

IN THE CIRCUIT COURT OF THE 11th  
JUDICIAL CIRCUIT IN AND FOR  
DADE COUNTY, FLORIDA

CRIMINAL: DIVISION

STATE OF FLORIDA

CASE NO: F01-7975

Vs.

JUDGE: SCHWARTZ

SEAN CASEY,  
Defendant

**MOTION TO VACATE CONVICTION AND SENTENCE**

Comes now the Defendant, by and through undersigned counsel, pursuant to Florida Rule Of Criminal Procedure 3.850, with a Motion To Vacate Conviction and Sentence due to ineffective assistance of counsel, and states as grounds in support thereof:

1. The Defendant had no prior criminal history and no prior experience or knowledge about the criminal justice system until arrested in this cause.
2. The Defendant retained Milton Hirsch as counsel. Mr. Hirsch instructed the Defendant to meet regularly with a psychologist, Dr. Michael Rappaport.

LAW OFFICE OF **DAVID S. MARKUS**

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3. Both Mr. Hirsch and Dr. Rappaport advised the Defendant to leave the country. (See attached corroborating affidavit of Genevieve Casey)
4. When the Defendant did leave the country and attempt to obtain residency status in Chile, Mr. Hirsch assisted in that effort by providing the attached affidavit. The affidavit was presented to Chilean courts to establish that the Defendant was never tried or convicted of the charges in this case, which would have barred the Defendant from obtaining residency. (See attached affidavit from Milton Hirsch)
5. Mr. Hirsch's advice to flee the country and subsequent efforts to assist the Defendant in maintaining his fugitive status were clear ethical breaches. By assisting the Defendant in remaining in Chile, Mr. Hirsch sought to ensure that the Defendant did not return to stand trial and explain to the jury that the sole reason he fled the jurisdiction was because he had been so instructed by his attorney.
6. The Defendant entered a plea of guilty and was sentenced to 12.5 years in prison.
7. Defendant's counsel was operating under an actual conflict of interest at the time of the plea and, as a result thereof, provided inef-

fective assistance of counsel, resulting in prejudice to the Defendant. **Mr. Hirsch was forced to choose between his client's interests in proceeding to trial and his interest in not making his own misconduct known to the Court. A guilty plea by the Defendant would solve Mr. Hirsch's problem by obviating the need for the Defendant testify at trial so as to explain his flight. In short, a guilty plea would seal the Defendant's lips and leave Mr. Hirsch's unethical behavior a secret.**

8. It is well-settled that "the right to effective assistance of counsel encompasses the right to representation free from actual conflict". The Defendant "must establish that an actual conflict of interest adversely affected his lawyer's performance". **Mungin v. State**, 932 So2d. 986, 1001 (Fla. 2006)
9. It is equally well-settled that "the right to effective counsel also includes the right to have counsel free from ethical conflicts". **Colon v. State**, 907 So2d. 1267,1269 ( 5DCA 2005)
10. In **Buenano v. State**, 559 S02d. 1116, 1119-11120( Fla. 1990), the defendant claimed an actual conflict of interest because her attorney, midway through the penalty phase, signed a contract which assigned counsel a percentage of any book or film proceeds that

the Defendant might receive as a result of the trial proceedings. The Court addressed the claim that the attorney's personal misconduct during his representation of the defendant created an actual conflict of interest. The Court observed that **"in those instances in which a defendant can show a conflict of interest that actually affected the adequacy of representation, prejudice need not be demonstrated in order to obtain relief"**. The Court then reviewed the alleged acts and omissions that were purportedly caused by the conflict of interest and weighed it against trial evidence. The Court concluded that even if there were a conflict that caused the attorney to behave improperly, the trial record revealed overwhelming evidence of guilt, which overcame the presumption of prejudice. Unlike **Buenano**, there is no trial record herein for the Court to review to determine that the Mr. Hirsch's personal conflict of interest did not affect his advice to his client to plead guilty. Unlike **Beunano**, the nature of Mr. Hirsch's conflict compels the conclusion that his advice to the Defendant was affected by his desire to hide his own unethical behavior.

11. There was no appeal filed in this cause, and no previous Motion to Vacate Plea and Conviction has been filed.

Wherefore, for the reasons aforesated, the Defendant moves this Court to conduct an evidentiary hearing to determine whether to VACATE the plea and sentence in this Cause and set the matter for trial.

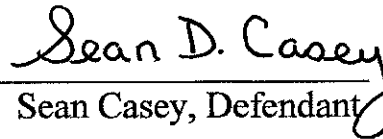
Respectfully submitted this 3rd day of November, 2006.



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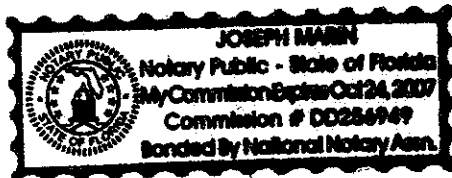
**DAVID S. MARKUS**, Esquire  
Florida Bar No: 331120  
1501 N.W. 14th Street  
Miami, Florida 33125  
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I hereby swear that I have read this Motion and that the facts contained herein are true and correct.

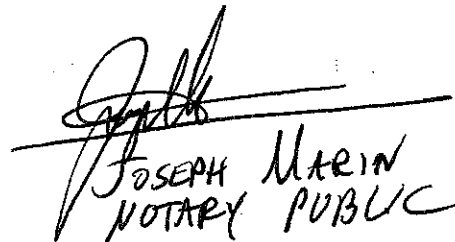


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Sean Casey, Defendant



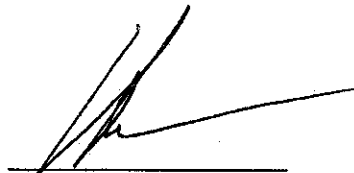
I.D. JAIL CARD



JOSEPH MARIN  
NOTARY PUBLIC

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to Assistant State Attorney Gail Levine, Office of the State Attorney, 1350 N.W. 12<sup>th</sup> Avenue, Miami, Florida, 33125, this 2nd day of November, 2006.

A handwritten signature in black ink, appearing to read 'David S. Markus', is written over a horizontal line.

David S. Markus