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IN THE SUPREME COURT
STATE OF FLORIDA

CASE NUMBER SC19-211

HECTOR SANCHEZ-TORRES

Appellant,

v.

STATE OF FLORIDA

Appellee.
_____/

REPLY BRIEF OF APPELLANT

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ARGUMENT I – THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF WITH REGARD TO THE ISSUE OF WHETHER HIS PLEA WAS KNOWING AND INTELLIGENT

The Appellant will format his response by citing to the page number where the State makes its argument so the reader might more easily follow along.

1. The State's argument. At page 20, the State asserts that had there been a trial in the Appellant's case, there would have been "a confession [from the Appellant] and testimony from the co-defendant that the Appellant was the shooter…"

The Appellant's reply. There would have been no testimony from the co-defendant in the Appellant's case as the co-defendant had neither plead nor gone to trial. This erroneous assertion may have been the result of the confusing oral argument presented by Assistant Attorney General Charmaine Milsap in the direct appeal of this case.[1] There, Ms. Milsap argued evidence outside the record and focused especially on evidence from the co-Defendant that would never have come in. No one objected to or otherwise halted Ms. Milsap's improper argument.

2. The State's argument. At page 20, the State commences an argument over the next couple of pages regarding collateral estoppel and the "law of the case" doctrine.

[1] That oral argument was held on May 8, 2013

The Appellant's reply. As this Court acknowledged in its opinion on direct appeal and at oral argument on the direct appeal, the complete picture of what went into the plea will not be known until the post-conviction litigation occurs. For example, this Court, in the direct appeal in this case (*Sanchez-Torres v. State*, 130 So.3d 661 (Fla. 2013)), stated the issue of whether the Appellant was misinformed about the consequences of his Fifth Amendment waiver would not be resolved until post-conviction litigation occurred. Id. at 673. In fact, the issue was litigated post-conviction and it came to light the Appellant was not properly informed but the court found there was no prejudice. (PCR 1097-1099).

What came out of the post-conviction litigation was a picture far worse than this Court could have suspected when it issued its ruling on direct appeal. There was no first chair lawyer responsible for trial preparation. There was a second chair lawyer in charge of mitigation that was making decisions designed to postpone a sentencing proceeding so she had time to prepare an effective presentation. The Appellant was told his attorneys were not ready for trial and the evidence at the post-conviction hearing proved that was very much the case.

The arguments made in this post-conviction appeal are the result of information coming from that post-conviction litigation and thus are not foreclosed by the law of the case doctrine. In its direct appeal opinion, this Court specifically

anticipated the possibility of litigation on a record that included testimony from the defense attorneys about the events leading up to the plea and waiver.

3. The State's argument. At page 23, counsel for the Appellee makes the following assertion: "Ms. Bedell testified that at the time of the plea, the defense team was prepared to go to trial," and cited "PCR 1235" as the source of that assertion.

The Appellant's reply. The State's characterization completely misapprehends the record in this case. Ms. Bedell was asked if she advised Mr. Sanchez-Torres she was not ready to go to trial. Her response was "I don't recall that." (PCR 1235). Hardly a denial and hardly an affirmative representation the defense was ready for trial. Mr. Sanchez-Torres swore to the fact Ms. Bedell indeed told him the defense was not ready for trial. (PCR 835). Bedell does not deny she told him that. Add to that there was no testimony at the 3.851 hearing that anyone had actually prepared the case for trial.[2] Mr. Sanchez-Torres' sworn testimony is consistent with the record. Ms. Bedell's inability to recollect what she said about her preparedness to her own client speaks volumes. Moreover, she confesses to being unsure as to her preparation for the part of the case she said she

[2] On April 21, 2011, Ms. Bedell told the trial court she was ready, but Mr. Sanchez-Torres was not present for that proceeding. (PCR 3165). Moreover, the record is clear she was not in a position to speak to trial readiness (she said she wasn't lead counsel) and she was not in fact ready to proceed with her sentencing presentation if it had been held following a guilt phase proceeding.

was responsible for – sentencing – until the plea was consummated. (PCR 2666). Finally, when asked if she was prepared to go to trial on April 29, 2011 (the day of the plea, the Friday before trial) if Mr. Sanchez-Torres didn't enter the plea, Ms. Bedell didn't say "yes." Rather, she said "[y]ou'd have to ask Mr. Till that." (PCR 2661). Mr. Till's role in this case *de minimis* as it was, has already been sufficiently addressed in the Initial Brief.

4. The State's argument: On page 23 of their Brief, the State argues the defense team knew the Appellant "would very likely" have been convicted.

The Petitioner's response: This points up the absurdity of the State's position and the notion there was a strategy to the defense team's efforts. Their solution to a "very likely" conviction was to eliminate any possibility of acquittal. A plea ensures a conviction. "Very likely" becomes "absolute certainty" when a plea is entered. To be sure, pleas can be beneficial – when they elicit a concession. There was no concession here. Instead, there was unconditional surrender. The was made not because the situation was utterly hopeless. Rather, it was made because the troops were not prepared for battle. Keep in mind the Appellant had passed a polygraph with a high degree of certainty as to his claim he was not the shooter. This point is not made because of the admissibility of polygraph results. They are clearly not admissible. The point is made because it argues for the fact this Appellant would have made a compelling witness in his own behalf on a key

issue in the case. Although the judge didn't care whether the Appellant was the actual shooter, a jury of his peers may very well have.

5. The State's argument: On page 23 of their Brief, the State suggests the decision to plea and waive jury participation in sentencing was informed by the result in the Kenneth Ray McBride case.

The Petitioner's response: In the McBride case, a jury voted 8 to 4 for death. The judge (the same judge hearing the Appellant's case) proceeded to sentence Mr. McBride to life immediately after the jury's recommendation was published. The judge informed Mr. McBride he was, like the jury, torn about the appropriate sentence. (PCR 1709). At a unrecorded bench conference, the State alleged Judge Skinner expressed his belief any death sentence he would impose on the facts of Mr. McBride's case would be reversed by the Florida Supreme Court on proportionality and it was that belief that led him to determine life was the appropriate sentence. (PCR at 1712-1718). Ms. Bedell's testimony about her communications with Mr. Sanchez-Torres did not include these important details about the McBride case. (PCR 2670-2671). It's use as guidance in Mr. Sanchez-Torres' decision making on his facts is problematic to say the least. This type of "seat of your pants" legal work was therefore particularly harmful to Mr. Sanchez-Torres because he was not making a fully informed decision.

6. The State's argument: At page 24, middle of the first full paragraph, the State asserts there were multiple discussions regarding the possibility of the Appellant entering a plea.

The Appellant's reply. What the State omits to mention is what type of plea. Ms. Bedell, according to her testimony, began working on a proposed plea to a life sentence in January 2011. (PCR 2662, 2664). She had a meeting with Angela Corey that month. (PCR 2662). Bedell hoped Ms. Corey would approve the proposed plea to life. Ultimately, Corey apparently never responded to Bedell's offer. (PCR 2663). The hope of a plea to life ended on April 29, 2011, according to Ms. Bedell. Id. April 29, 2011 was the day Mr. Sanchez-Torres entered his "straight up" plea.

7. The State's argument. On page 24 (bottom 4 lines), the State argues this Court should assign some significance to the finding of the jury in the co-defendant's case that Mr. Sanchez-Torres was the "shooter."

The Appellant's reply. What the State omits to mention is that both the State and the defense in the co-defendant's case were arguing that Mr. Sanchez-Torres was the shooter. This was hardly an adversary process. No one in that proceeding was advocating for Mr. Sanchez-Torres – nor were they supposed to. The problem is when one attempts to glean some larger significance from the jury's conclusion in an ancillary proceeding. It simply doesn't provide a reliable

answer to the question of who was the "shooter" in the absence of adversarial testing.

8. The State's argument. On page 25, the State argues the Defendant should have withdrawn his plea when he was reticent to testify at his co-defendant's trial.

The Appellant's reply. This ignores the fundamental problem with the plea in the first place. His attorneys were not ready for trial. Why would he withdraw his plea when he knows his attorneys are still not ready for trial? The State fails to acknowledge what is readily apparent from the post-conviction record in this case – the Appellant's trial counsel was effectively non-existent and therefore non-prepared. At that point in time, withdraw of his plea would have been as useless as going to trial at the time of the plea. The part of the record cited by the State, (PCR 2509-2512) actually makes the Appellant's point. At 2511, the following exchange occurs:

> Q: "and he [the Judge] told you that if you didn't testify he would take back your plea agreement?"
> A: [by Mr. Sanchez-Torres]: "Yes."
> Q: "That you would be picking a jury this week."
> A: "Yes, Sir."
> Q: "You didn't want to pick a jury this week, did you?"
> A: "No, sir."
> Q: "That's why you plead guilty back on April the 29th?"
> A: "Yes sir."

He entered a plea because he didn't want to be picking a jury **that week**. Given the circumstance he found himself in, with a completely unprepared legal team, he had no choice. The State's argument the Appellant's failure to withdraw his plea under these circumstances somehow demonstrates a lack of prejudice is therefore meritless.

ARGUMENT II—THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF WITH REGARD TO WHETHER HIS ADVISORY JURY WAIVER WAS KNOWING AND INTELLIGENT

1. The State's argument. Page 28, first full paragraph. The State asserts "just as a guilty plea can mitigate a sentence, so too can a waiver of a penalty phase jury."[3]

The Appellant's reply. The State of Florida would have this Court hold a waiver of the right to jury trial is something a sentencing court can consider in determining the appropriate sentence to impose. They continue by stating "not having to spend time and resources on a penalty phase jury would mitigate the sentence." Id.

First of all, it is worth noting the trial judge did not in fact find the Appellant's waiver of jury trial or jury sentencing to be a mitigating factor so under the State's hypothesis, Mr. Sanchez-Torres was denied a key benefit of his waiver. Second, the trial court did not inquire of the Appellant whether he was waiving his right to trial because of a belief he would derive some benefit from the act itself. In that sense, the plea colloquy and jury waiver colloquy were fatally deficient. Thus, the State itself concedes the deficiency in the plea and waiver in

[3] The State cites for this proposition the Third District Court of Appeal decision in *Green v. State*, 84 So.3d 1169 (Fla. 3rd DCA 2012) at 1171. *Green* is not a death penalty case (the conviction was for manslaughter) and does not involve a waiver of jury in a penalty phase as no such thing exists in a manslaughter prosecution.

Mr. Sanchez-Torres' case. If it is in fact a mitigator as the State asserts, the Appellant is entitled to relief from this Court.

More fundamentally though, the idea of a waiver of jury trial as a mitigator is not recognized anywhere in Florida law, nor should it. It is not a statutory mitigator. It is not a non-statutory mitigator. It was not argued as a mitigator by the defense in this case. In other jurisdictions, it is considered important for a court to assure itself a waiver of jury trial is not the result of some expectation that the waiver will be rewarded. For example, in *State of Iowa v. Liddell*, 672 N.W.2d 805 (Iowa, 2003), the Iowa Supreme Court encouraged courts of that state to assure the defendant does not expect "the court [or] the prosecution will reward the defendant for waiving a jury trial." Id. at 815. Florida Rules and caselaw on this topic are silent.

More directly, the California Supreme Court, in *People v. Collins*, 27 P.3d 726 (Cal. 2001), held that it was a violation of due process for a trial court to suggest there may be some benefit to a waiver of jury trial to the defendant. The trial court had suggested "that just by having waived jury" trial it might have "some effect on the court." Id. at 734.

In non-capital felony cases, a downward departure from the Florida sentencing guidelines system can be awarded based on a "legitimate, uncoerced plea bargain." *See Section 921.0026(2)(a)*, Florida Statutes. A "legitimate,

uncoerced plea" (removing the "bargain" aspect) is specifically not a mitigating factor. *See, e.g., State v. Pita*, 54 So.3d 557 (Fla. 3rd DCA 2011)("legitimate uncoerced plea bargain" means bargain agreed to by the State). Significantly, the legislature does not provide for a legitimate uncoerced plea (i.e. a plea that was made with no promises made at all). In other words, under our current system, a plea bargain that is obtained through the benign coercion of a promise of a downward departure is "uncoerced," while an open plea entered through no promises and is entered for potentially every morally correct reason imaginable does not confer any benefit upon that citizen. This is not a criticism, except to the extent it may involve quibbles about nomenclature. Significantly, there is no concomitant mitigator in capital cases for any kind of plea or plea bargain, "coerced" or otherwise. Obviously, where there is an agreed upon plea to life in a capital case, mitigation analysis is unnecessary because there is no mitigation calculus to perform.

The reason for not rewarding waivers of jury trial is obvious. Such a rule or holding from this or any court would clearly be interpreted to have a chilling effect on the exercise of the constitutional right to trial and jury sentencing. It is therefore not a surprise there is no codification or decisional law supporting the State's assertion here.

2. The State's argument. Page 28, first full paragraph. The State commences this paragraph by stating the Appellant's assertion there is no "down side" to submitting the case to the jury is somehow "vague."

The Appellant's reply. The State never explains what is vague about it. It is in fact quite clear. It means there is no benefit to waiver. It achieves nothing at all. It gives up a right and garners nothing in return. It ignores the existence of *Fla,. R. Crim. P. 3.380*, which provides for motions for judgment of acquittal by the court in a jury or non-jury trial. A citizen abandons twelve (12) separate and individual triers of fact (arguably 13 with *3.380*) in exchange for one (1). It is not a "strategic" decision in any legitimate sense. "Strategic" moves involve some weighing of options and an assessment regarding which of those options to proceed with. It necessarily assumes there is something potentially negative to the exercise of each choice and that those negatives are to be identified, examined and weighed. The defense attorney in the instant case believed a Clay County jury would find the Appellant guilty and "give him death" (a false statement on its face or at the very least a gross overstatement). There might arguably have been some strategy if a decision to waive jury trial happened after the jury was seated. At least there is some comparing of knowns.

Separately, telling Mr. Sanchez-Torres that the jury can "give him death" misinforms him and is the kind of sloppy language that leads citizens to make the

kind of decisions that lead to cases like this. The State's assumption there is something to weigh here is based on their mistaken assertion elsewhere in their Brief that a court can treat a waiver as a mitigator. It clearly cannot.

Assuming *arguendo* the defense attorney accurately foresaw the future, it is inarguable the Appellant would have been in the same situation he would have faced had he had not waived the rights he was convinced to waive here. Even worse, the trial court did not reward the Appellant for his waiver as the State suggests in the same paragraph. Brief at page 28.

3. The State's argument. Page 29, first full paragraph. Here, the State presents its argument that given their view of the evidence, the "Appellant's chances of receiving a death recommendation from the jury were the same, if not higher with the judge." Id.

The Appellant's reply. It is not nitpicking to point out judges don't give recommendations. It is an essential fact. It recalls the same lax use of language by defense counsel where they told the Appellant a Clay County jury would "give him death" – suggesting their decision was final (in 2011). It is not enough for attorneys to use sloppy language when they communicate with one another with the understanding that "we (fellow attorneys) know what they mean." We are communicating with clients and the general public and they don't know what we mean and they are not required to.

This type of sloppy language pervades this case. It started with whether this was a plea to felony murder or premeditated murder. It continued with whether his waiver of his right to remain silent included an obligation to testify against his co-defendant. It continued with whether he could be sentenced to death if the court determined he wasn't the "shooter." It continued when Mr. Sanchez-Torres assumed he had a "first chair" lawyer when he in fact had no one preparing his case for trial. It continued when the issue became whether it was a "guilty" plea or a "best interests" plea. It continued when page two (2) of the signed plea form contemplated an agreement from the State when there was allegedly no such agreement. It continued when the Defendant entered his guilty (?)/no contest (?) plea and asserted the reason for doing so was although he didn't actually kill Mr. Colon, "by being there I know it makes me just as guilty because I didn't report it or anything like that…" (PCR. 3180-1). It continues even to this day where the State alleges the Appellant was entitled to a benefit for waiving his rights when in fact he derived no such benefit. In the face of all of this and the other points made in the Initial Brief, the State of Florida still asserts this process guaranteed the Appellant and the legal system writ large that a voluntary, knowing and intelligent plea and waiver of jury participation in sentencing was effectuated.

ARGUMENT III—THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF WITH REGARD TO HIS CLAIM A MOTION TO SUPPRESS SHOULD HAVE BEEN FILED ON HIS BEHALF

1. The State's argument. At page 31, the State asserts that for a confession to be illegally obtained, "promises or threats must be made to induce, or be a 'quid pro quo for the confession.'" Id.

The Appellant's reply. Agreed.

2. The State's argument. At page 32-33, the State cites *Thompson v. Haley*, 255 F.3d 1292 (11th Cir. 2001) in response to the Appellant's argument that law enforcement's conduct in the instant case constituted extortion under Florida law.

The Appellant's reply. Critically, the *Thompson* court does not address Florida's extortion statute as it was a case coming from the State of Alabama. None of the cases the State cites on page 33 of their Brief address the issue of whether Florida's extortion statute was violated.

3. The State's argument. The State asserts at the top of the page 34 "[a]n officer's truthful description of the family member's predicament is permissible and is not properly classified as a 'threat' or 'extortion' as Appellant alleges, since it merely constitutes an accurate depiction of the situation."

The Appellant's reply. This statement and the rest of the paragraph containing it misapprehend the nature of extortion.

As a hypothetical, assume "John" has proof his neighbor "Ed" has been cheating on his wife. If John threatens to tell Ed's wife about his infidelity unless Ed mows John's yard once a week in perpetuity, John has committed extortion under Florida law. The threat itself is the crime, regardless of what happens as a result of the threat. *Section 836.05, Florida Statutes*. The State's argument is that John has not committed extortion since it is in fact true Ed has cheated on his wife and there is nothing wrong with threatening to expose Ed and his paramour. What the State ignores is the validity of the information underlying the threat is precisely what makes the threat effective. Moreover, it does not matter whether the threat is made directly or through a third party. *See, e.g., In re David L.*, 234 Cal. App. 3d 1655 (Cal 3rd Dist. 1991).

Given the State's flawed understanding of Florida's extortion statute and their concession of the factual scenario here (one that in fact constitutes extortion), the agreed upon fact pattern here meets the State's criteria for an involuntary statement by the Appellant. This Court said in *Carricarte v. State*, 384 So.2d 1261 (Fla. 1980), Florida's extortion statute was constitutional in the face of a vagueness challenge, ruling "[t]he state's interest in shielding its citizens from these types of strong-arm tactics can only be designated as compelling." Id. at 1263. The Appellant could not agree more.

CONCLUSION

The Appellant requests this Court reverse the denial of post-conviction relief in this case and remand for further proceedings.

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished through the e-portal to Jennifer A. Donahue, Assistant Attorney General, at Jennifer.Donahue@myfloridalegal.com and capapp@myfloridalegal.com this 2nd day of September, 2019.

RESPECTFULLY SUBMITTED

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CERTIFICATION OF COMPLIANCE

I HEREBY CERTIFY this Petition complies with the font and formatting requirements of Fla. R. App. P. 9.210(a)(2). A Times New Roman 14 font was used.

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