's Rule 3.850 motion specifically alleged that having been provided necessary

information and asked relevant questions, Dr. marina is of the opinioin that, inter alia, Mr. Lopez was not competent and that substantial mental health mitigation existed. Of course, Mr. Lopez cannot "substantiate" these allegations without an evidentiary hearing.

Rather than address Mr. Lopez's allegations, Appellee contends that Mr. Lopez is not entitled to an evidentiary hearing because all of the issues raised in his Rule 3.850 motion are conclusively resolved by the record, or were or should have been raised on direct appeal (Answer Brief at 17-18). Of the eighteen (18) arguments raised by Mr. Lopez, however, Appellee only discusses why three (3) do not require evidentiary development (Answer Brief at 17). Moreover, given Appellee's position regarding Argument I, a hearing is conceded by Appellee.

As to the remaining claims, Appellee claims that because this is an "unusual" case due to the fact that there was an evidentiary hearing held on enforcing the plea agreement, there is no need to have a hearing at all on any claim. According to Appellee, because the trial judge denied the motion to vacate the guilty plea, "[t]his Court should also deny the defendant relief and affirm the trial judge's denial." (Answer Brief at 17). Appellee fails to point out where in the record of that hearing the extra-record allegations raised in the 3.850 motion were even discussed, let alone how that hearing conclusively establishes no entitlement to relief. Mr. Lopez's Rule 3.850 motion raised many

more issues than were discussed at that hearing and presented many extra-record facts which were not presented at the hearing.

Mr. Lopez relies on his Initial Brief in regard to the applicable law concerning the trial court's improper summary denial. Moreover, the improper summary denial of particular claims is addressed during the discussion of those claims in this brief, as well as in the Initial Brief.

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.

Appellee contends that after the plea was entered into, "there were no other proceedings pending in court against [Mr. Lopez] until after he refused to testify at his co-defendant's deposition," (Answer Brief at 19), and that Mr. Castro's actions in abandoning his client were at the instruction of Mr. Lopez himself (Answer Brief at 18). Although claiming that a review of the record reveals that this claim is meritless, Appellee cites to no record reference which supports the proposition that Mr. Lopez ever, either explicitly or impliedly, discharged or directed his attorney to withdraw from his representation.

Appellee does not address the non-record facts presented by Mr. Lopez demonstrating that when the State approached Mr. Lopez about testifying against the codefendants, Mr. Lopez believed he was still represented by Mr. Castro and asked for Mr. Castro's assistance in dealing with the State. Nor does the State address

the significance of the fact that Mr. Castro did not withdraw as Mr. Lopez's counsel right after the gulty plea but waited some nine (9) months before withdrawing. During these nine months, although still representing Mr. Lopez, Mr. Castro did nothing to assist Mr. Lopez in his dealings with the State. Mr. Lopez wanted his plea agreement with the State to work and needed Mr. Castro's assistance to carry out the agreement, but Mr. Castro stood idly by and allowed the agreement to fall apart.[10] Had Mr. Castro not abandoned his client, Mr. Lopez would have received the benefit of the plea agreement.

Appellee argues that Mr. Castro did not abandon his client because there was an instance when Mr. Lopez specifically refused the presense of his attorney despite Detective Diaz's offer to have Mr. Castro present. (Answer Brief at 20). Appellee cites to pages in the Record on Appeal which have absolutely nothing to do with Mr. Castro or Det. Diaz. If Appellee is referring to Det. Diaz's testimony in this regard at the penalty phase, then Appellee's reference is completely misleading. The instance of which Det. Diaz was testifying occurred on August 23, 1983, well before the abandonment which is the subject of this claim. (R. 1122-24). In fact, this incident occurred before Mr. Castro was

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[10]Indeed, appellee recognizes that Mr. Lopez wanted the plea agreement to work. See Answer Brief at 19 ("It was the defendant who urged Mr. Castro to pursue a plea agreement with the State and to do whatever he could to spare him a sentence of death"); 34 ("The defendant wanted at all costs to avoid the death penalty and it was at his insistence that Mr. Castro approached the State about a possible plea"); 47 ("this defendant wanted to avoid a sentence of death at all costs").

even appointed to represent Mr. Lopez, and thus has nothing to do with Mr. Castro. Appellee's statement is incorrect.

The extra-record documents presented in the Rule 3.850 motion regarding the letters from the prosecutor to Mr. Castro refute the contention that Mr. Lopez was not abandonded by Mr. Castro, and a hearing was and is therefore required. Appellee completely ignores the information that was pled in the Rule 3.850 motion regarding this claim, information which requires an evidentiary hearing.

It is ludicrous to suggest that the period of time during which Mr. Lopez was under the ever-present threat of a death sentence was not a critical period for Mr. Lopez, as the trial judge himself demonstrated:

> 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.

(Supp. R., 6/13/84 hearing, pp. 16-17) (emphasis added). It is clear that the trial court did not consider Mr. Lopez's post-plea actions insignificant, and imparted to Mr. Lopez the critical nature of these proceedings. The fact that Mr. Lopez is now on death row is conclusive evidence of the critical nature of the time period in question.

As to Appellee's notion that Mr. Lopez somehow directed Mr. Castro to discontinue his representation or that he substantially influenced his actions in abandoning him, Appellee cites to no place in the record which supports this factual allegation. In fact, the extra-record materials provided in the Rule 3.850 motion explicitly reject this notion. These materials were completely ignored by Appellee. A letter from the state attorney prosecuting the case to Mr. Castro indicates that he understood that Mr. Castro had abandoned his client, and re-emphasized just how critical these proceedings were for Mr. Lopez. (See Initial Brief at 15). There is no mention of this letter in Appellee's argument. This letter directly and expressly refutes Appellee's contention that Mr. Lopez somehow discharged Mr. Castro, and that the abandonment was therefore at Mr. Lopez's direction. Appellee also ignores the Interoffice Memo from the prosecuting attorney which again indicated that Mr. Lopez wanted to speak to his attorney. (See Initial Brief at 14). Again, this extra-record information contradicts Appellee's argument that Mr. Castro abandoned Mr. Lopez due to Mr. Lopez's willful actions. At a minimum, this information required evidentiary development. None of this information was taken into account by the trial court.

Appellee concedes that Mr. Lopez was prejudiced, yet summarily concludes that the prejudice was not the result of ineffective assistance of counsel. (Answer Brief at 22-23). This sort of conclusory allegation finds no support in the record, and serves only to point to the need for an evidentiary

hearing in this case. Moreover, in cases when counsel is totally absent, constitutional error is present without a showing of prejudice. Blanco v. Singletary, 943 F.2d 1477, 1496 (11th Cir. 1991). 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. These deprivations offend basic concepts of due process, Blanco, 943 F.2d at 1496, thereby violating the sixth, eighth, and fourteenth amendments. Had counsel not abandoned his client, Mr. Lopez would have received the benefit of the plea agreement -- i.e., a life sentence. An evidentiary hearing and relief are warranted.

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.

In the Answer Brief, Appellant argues in the alternative that this claim is procedurally barred or without merit. However, Appellee fails to accept as true the allegations contained in the motion to vacate. Whether the allegations are in fact true requires a factual determination. Such a determination is impossible to make without a full and fair evidentiary hearing. Mr. Lopez has alleged extra-record information in his pleadings. Accepting this information, an evidentiary hearing is required.

Maria Perez-Vega was the chief prosecution witness against Mr. Lopez. She testified at the penalty phase that it was

Eduardo Lopez who put his hand over her mouth, (R. 970), it was Eduardo Lopez who placed the gun next to her face, (R. 972), and it was Eduardo Lopez who shot her and her son. Of these facts she had no doubt (R. 998).

What was never elicited at the penalty phase from defense counsel was that Ms. Perez-Vega's testimony in this regard was the product of hypnosis. Appellee concedes that both Mr. Castro and Mr. Haymes knew that Ms. Perez-Vega had undergone hypnosis, (Answer Brief at 24), yet argues that counsel was not deficient for failing, at a minimum, to even ask one question regarding the hypnotically-induced facts to which she testified.[11]

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[11]Appellee argues that no valid legal challenge existed to exclude Ms. Perez-Vega's testimony (Answer Brief at 28). However, this is belied by the prosecuting attorney's position to the contrary:

> I cannot say what will happen, whether all [Mrs. Pérez-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.
>
> * * *
>
> [T]he case by virtue of its age, would not be as prosecutable as it was at the time that Mr. López 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).

Appellee's argument that counsel was not prejudicially deficient in failing to challenge the hypnotically-induced testimony centers on the fact that it was a tactical decision not to do so (See Answer Brief at 27, 28). Not unexpectedly, there are no record cites to support these "allegations," as no evidentiary hearing was held. Whether or not defense counsel had a tactical or strategic reason for failing to challenge this evidence is a matter that can only be determined from an evidentiary hearing.[12] Just as a reviewing court may not baselessly assume strategic decisions, neither may Appellee do so. See Harris v. Reed, 894 F.2d 871, 878 (7th Cir. 1990).

Appellee also argues that, irrespective of counsel's performance, this case does not involved "tainted" testimony because Ms. Perez-Vega's pre-hypnosis description "was the same [as her post-hypnotic description] except that she was able to elaborate on her attacker's hairline and clothing." (Answer Brief at 25-26).[13] This is not the case. According to Ms. Perez-Vega's statement on January 29, 1983, she provided the following information to the police:

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[12] To the extent that Appellee concedes that an evidentiary hearing is required on this issue, Mr. Lopez agrees that this Court must remand for evidentiary development of this and other claims herein. See Argument II.

[13] As explained in Argument I, supra, Mr. Lopez has been denied access to the hypnotist's notes from the hypnosis session. Without access to the notes, it is impossible to fully evaluate this issue or know if, as Appellee argues, the notes would be of no consequence to this appeal or are relevant to a Brady or other claim. (See Answer Brief at 14, 15). Clearly a hearing is required on this issue.

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 anything else.

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

A I just saw them for a fraction of a second.

(Statement of Maria Perez Vega, 1/29/83, pp. 2-3).[14] All parties involved indicated that Ms. Perez-Vega's pre-hypnosis memory was very poor. After undergoing hypnosis, however, 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," and in fact went on to provide a rather detailed description. (Supplementary Report, 2/23/83, Det. Jose A. Diaz, pp. 6-7).

Appellee ignores the remarkably drastic change in Ms. Perez-Vega's "recollection" after she was hypnotized. As indicated above, prior to being hypnotized, she could not provide any meaningful description of her assailants because she was face down on the bed. In subsequent testimony, however, Ms. Perez-Vega indicated that without a doubt it was Mr. Lopez that she

[14] Appellee concedes that Ms. Perez-Vega was unable to provide a coherent and accurate description of her assailants due to stress, and therefore her memory was poor in this regard (Answer Brief at 23). Ms. Perez-Vega herself admitted that her pre-hypnotic memory was very poor (See Deposition of Maria Perez-Vega, June 21, 1985, in State v. [Margarita Cantinl Garcia, at 16). Moreover, Detective Diaz, when asked about Ms. Perez-Vega's inability to distinguish whether she had heard a man's or a woman's voice that night, explained that "a person who is waking up from a deep sleep, you know, may not have all the wits to say it was definitely a man or a woman." (Deposition of Detective Diaz, November 1, 1984, in State v.[Franciscol Felipe, at 50-51).

saw, face to face, his face directly above her face (R. 992).[15]

Defense counsel did not ask one question regarding the fact that Ms. Perez-Vega underwent hypnosis in order to be able to recall what happened. Counsel also failed to use many of her prior statements which indicated that her pre-hypnotically-refreshed memory was poor, and that her subsequent recollections were not as unmistakable as she testified. This was deficient performance, for the prosecution's case was never subjected to the crucible of "meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 659 (1984).[16]

Defense counsel failed to raise any issue at the penalty phase regarding the hypnosis, a failure which was clearly prejudicial. Ms. Perez-Vega's testimony was essential to the state's case for death and when entirely unchallenged. The trial court relied extensively upon her account in the sentencing

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[15] See Initial Brief at 34-43 for a detailed explanation of how Ms. Perez-Vega's "recollection" of the crime was enhanced by hypnosis and the extent to which her testimony was affected.

[16] Appellee also disregards the extra-record information discussed in the Rule 3.850 Motion and Initial Brief, such as the notes located in State Attorney files which reveal that one of Ms. Perez-Vega's versions of the crime included the fact that it was a black Latin male who was the shooter, not Eduardo Lopez. In fact, the only instance in which Appellee mentions this information is when Appellee directly refutes it, arguing that at no time did Ms. Perez-Vega refer to the black Latin male as the shooter (Answer Brief at 26). Appellee later argues that this information could not have affected the outcome of this case (Answer Brief at 53). This issue clearly warrants evidentiary development, as does the information regarding Ms. Perez-Vega's equivocal identification of a Ruben Merida as the shooter. This information, located in an undisclosed police report, see Initial Brief, Argument XIV, was also completely ignored by Appellee, as was the impact of this information on Ms. Perez-Vega's refreshed recollection.

order, even referring at one point to her "unrefuted testimony." (See R. 530-42). Her unreliable testimony was used to establish aggravating circumstances and to sentence Mr. Lopez to death.

Defense counsel's failure to challenge Ms. Perez-Vega's hypnotically-refreshed testimony also deprived Mr. Lopez 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 (11th Cir. 1984). Such information was elicited here. In particular, Anderson [the hypnotized witness] admitted that the hypnotic sessions he underwent, to some degree, had an effect on the testimony he was giving. Moreover, defense counsel explored . . . the discrepancies between Anderson's trial testimony and his statements prior to hypnosis. The record does not demonstrate that the trial court impermissibly limited the cross-examination of Anderson. In addition, Bundy examined the two hypnotists concernins their qualifications. Finally, the tape recordings of the two sessions were played to the jury, each juror received a transcript of those sessions, and Bundy presented an expert witness who addressed what he characterized as the flaws in those sessions. In light of these facts, Bundy certainly had the opportunity for effective cross-examination and no Confrontation Clause violation occurred.
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> * * * *
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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 testimony of an expert witness who addressed what he characterized as the flaws in those sessions. Cross-examination was the avenue with which to attack Anderson's testimony. 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 v. Dugger, 850 F.2d at 1415-20 (footnotes omitted) (emphasis supplied). Unlike the accused in Bundy, Mr. Lopez had no opportunity to cross-examine Ms. Perez-Vega and no opportunity to demonstrate the unreliablity of her testimony due to counsel's failures. Relief is warranted, and Mr. Lopez respectfully urges this Court to remand this cause for evidentiary development.

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.

Appellee argues that defense counsel adequately investigated because the court had "more than sufficient evidence" to make an "informed" decision (Answer Brief at 37), yet points to no place in the record to support this allegation. This is so because the trial court summarily denied this claim without the benefit of evidentiary development. Appellee also discusses the fact that counsel had a "tactical" reason for his failures (Answer Brief at 37), and that somehow Mr. Lopez had a significant impact on counsel's decisions (id.), yet again cannot point to anywhere in the record which supports these allegations. Appellee also claims that after his appointment, counsel "dilligently" prepared and investigated this case, yet once again there is no record cite following this allegation. Precisely because this claim is based on allegations, allegations which must be taken as true, an evidentiary hearing was and is required.

The fact that counsel presented some mitigation does not automatically foreclose a claim of ineffective assistance of counsel for failing to adequately investigate for the penalty phase. See Kenley 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); Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991) (even if counsel provides effective assistance in some areas, defendant is entitled to relief if counsel renders ineffective assistance in other areas).

Moreover, Appellee ignores the fact that because of counsel's inadequacies, the trial judge did not receive a complete picture of the person he sentenced to death. "The need for the respect due the uniqueness of the individual" is required by the eighth and fourteenth Amendments. Lockett v. Ohio, 438 U.S. 586, 605 (1978). "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545 (1987)(concurring opinion). Here, the trial court knew nothing of Mr. Lopez's life in Cuba, but only heard testimony from witnesses who had known Mr. Lopez during his brief

time in the United States. Appellee addresses none of the mitigation proffered in the Rule 3.850 motion.[17]

The Supreme Court of the United States has defined mitigation as "evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigates against imposing the death penalty." Penry v. Lynaugh, 109 S. Ct. 2934, 2946 (1989). Earlier, the Court had mandated that mitigation was to include "any aspect" of such evidence. Lockett, 438 U.S. at 604.

Contrary to Appellee's position, the fact that Mr. Haymes filed motions and attended depositions is of little persuasion regarding his failure to adequately investigate for penalty phase mitigation. Counsel may provide effective assistance in one area, yet still be found to be prejudicially ineffective in other areas. Horton v. Zant. An evidentiary hearing and relief are warranted.

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[17] Appellee finds some significance in the fact that Mr. Lopez did not testify at the penalty phase (Answer at 37). Apparently Appellee finds this significant because Appellee believes that Mr. Lopez is the source of the facts pled in the Rule 3.850 motion (Id.). However, Mr. Lopez's Initial Brief clearly states that this information comes from Mr. Lopez's family members, who were never contacted by defense counsel (Initial Brief, p. 63 ("Family members relate . . ."). Appellee is contesting the facts pled by Mr. Lopez, clearly establishing the need for an evidentiary hearing.

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.

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

Contrary to Appellee's position, the scope of the hearing was not whether Mr. Castro's representation was generally effective or not, but rather centered on Mr. Castro's representations regarding the plea itself. Appellee, in condoning Mr. Castro's revelations of highly privileged matters, fails to explain why "Mr. Castro's knowledge concerning the extent of the defendant's participation in this murder is critical in determining if he effectively represented the defendant." (Answer Brief at 46, 47).

Appellee admits that the crux of the motion to vacate the plea was that Mr. Lopez claimed that he did not understand the terms of the agreement (Answer Brief at 46), specifically the sentencing provisions. What Appellee fails to explain is how Mr. Lopez's supposedly privileged admissions to his attorney "greatly

impacted the likelihood of conviction," (Answer Brief at 47), or how the relevation of this information was even remotely relevant to Mr. Lopez's understanding of the sentencing provisions of the plea agreement.

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

ARGUMENT XIV

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

A criminal defendant is entitled to a fair trial. As the United States Supreme court has explained:

> ...a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. Strickland v. Washington, 466 U.S. 668, 685 (1984).

In order to insure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon the prosecutor. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and material either to guilt or punishment." united States v.Bagley, 473 U.S. 667, 674 (1985), quoting Bradv v. Maryland, 373 U.S. 83, 87 (1963). Here, these rights, designed to prevent miscarriages

of justice and ensure the integrity of fact-finding, were abrogated.

Regarding the first "alleged" Brady violation (Answer Brief at 52), the undisclosed polygraph reports from Ms. Perez-Vega's polygraph, Appellee does not contest the fact that these documents were improperly withheld by the prosecution. Rather, Appellee argues that because Mr. Lopez pleaded guilty anyway, this information would have been inconsequential. Appellee does not address the fact that Ms. Perez-Vega's credibility was critical in this case. If the prosecution had not improperly withheld the fact that her polygraph results were inconclusive, in addition to the fact that her testimony was also hypnotically induced, Mr. Lopez would have gone to trial rather than plead guilty. Appellee also disregards the fact that Detective Reilly testified at his deposition that Ms. Perez-Vega was "truthful in all the [polygraph] questions." (Deposition of Detective Reilly, March 23, 1984, at 10). This testimony misled defense counsel and Mr. Lopez. Disclosure of the inconclusive nature of the polygraph would thus have provided counsel with the ability to demonstrate that Detective Reilly was not being truthful and that Ms. Perez-Vega was not a reliable witness.

Regarding another "alleged" Brady violation, the undisclosed state attorney notes indicating that Ms. Perez-Vega told the prosecutor that the shooter was a black Latin male, not Eduardo Lopez, Appellee contests the validity of the content of the notes, indicating that at no time did Ms. Perez-Vega tell the

police that the shooter was a black Latin male (Answer Brief at 53 n. 44).[18] Clearly, this situation requires evidentiary development.

Appellee also ignores the fact that not only did Ms. Perez-Vega identify the shooter as being black, but she later idenitifed a Ruben Merida as possibly being the shooter. This information **was** located in a police report that was not disclosed to defense counsel. Moreover, this police report revealed that the police as well considered Merida a possible suspect in the shooting, again a fact not disclosed to defense counsel.[19]

Appellee sums up the State's argument by summarily concluding that no Bradv violations occurred in this case, that the prosecution did not withhold evidence or interfere with Mr. Lopez's ability to investigate defenses (Answer Brief at 54). Appellee points to no record cite to support these conclusions, and does not contest the existence of these notes or the fact

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[18] Appellee does not contest the facts that these notes exist or that they were improperly withheld from defense counsel.

"This information further contradicts Det. Diaz's deposition testimony that there were no suspects in this case until Jose Hung came forth with Eduardo Lopez's name. (Deposition of Det. Jose Diaz, November 1, 1984, at 21). Moreover, this undisclosed police report indicated that Ms. Perez-Vega was shown more than one photo line-up, in contradiction to the deposition testimony of Officer Fiallo, who was in charge of following up on the Merida lead, and who testified at deposition that his only involvement in this case was to transport Ms. Perez-Vega to the polygrapher's office. (Deposition of Officer Fiallo, February 28, 1984, at 14). Without this police report, defense counsel was unaware that the police were covering up the fact that there was another viable suspect in this case, a person indentified by the victim as possibly being the shooter.

that they were withheld by the prosecution. A hearing and relief are required.

CONCLUSION

On the basis of the arguments presented here and in Mr. Lopez's initial brief, Mr. Lopez respectfully submits that he is entitled to an evidentiary hearing, a new trial, and a resentencing. Mr. Lopez respectfully urges that this Honorable Court remand to the circuit court for such an evidentiary hearing, and set aside his unconstitutional conviction and death sentence.

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

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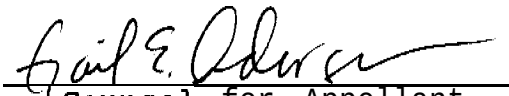
By: 
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