IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT
STATE OF FLORIDA

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APPEAL NO.: 2D01-1723

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STATE OF FLORIDA

Plaintiff-Appellee,

v.

JUAN CARLOS CASTRO

Defendant-Appellant.

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A DIRECT APPEAL OF A FINAL ORDER OF THE CIRCUIT COURT, TWELFTH JUDICIAL CIRCUIT, IN AND FOR MANATEE COUNTY, FLORIDA, DENYING DEFENDANT'S MOTION PURSUANT TO RULE 3.850, FLORIDA RULES OF CRIMINAL PROCEDURE, WITHOUT AN EVIDENTIARY HEARING

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INITIAL BRIEF OF APPELLANT
(ORIGINAL)

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STATEMENT OF THE CASE AND OF THE FACTS

Preliminary Explanation Regarding Record References

This is an appeal of a denial of a criminal defendant's motion

for post-conviction relief filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure. [Prisoner's Rule 3.850 Motion to Vacate, Set Aside, or Correct the Judgement or Sentence, dated March 9, 2001] The motion was denied without requiring a response from the State and without any evidentiary hearing. [Order Denying Defendant's Motion for Post-conviction Relief, dated march 27, 2001] A timely petition for rehearing was filed [Petition for Reconsideration, undated] and similarly denied [Order on Petition for Reconsideration, dated April 16, 2001]. The 3.850 Motion challenged the judgments and sentences imposed in three unrelated cases that had been consolidated for sentencing at the trial court, case numbers 98-2443F, 98-3475F, and 98-3665F.

Case number 98-2443F went to trial and resulted in a guilty verdict [R1-54-55], which was affirmed on appeal in case number 2D99-1441, *Juan Carlos Castro v. State*, reported in the table of decisions without published opinions at 761 So.2d 1104 (Fla. 2nd D.C.A. 2000).[1] Accordingly, there is pre-existing Record on Appeal for 98-2443F and references to it will be in the form [RX-X-X], where the first reference is to the volume of the record on appeal, the second is to the item number in the record on appeal, and the third reference, if any, is to the page number of the item. Matters of record from and after the date of completion of the

[1] The Public Defender appointed for the appeal filed an *Anders* brief (*Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)).

Record on Appeal for the direct appeal will be referred to by descriptive reference to the matter in the record.

There is no Record on Appeal prepared at this time for case numbers 98-3475F or 98-3665F, and references to the record in those cases will be by descriptive reference to the matter in the record. Those two cases were disposed of by guilty pleas and sentencings at the time of the sentencing on the trial case, 98-2443F, pursuant to a written plea agreement [R3-174-185; Attachment 3, Acknowledgment and Waiver of Rights Form, to Order Denying Defendant's Motion for Post-conviction Relief, dated march 27, 2001]. There was no direct appeal taken from either case number 98-3475F or 98-3665F.

Statement of Facts and Course of Proceedings

Juan Carlos Castro, who had just turned nineteen years old two weeks earlier, was arrested on August 21, 1998 and charged with robbery based on a purse snatching incident that happened earlier that same day in the parking lot of a Publix grocery store [R1-1].[2] Castro was determined to be indigent and the public defender was appointed to represent him on August 27, 1998. His bond was set at $100,000. A motion to reduce bond was filed on September 8, 1998 and denied. He has remained in custody ever since.

The State filed a two count information on September 15, 1998 [R1-10-11] charging in count one, robbery in violation of Fla.

[2] Juan Carlos Castro was born August 5, 1979. [R1-1]

Stat. § 812.13(1) and (2)(c),[3] and in count two, battery of a person 65 years of age or older, in violation of Fla. Stat. § 784.08(2)(c).[4]

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[3] (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.
(2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084.
(b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
(3)(a) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.
(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

[4] (1) A person who is convicted of an aggravated assault or aggravated battery upon a person 65 years of age or older shall be sentenced to a minimum term of imprisonment of 3 years and fined not more than $10,000 and shall also be ordered by the sentencing judge to make restitution to the victim of such offense and to perform up to 500 hours of community service work. Restitution and community service work shall be in addition to any fine or sentence which may be imposed and shall not be in lieu thereof.
(2) Whenever a person is charged with committing an assault or aggravated assault or a battery or aggravated battery upon a person 65 years of age or older, regardless of whether he or she

Castro entered a written plea of not guilty on or about September 18, 1998 and elected to participate in discovery. On November 10, 1998 the State filed a Notice of Defendant's Qualification as a Prison Releasee Reoffender and Required Sentencing Term Pursuant to Fla. Stat. § 775.082 [R1-17][5]

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knows or has reason to know the age of the victim, the offense for which the person is charged shall be reclassified as follows:
(a) In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.
(b) In the case of aggravated assault, from a felony of the third degree to a felony of the second degree.
(c) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.
(d) In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.
(3) Notwithstanding the provisions of s. 948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld.

[5] 775.082(9)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
a. Treason;
b. Murder;
c. Manslaughter;
d. Sexual battery;
e. Carjacking;
f. Home-invasion robbery;
g. Robbery;
h. Arson;
i. Kidnapping;
j. Aggravated assault with a deadly weapon;
k. Aggravated battery;
l. Aggravated stalking;
m. Aircraft piracy;
n. Unlawful throwing, placing, or discharging of a destructive device or bomb;
o. Any felony that involves the use or threat of physical force or violence against an individual;
p. Armed burglary;

q. Burglary of an occupied structure or dwelling; or
r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, or s. 827.071; within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor.
2. "Prison releasee reoffender" also means any defendant who commits or attempts to commit any offense listed in subparagraph (a)1.a.-r. while the defendant was serving a prison sentence or on escape status from a state correctional facility operated by the Department of Corrections or a private vendor.
3. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:
a. For a felony punishable by life, by a term of imprisonment for life;
b. For a felony of the first degree, by a term of imprisonment of 30 years;
c. For a felony of the second degree, by a term of imprisonment of 15 years; and
d. For a felony of the third degree, by a term of imprisonment of 5 years.
(b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.
(c) Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.
(d)1. It is the intent of the Legislature that offenders previously released from prison who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless the state attorney determines that extenuating circumstances exist which preclude the just prosecution of the offender, including whether the victim recommends that the offender not be sentenced as provided in this subsection.
2. For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file

The depositions of six witnesses were taken by the Public Defender, including that of the alleged victim, Pauline Gaskins.[6] In addition, on January 5, 1999 the Public Defender filed a motion to dismiss the robbery charge [R1-22] based on the testimony of the victim given in her deposition, that due to the lack of resistance and not putting the victim in fear, insufficient force was used to constitute a robbery, citing *Robinson v. State*, 692 So.2d 883 (Fla. 1997).[7] The State filed a traverse [R1-24] and a demurrer [R1-30]

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maintained by the state attorney. On a quarterly basis, each state attorney shall submit copies of deviation memoranda regarding offenses committed on or after the effective date of this subsection, to the president of the Florida Prosecuting Attorneys Association, Inc. The association must maintain such information, and make such information available to the public upon request, for at least a 10-year period.
(10) The purpose of this section is to provide uniform punishment for those crimes made punishable under this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.

[6] These depositions were transcribed and filed with the trial court.

[7] The deposition testimony was as follows:

Q. [Assistant Public Defender John Mika] Right. But did you - - I guess I am going to ask you one more time, did you try and prevent him from taking the purse, or did he take it before you even knew what happened?

A. [Alleged victim Pauline Gaskins] He took it before I even knew what happened.

to the motion to dismiss on January 25, 1999 and after hearing argument of counsel the trial judge denied the motion on January 26, 1999.

The case was set for jury selection on March 2, 1999 at which time the Public Defender filed a number of motions in limine, one of which was directed at voir dire and pretrial publicity in the

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Q. Okay.

A. Yeah.

Q. All right then.

A. I would have prevented it had I seen him coming up and had an idea that's what he was going to do, of course.

Q. Right.

A. But, you know, it was so fast.

Q. Okay.

On recross the Assistant State Attorney attempted to rehabilitate his case by this exhange:

Q. [Assistant State Attorney James Rawe] Let me ask you this again. I asked you before you said - - you testified - - I asked you when you felt him grabbing it, did you tighten your grip on the door [car door]?

A. [Alleged victim Pauline Gaskins] Uh-huh.

Q. Did you?

A. Uh-huh.

Q. Okay.

[Deposition of Pauline Gaskins, November 12, 1998, page 15, lines 15-25, page 16, lines 1-2 and 7-13]

case due to CBS News having chosen Juan Carlos Castro to be the subject of two separate "48 Hours" documentary television programs hosted by Dan Rather.[8] A second motion in limine asked the court to prohibit the State from eliciting any testimony or any comment about a statement allegedly made by Castro, "he does this [purse snatching] for a living, for the money." The court ordered that any voir dire concerning the television program be conducted individually [R3-86, pages 3-4]. The court denied the motion in limine concerning the admission of the other crimes evidence. [R2-4-6].

The trial took place March 5, 1999. The State called five witnesses. [R2-1; R2-3] The first witness was Pauline Gaskins, the alleged victim. [R2-16] She testified that she had gotten groceries on a Friday afternoon about 5:00 p.m. at the Publix grocery on Cortez and 9th. She had put the grocery bags in the back of her Cougar automobile and was returning the grocery cart. She had closed the car door. She was still facing her car. The purse was on her left shoulder and her left hand was on the door handle of the car. She felt it sliding down. She did not do anything in response to that feeling. She started to grab it with her right hand to put it back on her shoulder but by that time it was gone.

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[8] The Motion in Limine does not identify the programs but we ask the Court to take judicial notice of the CBS News 48 Hours programs on this case that can be found on the internet by going to http://www.cbsnews.com/ and entering Juan-Carlos-Castro in the search window on the CBS News webpage.

The guy had jerked it off her arm and broke the strap. She felt him jerk it off her arm. She didn't have time to do anything in response to him jerking it off. She did tighten her grip on the door of the car. That is when he jerked it hard enough that it broke the strap. She did not see the person who jerked it off. It did not break her skin, but she still has a blue place there [where it was jerked] and a knot there on the upper part of her arm near the elbow. It was black from her wrist all the way up to her elbow. A bruise began to show about five minutes after the incident. It swelled up. It did not get worse the next day. It stayed that way for about a week then it started clearing up. [R2-18-24] She identified her purse, with a broken strap, which was admitted into evidence as State's Exhibit 1.

The following occurred on cross-examination:

Q. [Assistant Public Defender John Mika] All right. And the purse that was taken from your shoulder, that happened very quickly, did it not?

A. [Pauline Gaskins] Yes, it did.

Q. Yes. And it happened so quickly, the purse being separated from your shoulder by the strap, pulling out of the hole, the grommet in the purse, that you didn't even have a chance to grab for it or make any attempt to; is that right?

A. That's right.

Q. Okay. And it's true, Mrs. Gaskins, that he took your purse before you even knew what happened.

A. Right.

Q. Yes, ma'am. And you didn't try to prevent it because you didn't even know what was happening.

A. Didn't have a chance.

[R2-28-29]

The second State witness was Richard Barton, a cab driver. He testified that he drove three young men to the Publix parking lot on the day in question, that one got out, and the other two had the cab wait across the street at a gas station. At some point the young man who got out of the cab at the Publix parking lot returned to the cab and then the cab driver took all three young men to the HoJo Inn, Room 111. Later that same day the cab driver was called to the Howard Johnson's by the sheriff's office where he identified Castro as the person who had gotten out of the cab at the Public lot and then returned to his cab and been taken to Room 111 of the HoJo Inn. [R2-31-34]

The third state witness was Chris Kincy, a 17 year old[9] who saw Castro running through the Publix parking lot with a purse in his hand and then heard a woman cry "help, help, he stole my purse." [R2-37-38] Kincy followed after Castro and saw him get into a cab. [R2-38] Kincy said he knew Castro by his first name only.

[9] He was 18 by the time of the trial. [R2-35]

[R2-37]

The fourth State witness was Manatee County Sheriff's Deputy Benjamin Slocum. Deputy Slocum went to the Howard Johnson's motel on Highway 41. He and his partner, Deputy Robbins saw a young man at a vending machine getting a bucket filled with ice. They asked him what room he was in and he said room 110. They followed behind him and saw him put his key in and open the door to room 111. They then drew their guns and ordered him to the pavement. He saw another white male in the room and ordered him out and also to lie down on the pavement. Castro was the third person in the motel room. Castro was placed in handcuffs and made to sit on the sidewalk until another patrol car arrived and he was placed in the back of the patrol car. The cab driver came and identified Castro. [R2-45-51][10]

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[10] This arrest was illegal under *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). The police lacked probable cause at that point to arrest Castro, therefore the subsequent confession he made and his leading the deputy to the purse which he had discarded in a dumpster, would all have been suppressible, had counsel raised the issue. See *Brown v. Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), *Dunaway v. New York,* 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), and *Taylor v. Alabama,* 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982). In each of those cases, evidence obtained from a criminal defendant following arrest was suppressed because the police lacked probable cause. The three cases stand for the familiar proposition that the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality. See also *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The final State witness and the final witness of the trial was Manatee County Sheriff's Deputy Danny Robbins. He was with Deputy Slocum and he had Castro exit the motel room, guns drawn. After he had Castro placed in his patrol vehicle Castro nodded his head at him indicating, apparently, for Deputy Robbins to come over. Deputy Robbins came to Castro and opened the rear door and Castro told him "he did the purse snatching, that no one else was involved." [R2-71] After Castro made this statement Deputy Robbins *Mirandized* him. He then told the Deputy that the property taken from the purse was on the vanity in the motel room and that the purse was in a nearby dumpster. Photos of the items on the vanity were admitted into evidence as State's exhibits as was a photo of the bag Castro described that the purse could be found in in the dumpster. The Deputy concluded by testifying that Castro told him "He says that he does this for a living, for the money." [R2-79]

Before the confession and other incriminating statements of Castro was admitted the Public Defender objected at the bench on *Miranda* grounds (*Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). The court chastised defense counsel for an untimely objection, noting that a motion to suppress should have been filed in a timely manner. The court reluctantly allowed the defense counsel to voir dire Deputy Robbins in the presence of the jury, after which, the court allowed the State to proceed to introduce the confession. There was no voluntariness hearing

outside the presence of the jury as required by *Jackson v. Denno*, 378 U.S. 368, 376, 84 S.Ct. 1774, 1780, 12 L.Ed.2d 908 (1964).

At the close of the State's case the Public Defender in support of a motion for judgment of acquittal, raised the insufficient force argument that he had made pretrial in his written motion to dismiss in reliance upon *Robinson*. The State responded with two cases, *Reed v. State*, 698 So.2d 1271 (Fla. 4th D.C.A. 1997)[11]and *Santiago v. State*, 497 So.2d 975 (Fla. 4th D.C.A.

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[11] The published opinion in its entirety for the *Reed* case is as follows:

PER CURIAM. We affirm. The defendant's act of taking the victim's purse with such force as to break the strap and bruise her shoulder distinguishes this case from *Robinson v. State,* 692 So.2d 883 (Fla.1997). AFFIRMED.

One can only speculate what the facts and issues were in the *Reed* appeal. Did the victim resist? Did the victim not resist? In any event, the language of the holding of *Robinson* is unambiguous:

In accord with our decision in *McCloud,* we find that in order for the snatching of property from another to amount to robbery, the perpetrator must employ more than the force necessary to remove the property from the person. Rather, there must be resistance by the victim that is overcome by the physical force of the offender. *See S.W.,* 513 So.2d at 1091-92 [*S.W. v. State*, 513 So.2d 1088 (Fla. 3rd D.C.A. 1987)](quoting *R.P. v. State,* 478 So.2d 1106 (Fla. 3d D.C.A. 1985), *review denied,* 491 So.2d 281 (Fla.1986); *Mims v. State,* 342 So.2d 116, 117 (Fla. 3d D.C.A. 1977); *Adams v. State,* 295 So.2d 114, 116 (Fla. 2d D.C.A.), *cert. denied,* 305 So.2d 200 (Fla.1974); Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* §§ 8.11(d), at 781 (2d ed.1986)); *see also Colby v. State,* 46 Fla. 112, 113, 35 So. 189, 190 (1903); [FN10] Fla.Std. Jury Instr. (Crim.) 156-57. The snatching or grabbing of property without such resistance by the victim amounts to theft rather than robbery.

1986). *Santiago* predated *Robinson* and clearly was no longer good law. Nevertheless, the trial judge denied the judgement of acquittal motion.

That decision was error under the law of this District. In *Owen v. State*, 2001 WL 427616 (Fla. 2nd D.C.A. April 27, 2001), this court held "The evidence here failed to prove the force necessary to sustain a robbery conviction under *Robinson.* The victim did not resist at all, nor was she held or struck. *See Walker v. State,* 546 So.2d 1165 (Fla. 3d D.C.A. 1989). While the snatching produced a mark on her shoulder, her testimony established that the mark resulted merely from the force Owens employed to remove the purse."[12]

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[12] The opinion in *Owen* follows:

> For snatching a purse, Bernard Owens was charged with robbery. At his trial Owens moved for a judgment of acquittal on the ground that the evidence proved only theft, not robbery. The trial court denied the motion, and the jury convicted Owens as charged. We agree with Owens's assertion that the evidence failed to prove he committed robbery. Therefore, we reverse that conviction and remand with directions to enter a conviction for theft and to resentence Owens accordingly.
>
> The victim testified that she was talking on a pay telephone when a man approached her from behind and "ripped my purse off my shoulder." She clarified that he "grabbed and snatched it." This "naturally" pulled on her and left a mark on her shoulder. Although it hurt when the man removed the victim's purse, he did not threaten her or try to injure her. The victim identified Owens as the man she saw running away with her shoulder bag.
>
> Owens argued that the evidence did not establish the force necessary to prove robbery, and that the charge should be reduced to theft. To sustain a conviction for robbery, the State must prove that the theft was accomplished by "force, violence,

The State affirmatively misargued the facts and the law in its

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assault, or putting in fear." §§ 812.13(1), Fla. Stat. (1997). In snatching scenarios where the victims are not put in fear, the element of force is what distinguishes robbery from theft. *Robinson v. State,* 692 So.2d 883, 887 (Fla.1997). In *Robinson,* the court held that in order for a snatching of property to amount to robbery, "the perpetrator must employ more than the force necessary to remove the property from the person. Rather there must be resistance by the victim that is overcome by the physical force of the offender." [FN1] *Id.* at 886. As an example, the *Robinson* court pointed to *McCloud v. State,* 335 So.2d 257 (Fla.1976), where the victim held fast to her purse after the perpetrator grabbed it, and let go only after she fell to the ground. 692 So.2d at 886.

> FN1. The legislature abolished this requirement when it enacted section 812.131, Florida Statutes (1999), "Robbery by sudden snatching." To convict a defendant of that new crime, it is not necessary for the State to prove that the accused used more force than necessary to obtain the property or that the victim offered any resistance. Section 812.131 became effective on October 1, 1999. Ch. 99-175 §§ 3, at 974, Laws of Fla. It does not apply in this case because Owens committed this crime on February 4, 1998.

The evidence here failed to prove the force necessary to sustain a robbery conviction under *Robinson.* The victim did not 546 So.2d 1165 (Fla. 3d D.C.A. 1989). While the snatching produced a mark on her shoulder, her testimony established that the mark resulted merely from the force Owens employed to remove the purse. *Cf. A.J. v. State,* 561 So.2d 1198 (Fla. 3d DCA 1990) (holding that the force was insufficient to support a robbery conviction where the defendant grabbed a camera hanging from the victim's shoulder and fled).

We reverse Owens's robbery conviction and remand with directions to reduce his conviction to theft and to resentence him. The information charged that the value of the victim's purse was less than $300. Therefore, Owens's conviction must be for a crime specified in section 812.014(3), Florida Statutes (1997). Reversed and remanded.

THREADGILL, A.C.J., and CAMPBELL, MONTEREY (Senior) Judge, concur.

closing argument.

> Isn't that resistance? She didn't have an opportunity to do anything more because he overpowered her. Quick, strong, young man, old woman. Went to grab it, that was her testimony, wasn't giving it up. That's called resistance. Didn't get to attempt to grab it, knew it was being tugged. Her testimony was - - you heard her on direct testimony, why did you grab on tightly, because I felt it being tugged off my arm. It wasn't gravity, it wasn't falling off, it was being pulled, she knew that in that quick second.
>
> The law does not require the victim of robbery to resist to any particular extent.[13] There doesn't have to be a knock-down drag-down battle, there doesn't have to be punches thrown, kicking, screaming, just some resistance. The natural resistance of I'm not giving you my property, this is mine, you're not supposed to be out here ripping purses off people. [R2-96]

The jury returned verdicts of guilty on both counts, robbery and battery on a person 65 years of age or older. [R2-118]

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[13] This is only true, according to the pattern jury instructions, when the victim is acquiescing because she has been placed in fear of death or great bodily harm if she does resist - it is not true in a case such as this where the State has conceded that the defendant came from behind, the victim did not even know he was there, and there was no intimidation. [R2-97]

Sentencing was scheduled for the following Friday, March 12, 2001.

At that point, Castro had been convicted of robbery, a second degree felony punishable by up to 15 years in prison, and battery on a person age 65 or older, a third degree felony, punishable by up to 5 years in prison.

Prior to the trial, on November 25, 1998 the State had filed a three count information in case number 98-3475F charging Castro with armed burglary of a dwelling in violation of Fla. Stat. § 810.02 and 810.02(2)(b), a first degree felony punishable by life imprisonment, in count one, grand theft of more than $10,000 and less than $20,000, in violation of Fla. Stat. § 812.014(2)(c)(3), a third degree felony punishable by five years imprisonment, in count two, and grand theft of a firearm in violation of Fla. Stat. § 812.014(2)(c)(5), a third degree felony punishable by five years imprisonment, in count three. Also prior to the trial on the robbery and battery counts, the State had filed a third information on January 4, 1999 in case number 98-3665F, charging Castro with armed burglary of a dwelling in violation of Fla. Stat. § 810.01 and § 810.02(2)(b), a first degree felony punishable by life imprisonment, in count one and with grand theft in violation of Fla. Stat. § 812.01(2)(c), a third degree felony punishable by five years imprisonment, in count three.

The State filed notices of Castro's qualification as a prison releasee reoffender in both of the new cases. Castro had entered

written pleas of not guilty in both new cases prior to the jury verdict in 98-2443F. Under the Prison Releasee Reoffender Act Castro faced a mandatory 15 years imprisonment on the robbery charge he had gone to trial and been convicted on.[14] He faced mandatory life sentences on the armed burglary offenses if convicted and sentenced as a prison releasee reoffender.

With no discovery having been completed in the two new cases on which Castro faced mandatory life imprisonment, no depositions taken, no experts retained to examine fingerprints or palmprints, no investigation, Castro's Public Defender brought Castro a written plea agreement offer from the State that provided:

> (1) Castro would plead guilty or no contest to two counts of armed burglary of a dwelling, two counts of grand theft and two counts of grand theft of a firearm in case numbers 98-3475F and 98-3665F.
>
> (2) The maximum penalty was life and no minimum mandatory penalty was noted.
>
> (3) His plea was conditioned on his right to appeal the validity of the plea and sentence because of any legally dispositive issues, including sentencing errors not

[14] It is not clear what penalty Castro faced on the felony battery, whether a guideline sentence or a five year minimum mandatory sentence as a prison releasee reoffender. The issue is whether a battery that has been reclassified as a felony from a misdemeanor by virture of the age of the victim is susceptible to application of the prison releasee reoffender.

apparent at that time.

(4) Castro admitted that there was a factual basis for the charges [but none was specified].

(5) Castro's sentence would be 35 years total, adjudications, 15 years DOC on robbery case, C.T.S. [credit for time served], 20 years DOC consecutive on Armed Burglaries. (Not as PRR) Stipulated upward departure.

The written plea agreement was signed by Castro and by his Public Defender, John Mika, and dated March 12, 1999, the same day as the sentencing in the robbery case. The written plea agreement was filed with the clerk of the court on March 12, 1999.

The plea agreement misadvised Castro of the penalties, advising him that he faced life, when in fact he faced as little as five years on the grand theft charges, the plea agreement did not advise Castro of the elements of any of the offenses,[15] the plea agreement had Castro pleading guilty to two counts of grand theft of a firearm, when he only was charged in once such count.

The judge never went through any plea colloquy with Castro as to the written plea agreement he and his counsel signed and filed with the court. Instead, the Assistant State Attorney, James Rawe,

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[15] Castro entered written pleas of not guilty on all counts. There is no evidence in the record that Castro was ever advised of the charges or what constituted the elements of the charges or the maximum penalties for the charges.

stated to the Court:

> MR. RAWE: Your Honor, I'm under the understanding that the Defendant was going to enter a plea in the other two cases.
>
> MR. MIKA: Judge, that is correct. It was decided earlier this morning, and speaking with Mr. Castro, that if the Court would accept it he will enter a plea to the other charges pending and have sentencing on all three cases today, *and it's a negotiated sentence*. [emphasis supplied]
>
> . . .
>
> THE COURT: All right, let's proceed with the plea if that's what Mr. Castro wants to do.
>
> MR. MIKA: Judge, on the three cases, the one case in which the jury returned a verdict, 98-2443F, and the two pending cases, 98-3475F and 98-3665F, to those Informations Mr. Castro enters a best interest, no contest, plea. The understanding that we have is that he be adjudicated guilty on each count in each information. On the robbery charge he will serve a 15-year Department of Corrections sentence.
>
> THE COURT: One second, on 98-2443 he was tried.
>
> MR. MIKA: Yes, sir, right.
>
> THE COURT: So what do you mean he is - - did you just say

he was pleading to that?

MR. MIKA: He is pleading to the other two cases.

THE COURT: Okay.

MR. MIKA: Yeah, I'm sorry if I - -

THE COURT: All right. And there is a sentence that's going to already be agreed on 2443?

MR. MIKA: Well, I guess that's what we had sort of maybe - -

THE COURT: Maybe somebody skipped me here, I didn't get that. In other words, the State is going to make a recommendation on 2443?

MR. RAWE: Yes, your Honor. The recommendation that I made, to wrap all three cases, is that the Defendant be sentenced to 15 years Department of Corrections on 98-2443F, followed by a 20-year sentence consecutive to that 15, a 20-year sentence Department of Corrections on 98-3475F and 98-3865F [*sic*].

THE COURT: And that's - -

MR. RAWE: A straight sentence.

THE COURT: No enhancements on those two sentences.

MR. RAWE: On those two, and it would be a stipulated upward departure on all three as far as sentence.

THE COURT: And even on the first case that would not be a PRR.

MR. RAWE: That is correct, your honor.

THE COURT: Okay. Approach the bench.

(THERE WAS AN OFF THE RECORD DISCUSSION AT THE BENCH.)

THE COURT: All right, I'm ready to proceed with the sentencing on 98-2443.

MR. MIKA: Judge, I believe Mr. Castro is going to accept - - or ask the Court to accept the plea to all three case numbers, *as the Court has indicated*. [emphasis supplied]

THE COURT: Two case numbers. He has been convicted of the third case.

MR. MIKA: I'm sorry, Judge.

THE COURT: If he wants to plead to 98-3475 and 98-3665, I have agreed that I will accept those pleas, and I will sentence him on those cases to an upward departure sentence, stipulated to, that is agreed to by him and by you, to 35 years on the armed burglaries, and to five years on the third degree felonies. And that will run concurrent with a 15-year sentence, which would be an upward departure in 98-2443.

MR. MIKA: Yes, sir.

THE COURT: if that's what Mr. Castro wants to do *and that's what the State has offered*, I will go along with it. [emphasis supplied]

(THERE WAS A CONFERENCE BETWEEN THE DEFENDANT AND

COUNSEL)

THE DEFENDANT: Yes, your honor.

THE COURT: How does he plead?

MR. MIKA: No contest, Judge.

THE COURT: Mr. Castro, do you understand - - do you solemnly swear or affirm the answers to the following questions will be true?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand that you're entering a plea to two counts of armed burglary to dwellings, which are first degree felonies punishable by life in prison; two counts of grand theft and one count of grand theft of a firearm, and those are felonies each punishable by up to five years in prison?

THE DEFENDANT: Yes, your Honor.

. . .

THE COURT: All right, I find that the pleas are entered freely and voluntarily, and I will accept them. I have read the probable cause affidavits and find there is a factual basis. . . .[16]

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[16] The probable cause affidavit in 98-3475F does not, in counsel's opinion, provide probable cause for a charge of armed burglary against Castro. The affidavit only supports a finding that there was an armed burglary, it does not contain any allegation that ties Castro to an entry into the dwelling or to Castro's personally having armed himself with a stolen firearm. The affidavit in 98-3665F is a little better, but there is no

[R3-174-185]

Intentionally or unintentionally the judge had interjected a subtle but very important change in the terms of the plea agreement - the sentence was still a total sentence of 35-years, but now the 35 years is being arrived at by a concurrent 35 years on the two armed burglaries instead of a consecutive 20 years to the 15 years on the robbery. This clearly was not what had been agreed to in writing by Castro in the written plea agreement he had signed with his attorney and filed that very morning with the Court. This clearly was not the offer the State had made to the Defendant. Yet, the Court mischaracterized the sentence as "what the State has offered." This was not what the State had offered. This was what the Court was offering. At no time did the Court advise Castro that the Court had rejected the plea agreement made between the State and the Defendant and that the Court was now making the offer. At no time did the Court explain to Castro that the terms of the deal had been materially changed. At no time did the Court advise Castro that as a result of the Court's change in the plea agreement, that he had now lost his right of appeal of the conviction arising out of the trial of the robbery charge.[17] In

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allegation that Castro armed himself while committing the burglary, that is, the fact that at some later date he possessed a firearm that had been stolen in a burglary is not evidence that he armed himself during the course of the burglary.

[17] No doubt the import of the change was clear to the trial judge. By running the 35 year sentences on the armed burglaries

fact, this alteration in the sentencing package constituted a *de facto* waiver of Castro's appeal rights on the robbery and felony battery charges, yet at no time did the Court engage in a waiver of appeal colloquy with Castro.

It is important to note that there was no reason at this point to enter a plea to the two life offenses. The two cases were not on the calendar the day of the filing of the plea agreement and entry of plea. Instead, the only case on the calendar that day was the robbery case, 98-2443F, for sentencing. The "plea agreement" did not make any concession as to the robbery case other than that it would not be sentenced as a prison releasee reoffender.[18] The judge sentenced Castro to the statutory maximum for the robbery charge. Why the hurry to dispose of such serious charges? The Court had noted at hearing on a Defense motion to continue that the Court heard on February 16, 1999 in 98-2443F, "Well, I understand that Mr. Mika is leaving the Public Defender's office." Assistant State Attorney Rawe responded "Well, Judge, I understand that as

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concurrent with the 15 year sentence on the robbery, any appeal of the robbery would be moot under the concurrent sentence doctrine. This was not explained or even mentioned to the Defendant.

[18] This was a concession that could save Mr. Castro up to 15% off his sentence, for good behavior, approximately 27 months. However, there is no reason that this benefit could not have been effected by either a motion under Rule 3.800 or by a *nunc pro tunc* modification of the sentencing order, if the Defendant and State later reached an agreement on a sentencing package after the Defendant's counsel had completed diligent discovery, investigation, and case preparation.

well." [R3-80-85] Castro, in his sworn 3.850 Motion, alleges that Mr. Mika had committed to a job with the State Attorney's Office, a fact that Mika did not inform Castro of at the time of his representation, and which Castro alleges created a conflict of interest.

This conflict of interest was never disclosed to Castro during the proceedings, although both the Court and opposing counsel appeared aware of it. There was no disclosure, so obviously there also was no hearing for the court to discuss the conflict with Castro and determine if it were waiveable and if so, if Castro were willing to waive it.

Clearly Castro did not intend to waive his right of appeal of the robbery and felony battery convictions, because he caused his Public Defender to file a timely notice of appeal in 98-2443F. Castro alleged in his 3.850 motion that due to his trial counsel joining the State Attorney's Office, he was not available and did not make himself available to the appellate public defender assigned to the appeal. That attorney filed an *Anders* brief that noted the force question on the robbery, but did not argue it. Without benefit of effective appellate advocacy on Castro's behalf, this Court affirmed his robbery and felony battery convictions without published opinion on May 3, 2000.

Thereafter Castro filed a timely Motion for Post-conviction Relief under Rule 3.850, Florida Rules of Criminal Procedure on or

about March 9, 2001. The motion was drafted in the style of a *pro se* pleading, but the oath of the petitioner was acknowledged by a member of the Florida Bar, James Glennon Mahorner.

The motion set forth the following claims:

I. Conflict of Interest

a. The Public Defender was committed to the prosecution not the defendant.

b. The Public Defender did not tell the defendant he had committed to job with the State Attorney and would be working with the State Attorney when the appeal was taken.

c. The Public Defender needed to resolve the charges because he was leaving the office.

II. Ineffective Assistance of Trial Counsel

a. Due to age and lack of education the defendant needed direction from attorney.

b. The defendant needed full disclosure from his attorney of relevant facts.

c. The Public Defender needed to resolve the charges because he was leaving the office.

d. The Public Defender did not tell defendant he had

committed to job with State Attorney.[19]

e. Despite great public interest and publicity[20] the Public Defender did not move for a change of venue.

f. The Public Defender waived a defense of Double Jeopardy based on the use of the same battery to complete the robbery and for the charge of battery on a person over age 65.

g. The Public Defender did not seek a special jury instruction [on the issue of the force necessary to amount to robbery] and this omission was criticized in *Anders* brief.

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[19] Attorney James Mahorner wrote the former Public Defender, John Mika, who is now an Assistant Attorney General in Tallahassee, and asked him: "How long after sentencing of Castro did you terminate your customary presence with the public defender's office. {Before using terminal sick and vacation time) How long before sentencing did you have employment communication with the state attorney office." In reply, Assistant Attorney General Mika wrote back: "I had given notice to my employer that I was leaving the Public Defender's Office prior to sentencing in this matter. My new position is with the Department of Legal Affairs, Office of the Attorney General, in their civil litigation section and **not** with the state attorney." Defendant's Exhibits 11 and 12 to Motion for Post-conviction Relief. Mr. Mika pointedly did not respond to the question whether he had had employment communication with the state attorney before Castro's sentencing and did not say that he had not gone to work for the state attorney before coming to the Attorney General's Office. He merely said that his current position was with the Attorney General.

[20] The former Public Defender notes in his reply to Attorney Mahorner, Defendant's Exhibit 12 to the Motion for Post-conviction Relief, that the "CBS newsshow 48 Hours was producing a story on Mr. Castro."

h. The Public Defender did not consult with the appellate attorney and that prejudiced the defendant on appeal, specifically noting the *Miranda* issue, the force necessary for robbery issue, and the improper testimony of committing purse snatchings for a living issue.[21]

i. The Public Defender had the defendant decide on the plea offer without benefit of having any discovery.

j. The Public Defender did not explain that the muzzle loader replica which was the alleged firearm in one of the armed burglary charges was not a firearm under the law.

k. The Public Defender made no effort to question any witnesses to determine if the muzzle loader was operable.

l. The Public Defender did not check to see if the weapon was a firearm under the law so as to require registration.

m. The Public Defender did not inform the defendant that his statement to a jailhouse informant would not be

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[21] Attorney Mahorner had inquired of the former Public Defender Mika whether he knew that the appellate public defender had filed an *Anders* brief and whether it was the custom of the appellate public defender to consult with the trial public defender before filing an *Anders* brief. In reply, Mika did not answer whether he knew or not that an *Anders* brief had been filed and did not say whether he had been consulted on the brief. His only reply was "I do not know the usual practice of the appellate public defender." Defendant's Exhibits 11 and 12 to Post-conviction Relief motion.

admissible if found to be a boast and not an admission.

n. The Public Defender did not check to see if the jailhouse informant had been used previously as an informant or had been placed by the prosecution purposely to obtain the defendant's statement in violation of his written [*Edwards*'] notice.

III. Plea And Agreed Upon Upward Departure Not Knowing And Intelligent

a. The Public Defender came to the defendant with the state offer the morning of sentencing.

b. The defendant's written plea agreement was changed without the defendant's permission.

c. The sentencing was not consistent with the plea agreement but the Public Defender told the defendant it was fine.

d. The change in the sentencing from what had been agreed to had the effect of taking away the defendant's right of appeal of the robbery conviction.

e. The Public Defender had the defendant decide on the State's offer of a 35 year sentence without benefit of having completed discovery.

IV. Robbery Conviction Invalid due to Issue of Lack of Force

a. The offense was not a robbery, *cf.* new Fla. Stat. §

812.131.

b. The Public Defender had said that there was a substantial point that the force did not equate to robbery but only larceny.

V. Armed Burglary Charge - Lack of Defense Investigation

a. The Public Defender did not explain that the muzzle loader replica was not a firearm under the law.

b. The Public Defender made no effort to question any witnesses to determine if the muzzle loader was operable.

c. The Public Defender did not check to see if the weapon was a firearm under the law so as to require registration.

d. The Public Defender did not inform the defendant that his statement to the jailhouse informant would not be admissible if found to be a boast and not an admission.

e. The Public Defender did not check to see if the jailhouse informant had been used previously as an informant or had been placed by prosecution purposely to obtain the defendant's statement in violation of his written [*Edwards*'] notice.

f. The Public Defender did not tell the defendant that the probable cause affidavit falsely stated that a fingerprint match was obtained when in fact only a palm print was obtained.

VI. Constitutional Challenge to Charges

a. None of the charges were brought by the required constitutional officer, the State Attorney, but rather by an Assistant State Attorney, in violation of the constitution.

VII. Discovery Rights on Habeas

a. It was essential to allow the post-conviction relief attorney to take the deposition of the Public Defender.

The trial court promptly denied the 3.850 motion on March 27, 2001 without benefit of a response by the state, a supplemental memorandum of law from counsel for petitioner Castro, or any evidentiary hearing, despite the fact that the motion was facially sufficient, timely, and replete with specific factual allegations that if true, would entitled Castro to relief, and which could not be conclusively refuted merely by attachments from the record. The trial court attached the following portions of the record to its order denying relief:

1. The probable cause affidavits in case numbers 98-3475F and 98-3665F.

2. The Acknowledgment and Waiver of Rights form [this, in fact, is a written plea agreement, although captioned an Acknowledgment and Waiver of Rights].[22]

[22] It should be beneath the dignity of a court to mischaracterize something as fundamental and important as a written plea agreement, by causing it to be printed with a misleading caption. This form appears to be a preprinted form used by the court for guilty pleas. It clearly is a plea agreement form, and is used, as it was in this case, to have a defendant give up his right to trial and enter a guilty plea, yet nowhere on the form is it identified as such. Then to compound this judicial slight of hand, the trial judge who issued the order denying relief tried to hide behind that label, by asserting that "First, the Defendant did not sign a "plea agreement," but did sign an Acknowledgment and Waiver of Rights."

3. The sentencing guidelines score sheet.

4. Transcript of February 16, 1999 hearing.

5. Transcript of March 12, 1999 change of plea and sentencing.

6. Portions (seven pages) of the transcript of the voir dire of March 2, 1999.

7. Four pages of the March 5, 1999 trial transcript.

8. The judgement and sentence in all three cases.

A timely Petition for reconsideration was filed which was again promptly denied by the trial judge on April 16, 2001. A timely notice of appeal of the denial of the motion was filed on April 30, 2001, and this appeal followed.

STANDARDS OF REVIEW

When a 3.850 motion is summarily denied without an evidentiary hearing, the order shall be reversed and the cause remanded for an evidentiary hearing unless the record shows conclusively that the appellant is entitled to no relief. Fla. R. App. P. 9.140(i), "Rule 3.850 explicitly requires that the record 'conclusively' rebut an otherwise cognizable claim if it is to be denied without a hearing." *State v. Leroux,* 689 So.2d 235, 237 (Fla.1996), cited in *Flowers v. State*, 2001 WL 387752 (Fla. 2nd D.C.A. April 18, 2001). To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. *See* Fla. R.Crim. P. 3.850(d). Further, where no evidentiary hearing is held below, the appellate court must accept the defendant's factual allegations to the extent they are not refuted by the record. *See Lightbourne v. Dugger,* 549 So.2d 1364, 1365 (Fla.1989). Rule 3.850 requires defendants to allege "a brief statement of the facts (and other conditions) relied on in support of the motion." Fla. R.Crim. P. 3.850(c)(6). Although mere conclusory statements alleging ineffectiveness are insufficient, *see, e.g., Kennedy v. Singletary,* 599 So.2d 991 (Fla.1992), petitioners are not required to allege the witnesses who are available to testify at the evidentiary hearing. *See, e.g., Valle v. State,* 705 So.2d 1331, 1333 (Fla.1997), *Peede v. State*, 748 So. 2d 253 (Fla. 1999). A defendant's claim that trial

counsel's failure to interview and subpoena a witness was potentially ineffective assistance required remand for evidentiary hearing on whether counsel's omission was a matter of strategy. *Stokes v. State*, 2001 WL 332020 (Fla. 2nd D.C.A. April 6, 2001); see also *Flores v. State,* 662 So.2d 1350 (Fla. 2d D.C.A. 1995). Voluntariness of plea requires evidentiary hearing where defendant alleges promises that are not incorporated in sentencing, *Hyslop v. State*, 2001 WL 127758 (Fla. 2nd D.C.A. Feb. 16, 2001). Trial court was precluded from denying as facially insufficient petitioner's claim that his counsel was ineffective by failing to depose agent who secured his confession or by failing to preserve suppression issue for appellate review. *Reid v. State*, 777 So.2d 431 (Fla. 2nd D.C.A. 2000). *Mancera v. State,* 600 So.2d 550 (Fla. 2d D.C.A. 1992) (holding allegation that counsel failed to move to suppress confession even though he was aware that it was coerced was facially sufficient). *Pena v. State*,773 So.2d 1184 (Fla. 2nd D.C.A. 2000)(error to deny 3.850 motion without evidentiary hearing and remand was necessary to determine whether trial counsel was ineffective by failing to adequately prepare for trial). *Moragne v. State*, 761 So.2d 440 (Fla. 2nd D.C.A. 2000)(Post-conviction claim that trial counsel was ineffective for failing to request jury instruction on alibi defense was not conclusively refuted by record attachments, thus requiring reconsideration by Post-conviction court). *State v. Leroux*, 689 So.2d 235 (Fla. 1996)(held that

defendant's negative response to trial court's question of whether anything was promised to defendant to induce guilty plea did not conclusively refute Post-conviction relief claim that his negotiated plea was product of trial counsel's alleged misrepresentations and, therefore, evidentiary hearing was required). *Trenary v. State,* 453 So.2d 1132 (Fla. 2nd D.C.A. 1984)(held that the law is well settled that if a defendant enters a plea in reasonable reliance on his attorney's advice, which in turn was based on the attorney's honest mistake or misunderstanding, the defendant should be allowed to withdraw his plea). *See also Costello v. State,* 260 So.2d 198 (Fla.1972); *Brown v. State,* 245 So.2d 41 (Fla.1971).

SUMMARY OF ARGUMENTS

The record attached to the court's order of denial fails to conclusively show that Castro is not entitled to relief, therefore the trial court clearly erred in denying Mr. Castro's Motion for Post-conviction Relief under Rule 3.850, Florida Rules of Criminal Procedure, without an evidentiary hearing.

Indeed, we argue that the record as it currently exists shows that Castro is entitled to relief on his claim that the plea agreement was violated (Ground Three) and on the claim that he was denied effective assistance of trial counsel when his trial counsel failed to request a theory of defense instruction under *Robinson v. State*, 692 So.2d 883 (Fla. 1997) (Ground Nine).

On the remaining issues (except Ground Eight, the Double Jeopardy claim, as to which we concede error), Mr. Castro is entitled to an evidentiary hearing, and should be first allowed pre-hearing discovery, including the right to take the deposition of his former trial attorney.

ARGUMENTS

I. The Record Did Not Conclusively Establish That Mr. Castro Was Not Entitled To Relief on His Claims.

The Circuit Court's attachment of portions of the record to its order denying relief without an evidentiary hearing fails to conclusively show that Castro is not entitled to relief.

The trial court organized Castro's claims into nine grounds.[23] For ease of analysis, the argument in this brief will track the trial court's order:

A. Ground One - Ineffective Assistance of Counsel - Conflict of Interest

The trial court describes the first ground as an ineffective assistance of counsel claim when referring to Castro's unrefuted claim that his trial attorney had already planned on moving to a position with the state attorney while he was defending Castro in these cases. The claim is a special category of ineffective assistance of counsel, conflict of interest. Conflicts of interest can be potential or actual. In either event, if the court is on notice of a conflict of interest, whether potential or actual, the

[23] Castro's petition was in the form of a *pro se* pleading. The petition did not identify grounds for relief using legal language. The petition did not set forth discrete grounds. The petition contained no memorandum of law and no citation to any authority. We commend the trial court for its effort in organizing the petition into identifiable grounds of relief, although we do not necessarily agree entirely with the trial court's analysis.

court has a duty to engage in an inquiry with counsel and the defendant to insure that the defendant is on notice of the conflict, to examine the nature of the conflict, to determine if it is a conflict that is susceptible of waiver, and if so, to determine if the defendant will be allowed to waive the conflict, and if so, if he wishes to waive the conflict. Any waiver must be on the record and must be knowingly and intelligently made. *United States v. Ross,* 33 F.3d 1507, 1523 (11th Cir.1994), *cert. denied,* 515 U.S. 1132, 115 S.Ct. 2558, 132 L.Ed.2d 812 (1995) (citing *Wheat v. United States,* 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)); *In re Paradyne Corp.,* 803 F.2d 604, 611-12 (11th Cir.1986)("An otherwise valid waiver is effective if the defendant 'understands the details of his attorney's *possible* conflict and the *potential* perils of such conflict." *Id.* at 611. U.*S. v. Ard,* 731 F.2d 718, 725 (11th Cir.1984)); *Holloway v. Arkansas*, 98 S.Ct. 1173, 55 L.Ed. 2d 426 (1978).

An actual conflict of interest that adversely affects counsel's performance violates the Sixth Amendment of the United States Constitution. *Barclay v. Wainwright,* 444 So.2d 956 (Fla.1984). Nevertheless, a defendant's fundamental right to conflict-free counsel can be waived. *United States v. Rodriguez,* 982 F.2d 474 (11th Cir.), *cert. denied,* 510 U.S. 901, 114 S.Ct. 275, 126 L.Ed.2d 226 (1993); *Woseley v. State,* 590 So.2d 979 (Fla. 1st D.C.A. 1991). For a waiver to be valid, the record must show

that the defendant was aware of the conflict of interest, that the defendant realized the conflict could affect the defense, and that the defendant knew of the right to obtain other counsel. 982 F.2d 474 at 477. It is the trial court's duty to ensure that a defendant fully understands the adverse consequences a conflict may impose. *Winokur v. State,* 605 So.2d 100 (Fla. 4th D.C.A. 1992), *review denied,* 617 So.2d 322 (Fla.1993).

Castro has alleged under oath that his trial attorney was committed to a job with the state attorney. The trial court pointed to the former trial attorney's letter (which *Castro* had attached as an exhibit to his Post-conviction relief motion) in which the trial attorney did not respond to the question whether he had been in communication with the state attorney about employment possibilities before Castro's sentencing, but only stated that his current position was with the Attorney General, as evidence refuting Castro's claim. Clearly the trial attorney's evasive response is not conclusive evidence refuting the accusation sworn to by Castro.

Because the trial court did not permit Castro an evidentiary hearing, this court must accept as true the defendant's factual allegations to the extent they are not refuted by the record. *See Lightbourne v. Dugger,* 549 So.2d 1364, 1365 (Fla.1989). If the allegation were true, then Castro would be entitled to relief; at a minimum he is entitled to an evidentiary hearing to establish the

parameters of the conflict and to further identify its effect on his representation. *Cf. Quince v.* State, 592 So.2d 669 (Fla. 1992), *Thompson v.* State, 246 So.2d 760 (Fla. 1971), *Monson v. State*, 443 So.2d 1061 (Fla. 1st D.C.A. 1984), *State v. Fitzpatrick*, 464 So.2d 1185 (Fla. 1985), *Surrette v. State*, 251 So.2d 149 (Fla. 2nd D.C.A. 1971).

B. Ground Two - Ineffective Assistance of Counsel - *Anders* Brief.

The trial court properly notes that ineffective assistance of appellate counsel ("IAAC") claims must be presented by a Petition for Habeas Corpus directed to the District Court of Appeal. We agree with this proposition.[24] However, the IAAC claims are presented in this petition do double duty as ineffective assistance of trial counsel ("IAC"), because the argument is that the trial counsel failed to consult with appellate counsel after he left the public defender's office, abandoning his duty to his client to insure that the appellate counsel had the advice and assistance of the trial attorney who was most familiar with the record and issues in deciding what and how to argue the appeal. Mr. Mika seems to concede in his letter to Attorney Mahorner [Defendant's Exhibit 12 to Post-conviction Relief Motion], that he did not consult with the appellate counsel.

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[24] This Court affirmed Castro's direct appeal on May 3, 2000. Accordingly, Castro has until May 4, 2002 to file his habeas for ineffective assistance of appellate counsel.

C. Ground Three - Violation of Plea Agreement

Perhaps the gravest issue presented by this appeal is the violation of Castro's plea agreement. The trial judge sophistically opined that Castro "did not sign a "plea agreement[.]" Having said that, the trial judge proceeded to recite that the written "Acknowledgment and Waiver of Rights" set forth certain terms, that included a sentence of 15 years on the robbery conviction, to be followed by *a* ***consecutive 20*** *year sentence on each of the two armed burglary convictions* (the two armed burglary sentences to run concurrent with one another), for a *total* of 35 years in prison.

In the very next sentence of his order, the trial judge states "the Court indicated that it would accept the plea . . ." but then when the trial judge recites what the defendant has agreed to as the sentence, the sentence has somehow shifted to ***35*** *years on the armed burglary charges and a* ***concurrent*** *15 year sentence on the robbery charge*.

Nothing was said at the plea colloquy to explain to the Castro that the trial judge had rejected the State's offer. In fact, there is nothing in the record to put anyone on notice that the court had rejected the State's offer. As a trained criminal attorney one can surmise that that is what happened, but the record is bereft of any colloquy between the court and defendant or the court and counsel to show what has happened.

Assuming that this is what happened, and not merely a mistake by the court when it restated the terms of the written plea agreement, then the trial judge's *sua sponte* intervention in the plea negotiation, and his unilateral offer of a plea agreement from the court violates the Supreme Court's dictates in *State v. Warner*, 762 So.2d 507 (Fla. 2000). On this record Castro is entitled to withdraw his pleas and be resentenced on the robbery charge on this basis alone.

The trial judge states that there was a discussion between Castro and his counsel whereupon Castro indicated his willingness to enter *this* agreement and that subsequently the court engaged in a lengthy colloquy with the defendant about *his understanding of the plea, his rights, the sentences*. There is nothing in the record to reflect what Castro discussed, if anything, with his counsel, and the record does not contain one single word of the court explaining to Castro that the court had changed the deal that Castro had agreed to in writing and which had been repeated orally to the court and accepted by the State immediately prior to Castro's pleas.

What should be in the record, but is not, is an exchange whereby the court told Castro that the Court had refused to accept the State's offer. What should have been in the record was the court telling Castro that instead of the 20 year consecutive sentence on the armed burglaries that the State had offered, the

Court was only willing to accept a 35 year sentence on those charges. What should have been in the record but is not, is the court asking Castro if he understood the significance of the change in the sentence structure, that is, that his right of appeal on the robbery conviction and sentence would now be moot under the concurrent sentence doctrine. What should have been in the record, but is not, is the court asking Castro if he were therefore willing to waive his right of appeal on the robbery charge.

The trial judge stated that the Defendant "willingly entered into a plea agreement, negotiated by his attorney . . ." The attorney did not negotiate this agreement. The agreement the attorney negotiated was rejected by the court. This was a court offer in violation of *State v. Warner* and there is nothing in the record to show that the defense counsel had anything to do with the negotiation of this agreement.

In a masterpiece of understatement the trial judge concludes his denial of the breach of plea agreement claim as follows:

> Although the terms of the plea and sentencing agreement do not *exactly* match what is written on the Acknowledgment and Waiver form, there is no doubt that the Defendant was informed of *all details* of the agreement and indicated his understanding and assent to *the* agreement. [emphasis supplied]

We can agree with the trial judge that a 35 year sentence is

not *exactly* the same as a 20 year sentence. No, it is not *exactly* the same, for it means that Castro must serve 15 more years in prison than he had agreed to for those charges. It means that he had no effective right of appeal on the robbery conviction. We do not agree that he was informed of *all details* because the record shows that Castro was not informed of *any* details. Finally, the conclusion begs the question, which is, what was the agreement that Castro thought he was getting.

On this record, as it stands, Castro is entitled to relief.[25]

D. Ground Four - Ineffective Assistance of Counsel - Failure to Investigate Weapon in 98-3475F

The trial judge dismissed the lack of investigation IAC claim as to 98-3475F as follows:

> Whether or not defense counsel investigated the operability of the muzzle loader or the registration of the other firearms is irrelevant in light of the Defendant's plea to the offenses. The Defendant has waived his right to question the evidence and he fails to satisfactorily indicate how he was prejudiced by any of the omissions he has alleged his attorney committed.
>
> Clearly a plea of no contest does not operate as a bar to a

[25] Given this record, if this matter is remanded for an evidentiary hearing, we would request this honorable Court instruct that the matter be heard by a judge other than Judge Dubensky or Judge Williams.

later post-conviction relief claim alleging IAC. *Frazier v. State*, 447 So.2d 959 (Fla. 1st D.C.A. 1984). All that the movant need show is that had the investigation been done he would have more likely taken the case to trial or would have had a viable defense. Although the petition could have been more artfully drafted, the clear implication of the allegation is that had the investigation been done it would have led to a defense and the defendant would have taken the case to trial rather than plead to a 20 or 35 year sentence.

The question in terms of presented a legal defense is, was the muzzle loader a "dangerous weapon" for purposes of the armed burglary statute. *See Mims v. State*, 662 So.2d 962 (Fla. 5th D.C.A. 1995) Without some investigation to determine what this "muzzle loader" was, it is impossible to determine whether it was or was not a dangerous weapon. Regarding the determination wether the weapon was loaded and operable, *Wilson v. State*, 776 So.2d 347 (Fla. 5th D.C.A. 2001), by implication, suggest that a weapon must be loaded and capable of firing to constitute a dangerous weapon for armed burglary.

This was not the only lack of investigation complained of by Castro. Castro argued that his public defender did no discovery and took no depositions in two cases as to which Castro was threatened with mandatory life sentences, and as to which his public defender persuaded him to plead guilty to 20 or 35 year

sentences. The court does not respond to or address these broader claims. The allegations must be accepted as true, because the record attached to the order of denial does not conclusively refute them. If true, it clearly fell beneath any accepted standard of effective assistance of counsel to plead a 19 year old to a 35 year prison sentence without doing any discovery or investigation whatsoever to determine if there were any viable defense.

E. Ground Five - Ineffective Assistance of Counsel - Failure to Investigate Jailhouse Snitch

In *United States v. Henry,* 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), the Supreme Court held that an undisclosed government jailhouse informant "deliberately elicited" incriminating statements from the defendant and therefore interfered with his Sixth Amendment right to counsel. *Illinois v. Perkins,* 496 U.S. 292, 110 S.Ct. 2394, 2399, 110 L.Ed.2d 243 (1990). The Supreme Court's Sixth Amendment decisions in *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), *United States v. Henry,* 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), and *Maine v. Moulton,* 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985), held in those cases that the government may not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged with the crime. After charges have been filed, the Sixth Amendment prevents the government from interfering with the accused's right to counsel.

Moulton, supra, at 176, 106 S.Ct., at 487.

The Public Defender recognized that this was a likely issue that needed to be investigated. At the hearing on the motion for continuance, the Public Defender explained that he needed more time to locate the former jailhouse informant who claimed to have elicited a confession from Castro as to the 98-3665F. He never followed through. The trial judge excuses this lack of investigation as follows:

> Within the next month, however, a plea was negotiated, and this obviated the need for further discovery.

That would be correct, if the case fell within the parameters of *Stano v. Dugger*, 921 F.2d 1125 (11th Cir. 1991), for example, and the trial judge could point to evidence in the record that the plea was at Castro's insistence, after having been advised by a competent and experienced criminal defense attorney that he should first wait until discovery and investigation were completed. Instead the case is the other way around. The record shows that the State came to Castro the morning of his sentencing on the robbery case, 98-2443F, with an offer that could not properly be evaluated until discovery, in particular an investigation into the possible challenge on the jailhouse informant's claimed testimony, were completed. This is a claim that is not refuted conclusively by the record attached to the court's order of denial. Castro is entitled to an evidentiary hearing to expand the record on this

claim.

F. Ground Six - Ineffective Assistance of Counsel - Palm Print Error

Although not artfully worded, we submit that the claim Castro attempts to present in Ground Six is IAC for failure to investigate the reliability of the alleged palm print match, when it had already been determined that the original report erred in describing the match as a fingerprint match when it is now alleged to have been a palm print match. There is no report of an expert in the record and none attached to the order of denial that matches Castro's palm print with any print found at the scene of the burglary.[26] We submit that this is an issue that requires further development at an evidentiary hearing.

G. Ground Seven - Ineffective Assistance of Counsel - Publicity and Failure to Request Change of Venue

The trial court applied the wrong legal standard in denying relief on Castro's claim that he was denied effective assistance of counsel due to his trial counsel's failure to request a change of venue due to pretrial publicity. The trial court in its order of denial looked only to the record of the voir dire, in which it appeared possible to obtain a jury that was not prejudiced by the 48 Hours broadcast and coverage and other publicity. The selection

[26] The State's discovery responses that are in the record in both 98-3475F and 98-3665F refer to *fingerprint* cards and *fingerprint* analysis only.

of the jury is one factor, but not conclusive. To prevail on claim that trial court should have ordered change of venue on ground that media coverage saturated market, a defendant need only prove 1) that a substantial number of people in the relevant community could have been exposed to some of the prejudicial media coverage, and 2) that effects of the media saturation continued until trial. *Provenzano v. Singletary*, 3 F.Supp.2d 1353 (M.D. Fla. 1997). We submit that the record attached to the order does not conclusively refute the pretrial publicity claim when viewed under the proper legal standard.

H. Ground Eight - Ineffective Assistance of Counsel - Double Jeopardy Claim

We concede that the trial court was correct in denying relief as to Ground Eight. *See Hamrick v. State,* 648 So.2d 274 (Fla. 4th D.C.A. 1995) and *Maultsby v. State*, 688 So.2d 1010 (Fla. 3rd D.C.A. 1997), cited by the trial court.

I. Ground Nine - Ineffective Assistance of Counsel - Failure to Request Special Defense Jury Instruction under *Robinson v. State,* 692 So.2d 883 (Fla. 1997)

In light of this Court's recent decision in *Owen v. State*, 2001 WL 427616 (Fla. 2nd D.C.A. April 27, 2001), applying *Robinson* to facts squarely on point with the instant offense, the prejudice resulting to Castro from his trial counsel's failure to request a special jury instruction under *Robinson*, which was the law of the

State at the time of this trial, is apparent. Given the misargument of the facts and law by the State in closing argument, on this very point, the error was even more prejudicial. The defendant would have been entitled to a special instruction under *Robinson* and it would have been error for the trial court not to have given it if requested. If given, the instruction would have prevent the false argument of the State and properly focused the jury on the sole legal defense in the case.

We submit that Castro is entitled to relief on this claim in case number 98-2443F without need of any further proceedings.

II. Castro Is Entitled to Pre-Hearing Discovery

Given the complexity of the issues raised, it would facilitate an efficient hearing and would provide greater Due Process protection for Castro if this Court were to allow pre-hearing discovery if this matter is remanded for an evidentiary hearing. Such discovery is within the discretion of the court. *Davis v. State*, 624 So.2d 282 (Fla. 3rd D.C.A. 1993)(deposition of trial attorney should be allowed prior to hearing on claim of ineffective assistance of trial counsel).

CONCLUSION

Appellant Castro respectfully requests this Honorable Court reverse the order of the Circuit Court for the Twelfth Judicial Circuit and vacate his no contest pleas and judgments and sentences in case numbers 98-3475F and 98-3665F vacate his convictions and sentences in case number 98-2443F. In the alternative, Castro respectfully requests that this honorable Court remand this case for an evidentiary hearing on the grounds identified above (that is, all but ground eight, the Double Jeopardy claim), with instructions (1) that Castro be allowed reasonable pre-hearing discovery, including, but not limited to the right to depose his former trial counsel, and (2) that the matter be set before a judge other than Judge Dubensky or Williams.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing have been furnished to the Office of the Attorney General, The Capitol, Tallahassee, FL 32399 by hand and by United States Postal Service, this May 10, 2001.

_____
William Mallory Kent

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant Castro certifies that the size and style of type used in this brief is 12 point Courier or Courier New.

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William Mallory Kent