

**IN THE CIRCUIT COURT OF THE 11<sup>TH</sup>  
JUDICIAL CIRCUIT, IN AND FOR  
MIAMI-DADE COUNTY, FLORIDA**

**CRIMINAL DIVISION**

**CASE NOS.        F01-07975  
                         F06-032696**

**THE STATE OF FLORIDA,**

**Plaintiff,**

**vs.**

**SEAN CASEY,**

**Defendant/Petitioner.**

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**DEFENDANT/PETITIONER CASEY'S  
MEMORANDUM OF LAW IN SUPPORT OF  
MOTION FOR POST-CONVICTION RELIEF**

**I. MR. CASEY'S MOTION FOR POST-  
CONVICTION RELIEF WAS TIMELY FILED.**

It is important to note that Mr. Casey's motion for post-conviction relief was timely filed. Rule 3.850(b) of the Florida Rules of Criminal Procedure sets a two-year limitations period from the date a Defendant's judgment and conviction become final for defendants to file motions to vacate, set aside or correct their sentences. Where, as in this case, a defendant pleads guilty and does not timely file a notice of appeal therefrom, his judgment and sentence do not become "final" for purposes of

the rule until the 30-day period for filing a notice of appeal expires. *E.g.*, *Ramos v. State*, 658 So.2d 169 (Fla. 3d DCA 1995); *Mingo v. State*, 790 so.2d 1164 (Fla. 2d DCA 2001); *Westley v. State*, 903 So.2d 312 (Fla. 2d DCA 2005). In this case, the judgments and sentences were entered on October 17, 2006. These judgments and sentences did not become final until November 16, 2006, 30 days later. Mr. Casey's Rule 3.850 Motion filed herein on November 14, 2008 was therefore timely filed.

## **II. MR. CASEY DID NOT HAVE EFFECTIVE ASSISTANCE OF COUNSEL.**

### **A. The Legal Standards Governing Ineffective Assistance Of Counsel Claims.**

The right of an accused to counsel is beyond question a fundamental right. *See e.g. Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). "Without counsel the right to a fair trial itself would be of little consequence for it is through counsel that the accused secures his other rights." *Kimmelman, supra*. "The constitutional guarantee of counsel, however, cannot be satisfied by the mere retention or appointment of an attorney." *Id.* "An accused is entitled to be assisted by an attorney whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In other words, the right to counsel is the right to effective assistance of counsel. *Id.* at 686.

In *Strickland*, the United States Supreme Court established a two-pronged test for determining whether a defendant has received ineffective assistance of counsel. Under the first prong, the court must determine "whether counsel's performance was deficient." *Strickland*, 466 U.S. at 687. Counsel's performance is deficient where it falls below an objective standard of reasonableness. *Id.* at 688.

Under the second prong, the court must determine whether the deficient performance of counsel prejudiced the defendant's case. To satisfy the prejudice prong of the test, a defendant need not show that, but for counsel's errors, the outcome of the proceeding would more likely than not have been different. *Strickland*, 466 U.S. at 693. Rather, a defendant must only show that "there is a *reasonable probability*, that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694 (emphasis added). "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694.

This State employs *Strickland's* two-prong test for ineffective assistance of counsel claims. *E.g. Rutherford v. State*, 727 So.2d 216, 219 (Fla. 1999). A single, serious error of counsel may violate a defendant's constitutional right to effective

assistance of counsel. *United States v. Cronin*, 466 U.S. 648, 657, n.20 (1984). See also *Murray v. Carrier*, 477 U.S. 478, 496, (1986).

**B. Defense Counsel's Deficient Performance.**

**Claim One: Defense Counsel Failed To Object To Plea Induced By Trial Court Judge.**

As previously discussed in Mr. Casey's Motion for Post-Conviction Relief, Mr. Casey's trial attorneys failed to object to the trial judge's induced guilty plea. The law is well-settled that a trial court must not initiate a plea dialogue. *State v. Warner*, 762 So.2d 507 (Fla. 2000). The trial court may participate in plea discussions but *only* at the request of a party. *Id.* In this case, however, Judge Glick initiated the plea dialogue. The trial court's initiating of the plea dialogue was plainly wrong. But for this conduct by the trial court, the Defendant would not have pled guilty. Defense counsel rendered ineffective assistance of counsel when he failed to object to this violation of procedure. Accordingly, the plea must be vacated.

**Claim Two: Defense Counsel Misadvised The Defendant Of The Consequences Of His Guilty Plea.**

The law is well-settled that, if a defendant enters a plea in reasonable reliance on his attorney's advice, which in turn is based on the attorney's mistake or misunderstanding, the defendant should be allowed to withdraw his plea even if the misadvice concerned collateral consequences about which the trial court was under

no obligation to advise. *Deck v. State*, 985 So.2d 1234, 1236 (Fla. 2d DCA 2008); *State v. Sallato*, 519 So.2d 605 (Fla. 1988); *Costello v. State*, 260 So.2d 198 (Fla. 1972); *Brown v. State*, 245 So.2d 41 (Fla. 1971); *Burns v. State*, 826 So.2d 1055 (Fla. 4<sup>th</sup> DCA 2002); *Ghanavati v. State*, 820 So.2d 989 (Fla. 4<sup>th</sup> DCA 2002); *Murphy v. State*, 820 So.2d 375 (Fla. 4<sup>th</sup> DCA 2002). “[A]ffirmative misadvice about even a collateral consequence of a plea constitutes ineffective assistance of counsel.” *Deck*, 985 So.2d at 1236. *See also e.g. Colombo v. State*, 972 So.2d 1101, 1102 (Fla. 1<sup>st</sup> DCA 2008); *Fundera v. State*, 508 So.2d 1250 (Fla. 3d DCA 1987)(counsel was ineffective for failing to inform the defendant that a consequence of his plea was deportation). In this case, as explained in the Defendant’s Rule 3.850 Motion, the Defendant made his decision to accept the plea based on erroneous information provided to him by Milton Hirsch on three points. Mr. Hirsch rendered ineffective assistance of counsel by affirmatively misadvising the Defendant about these consequences of accepting the plea.

Mr. Hirsch’s previously explained misadvice, whether honest or intentional, as to the consequences of the plea and the viability of the Defendant’s defense in response to serious questions raised by the Defendant induced him to accept the plea. Accordingly, this Court must vacate the Defendant’s convictions and sentences.

**Claim Three: The Defendant's Trial Counsel Failed To Object To The Defendant Not Having Reasonable Time To Deliberate On Whether Or Not To Plead Guilty Which Violated Rule 3.170(j).**

Rule 3.170(j), of the Florida Rules of Criminal Procedure establishes that, "No defendant whether represented by counsel or otherwise, shall be called on to plead unless and until he or she has had a reasonable time within which to deliberate thereon." In *Williams v. State*, 316 So.2d 267 (Fla. 1975), the Supreme Court delcared, "A plea of guilty...is an extremely important step in the criminal process and should not be hurried." As previously explained, the Defendant was given approximately 30 minutes to decide whether or not to plead guilty, five of which were spent talking to Mr. Hirsch.

The Defendant thought that if he did not accept the plea right then and there that he would be going to trial that day with attorneys that were working against him. The Defendant was scared at the prospect of possibly spending 50 years, the rest of his life, in prison for a crime nobody knows for sure he committed and evidence supports that he did not. Defense counsel did not even review the scoresheet with the Defendant. See *Johnson v. State*, 736 So.2d 713 (Fla. 2d DCA 1999)(Rule 3.850 motion alleging threat by counsel that the defendant would receive harsher sentence if he went to trial and failure of counsel to go over scoresheet with defendant were sufficient to mandate evidentiary hearing).

Accordingly, for all of the reasons stated in the Rule 3.850 Motion, Mr. Hirsch was ineffective for failing to object to the Defendant being rushed to make the decision of whether or not to plead guilty.

**Claim Four: The Defendant Pled Guilty With The Understanding That His Attorney Had Properly Investigated All Available Witnesses and Defenses Pertaining to Case No. F01-07975 But Defense Counsel Failed To Fully And Adequately Investigate This Case.**

The United States Supreme Court has held that trial counsel “has a duty to make reasonable investigations....” *Strickland*, 466 U.S. at 691. “The failure to call witnesses can constitute ineffective assistance of counsel if the witnesses may have been able to cast doubt on the defendant’s guilt.” *Bulley v. State*, 900 So.2d 596, 597 (Fla. 2d DCA 2005)(reversing trial court’s summary denial of defendant’s ineffective assistance of counsel claim where defendant contended his trial counsel was ineffective in failing to adequately investigate, prepare and call defense witnesses at trial). *See also Ford v. State*, 825 So.2d 358, 360-61 (Fla. 2002).

Accordingly, where a defendant’s motion for post-conviction relief identifies witnesses who may have been able to cast doubt on the defendant’s guilt, states what their testimony would have been, that they were available to testify and that the defendant was prejudiced by their absence at trial, a defendant has presented a facially sufficient claim for ineffective assistance of counsel entitling him to an

evidentiary hearing. *Ford, supra; Bulley, supra; Sorgman v. State*, 549 So.2d 686 (Fla. 1<sup>st</sup> DCA 1989); *Greeson v. State*, 729 So.2d 397 (Fla. 1<sup>st</sup> DCA 1998); *Gutierrez v. State*, 778 So.2d 372 (Fla. 2<sup>d</sup> DCA 2001); *Highsmith*, 617 So.2d 825 (Fla. 1<sup>st</sup> DCA 1993).

As explained in Claim Four of Mr. Casey's Rule 3.850 Motion, the failure of Mr. Casey's trial attorney to properly investigate and present all witnesses and defenses pertaining to Case No. F01-07975 was a "deficient performance" that substantially prejudiced Mr. Casey. *See Strickland*, 466 U.S. at 687.

Furthermore, the Defendant's Claim Four in his Rule 3.850 Motion regarding newly-discovered DNA evidence that was not disclosed to the Defendant by his trial counsel is plainly a facially sufficient claim requiring an evidentiary hearing. *See e.g., Deck v. State*, 985 So.2d 1234, 1237 (Fla. 2<sup>d</sup> DCA 2008)(defendant who alleged in his Rule 3.850 Motion that he would not have pleaded guilty if alleged newly-discovered evidence had been known to him at the time of his plea and that his involuntary plea constituted a manifest injustice raised a facially sufficient claim requiring an evidentiary hearing).

For all of these reasons, the Defendant's conviction and sentence must be vacated.

**Claim Five: The Defendant's Trial Counsel Failed to Object to the Illegal Conviction And Sentence Imposed in Case No. F01-07975.**

The record in this case shows that the Defendant was adjudicated guilty of both DUI Manslaughter and Vehicular Homicide:

The Court: Could the defendant be adjudicated guilty as to both?

Hirsch: Yes. He can be *adjudicated* as to both and sentenced cumulatively.

State: Right.  
(Hr'g. Tr. Oct. 17, 2006, 4:13-17, A.9B)

The Court: The total is that by pleading guilty to all of these charges and being **adjudicated** guilty of all these charges you will be sentenced for all of these charges with the exception of count number two [Vehicular Homicide].  
(Hr'g. Tr. Oct. 17, 2006, 30:18-21, A.9B)

Clerk: Just a clerical matter, even though he can't be sentenced on count two the computer is going to want to see something.

The Court: It has to be suspended entry of sentence.  
(Hr'g. Tr. Oct. 17, 2006, 30:18-21, A.9B)

However, Florida law clearly establishes that when there is a single death, the Defendant can be charged with both DUI Manslaughter and Vehicular Homicide but *cannot* be adjudicated guilty of both charges. *E.g. Leveritt v. State*, 817 So.2d 891 (Fla. 1<sup>st</sup> DCA 2002); *State v. Chapman*, 625 So.2d 838 (Fla. 1983); *Holmes v. State*,

778 So.2d 534 (Fla. 1<sup>st</sup> DCA 2001). The record clearly shows that the Defendant was convicted of both DUI Manslaughter and Vehicular Homicide, both crimes stemming from a single act, and that defense counsel failed to object to such an *illegal* conviction. In fact, the record shows that Mr. Hirsch is the one who advised the Court that his client could be adjudicated on both counts. This is wrong. Therefore, the Defendant's conviction as to vehicular homicide must be vacated.

**Claim Six: New Evidence on Conflict of Interest.**

As explained in the Defendant's Rule 3.850 Motion, when the Defendant was deported from Chile in August 2006, he was not allowed to travel back to the United States with personal belongings. All of his paperwork on his criminal case was left behind in his apartment. It was not until well after the hearing on the initial Rule 3.850 Motion that the Defendant's mother traveled to Chile to take care of her son's belongings and she came across the fax which is the subject of Claim Six. This letter was one of hundreds that the Defendant wrote to Mr. Hirsch over the period of almost six years and, consequently, the Defendant did not remember sending this fax until his mother found it in Chile. This fax makes it pellucidly clear that Hirsch did, in fact, advise the Defendant to flee. Consequently, the Defendant's plea must be vacated.

**III. ENTITLEMENT TO AN EVIDENTIARY HEARING.**

Rule 3.850 and decisions of the Florida Supreme Court make it clear that “a defendant is entitled to an evidentiary hearing unless the record *conclusively* shows that the defendant is not entitled to relief.” *Gaskin v. State*, 737 So.2d 509, 519 (Fla. 1999)(J. Pariente concurring); Fla.R.Crim.P. 3.850(d); *Valle v. State*, 705 So.2d 1331, 1333 (Fla. 1997). Failure to conduct an evidentiary hearing where it has not been conclusively established by the record that the defendant is not entitled to relief “causes delay and undermines [the court’s] goal of providing a simplified, complete and efficacious remedy for postconviction claims.” *Gaskin*, 737 So.2d at 519. A court reviewing a Rule 3.850 motion “must treat the allegations as true” except to the extent that they are rebutted *conclusively* by the record. *See, e.g., Arbelaez v. State*, 775 So.2d 909, 914 (Fla. 2001).

Accordingly, for all the foregoing reasons, Mr. Casey is plainly entitled to an evidentiary hearing on his ineffective assistance of counsel claim.

**IV. MR. CASEY’S FILING OF A PREVIOUS RULE 3.850 MOTION DOES NOT PRECLUDE CONSIDERATION OF THE INSTANT RULE 3.850 MOTION.**

A second Rule 3.850 Motion is permitted if new grounds are asserted and there is a justifiable reason for the movant or his attorney not asserting those grounds in a prior motion. *E.g., Aikens v. State*, 488 So.2d 543 (Fla. 1<sup>st</sup> DCA 1986).

Claims One to Five of the Defendant's second Rule 3.850 Motion are new claims not raised in the Defendant's initial Rule 3.850 Motion. There is a justifiable reason for the Defendant not previously asserting these claims. More specifically, David S. Markus, who was retained by the Defendant to file his initial Rule 3.850 Motion, did not know of and never considered raising these new ineffective assistance of counsel claims because he was negligent in his investigation into potential Rule 3.850 claims. Indeed, Mr. Markus prepared the Defendant's initial Rule 3.850 Motion without ever obtaining the complete transcript of the proceedings involving the October 17, 2006 guilty plea. This transcript was not completed until December 2007 after almost a year of the Defendant requesting a copy, which was not provided until a formal complaint was filed with the Coordinator of Court Reporting Services. Even the prosecutor described Mr. Markus' preparedness of the initial Rule 3.850 Motion as "sad" during the January 8, 2007 evidentiary hearing on the initial Rule 3.850 Motion (Hr'g. Tr. 166:24-25, 167:1-3, Jan. 8, 2007, A.6). As a result, at the time the initial Rule 3.850 Motion was filed, Claims One to Five were unknown to the Defendant who justifiably relied upon his post-conviction counsel to properly investigate all potential Rule 3.850 claims.

Although Claim Six was raised in the Defendant's initial Rule 3.850 Motion, the Defendant has explained in his second Rule 3.850 Motion that he did not know

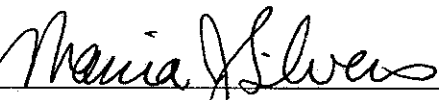
and could not have known about the new facts supporting this claim at the time he filed his initial Rule 3.850 Motion. Accordingly, raising this claim at this time is permissible. *See e.g. Witt v. State*, 465 So.2d 510, 512 (Fla. 1985)(a second Rule 3.850 motion is not an abuse of procedure where it alleges new facts relevant to the issue presented that the defendant could not have discovered at the time his first Rule 3.850 motion was filed).

### **CONCLUSION**

For the foregoing reasons, the Court should vacate and set the judgment and sentence aside and grant a new trial and such other relief as may be appropriate.

Respectfully submitted,

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By   
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 14<sup>th</sup> day of November 2008 to Gail Levine, Assistant State Attorney, 1350 Northwest 12<sup>th</sup> Avenue, Miami, Florida 33136.

  
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MARCIA J. SILVERS