

**IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA**

CASE NO. 3D08-510

SEAN CASEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

**APPEAL FROM CIRCUIT COURT
ELEVENTH JUDICIAL CIRCUIT, MIAMI-DADE COUNTY**

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STATEMENT OF THE CASE AND FACTS

I. Proceedings in the Trial Court.

Mr. Casey was charged in an amended Information with DUI Manslaughter/
Failure to Render Aid in violation of Fla.Stat. § 316.193(3)(c)3b (Count One),
Vehicular Homicide/Failure to Render Aid in violation of Fla.Stat. § 782.071(2)
(Count Two), and Leaving the Scene of an Accident with Death in violation of
Fla.Stat. § 316.027(1)(b) (Count Three). (R1-5-8).¹ These charges stemmed from a
traffic accident at about 10:15 a.m. on March 11, 2001, in which a pedestrian crossing
Harding Avenue on Miami Beach was struck by a passing automobile and killed.

The initial description of the suspect vehicle was that of a red BMW. Shortly
thereafter, the description of the vehicle was changed to a black BMW driven by a
black male. (R6-1005-06). Mr. Casey is a blond haired, fair-skinned Caucasian male.
(R10-1628).

Less than half an hour later, a BMW was found, lawfully parked but seemingly
abandoned, about a mile away. The forensic evidence showed beyond any doubt that

¹ Appellant Sean Casey will be referred to as he stands in this Court and
by name. The Record on Appeal will be referred to by "R" followed by the volume
number which, in turn, will be followed by a hyphen and the pertinent page numbers.
Mr. Casey's Motion for Post-Conviction Relief filed pursuant to Fla.R.Crim.P. 3.850
will be referred to as "Rule 3.850 motion." The briefs of the parties filed in the
State's appeal to this Court in this case from the trial court's Order granting Mr.
Casey's motions to suppress (*State v. Casey*, Case No. 3D02-04 (3d DCA)) will be
referred to herein as "State's Brief, Case No. 3D02-04" or "Mr. Casey's Brief, Case
No. 3D02-04." This Court can take judicial notice of the content of those briefs.

this was the car involved in the accident. (R6-1008-09). Thus, by about 10:45 a.m. on March 11, 2001, the police had identified, taken and impounded the vehicle that caused the fatality in question. It was then a simple matter for the police to check automobile identification records and determine that the black BMW they had impounded belonged to Sean Casey. (R6-1010).

Prior to Mr. Casey's scheduled trial, he filed a motion to suppress evidence taken from his home and car and any evidence derived therefrom. In this motion, he asserted that the police conducted an unconstitutional warrantless search of his apartment and his car and further explained as follows:

In the late-morning hours of Sunday, March 11, officers of the Miami Beach Police Department appeared at the apartment of Defendant Sean Casey and demanded entrance. The officers inquired about Mr. Casey's car; *their inquiries were couched in such a way as to suggest that the car had been stolen.* In the course of pursuing their purported investigation into the theft of Mr. Casey's car, the officers searched Mr. Casey's apartment and seized a number of items of physical evidence.

In truth the officers were never pursuing a stolen auto investigation. Mr. Casey's car was already in police custody. It had been found by the police about a mile from the location of a hit-and-run accident, and it matched the description of the car involved in that accident. As of this writing, the car remains in the custody of the Miami Beach Police Department. Upon information and belief, it has been towed to a police facility where it has been subjected to various kinds of examinations.

(R1-36).

Mr. Casey also filed a motion to suppress pre-arrest statements that he gave at the police station. (R1-57). In that motion, he asserted that these statements were illegally obtained. More specifically, that motion provided, *inter alia*, as follows:

During the mid-morning hours of March 11, Sean Casey's car was found parked about a mile from the site of a fatal automobile accident. Neither Mr. Casey nor anyone else was in or near the car at the time the police observed it, but the appearance of the car caused police to suspect that it had been involved in the fatality.

Miami Beach Police detectives were then dispatched to Mr. Casey's apartment, arriving there at or perhaps shortly before noon. The detectives found Mr. Casey at home and asleep. They did not inform Mr. Casey that his car was in police custody; rather, they asked without explanation if Mr. Casey knew where his car was. Surprised by the question, Mr. Casey responded that he had no reason to believe that his car was not in the parking area beneath the apartment building. The officers insisted that Mr. Casey check the parking lot for his car. When Mr. Casey observed that the car was missing from the parking lot (as the officers, of course, knew it would be), the detectives insisted that Sean Casey accompany them to the police station to make out a stolen auto report.

At the police station, the charade continued. Rather than informing Mr. Casey that his car was in their custody and that he himself was a suspect in a vehicular homicide, the officers continued to pretend that they were investigating the theft of Mr. Casey's car. They presented him with a stolen auto report to sign, and then took a lengthy sworn statement from him.

At no time was Mr. Casey informed of the true purpose of the interrogation. At no time was Mr. Casey informed that his car was in the hands of the police. At no

time was Mr. Casey given his Miranda warnings, or offered an opportunity to consult with counsel. At no time did Mr. Casey waive his Miranda rights.

(R1-57-58).

Mr. Casey also filed a supplemental motion to suppress which incorporated the prior motions to suppress by reference and included an additional claim to suppress evidence obtained by the police by the physical extraction of his blood.

Prior to the scheduled trial, the trial court held a hearing on Mr. Casey's motions to suppress. At that hearing, the State presented the testimony of three police officers who were involved in the interactions with Mr. Casey at his apartment and at the police station that culminated in them obtaining Mr. Casey's consent to search his car and apartment and give a tape-recorded interview. These police officers claimed that their purpose in taking Mr. Casey to the police station and obtaining these consents from him was to *investigate whether his car had been stolen* - not to investigate the fatality in which his car was indisputably involved.

(R6-1000-1119).

As previously explained, in Mr. Casey's motion to suppress, he argued that these police officers obtained his consent to search his apartment by deceiving him into believing that he was the victim of auto theft; that they were investigating that auto theft; and that their auto theft investigation necessitated their examining his apartment. However, the police officers testified that it was Mr. Casey who told them

that he believed his car was stolen. (R6-1009-10, 1025). Notably, only the police officers testified at the suppression hearing. No other witnesses testified for the State or the defense and no other evidence was presented. (R6-1000-1119).

At the suppression hearing, the police admitted that, when they obtained Mr. Casey's consent to search his apartment and car and be interviewed on tape at the police station, they withheld from Mr. Casey the critical, crucial facts that his car had been involved in a vehicular homicide and that his car had been recovered by the police hours earlier and was being processed as the instrument of a hit-and-run homicide. (R6-1022,1027,1050,1052,1100,1106). The police officers further admitted that Mr. Casey specifically requested to know if his car had been found, and, if so, the circumstances in which it was found. However, the police officers merely told him that their inquiries were in furtherance of a stolen vehicle investigation. (R6-1065).

Subsequent to the hearing, Mr. Casey filed an Omnibus Memorandum in support of his motions to suppress. In this "Omnibus Memorandum" Mr. Casey argued, through counsel, that, when the police officers questioned him and obtained his consent to search his car and apartment, they deliberately withheld from him the fact that his car had been involved in a vehicular homicide, and that his car was already being held and processed by the police despite the fact that Mr. Casey specifically requested to know if his car had been found, and, if so, the circumstances

in which it was found. He pointed out that the officers willfully deceived him, assuring him that their inquiries were solely in furtherance of a stolen vehicle investigation and never telling him that what they were really doing was investigating a vehicular homicide as to which they already had a working hypothesis of his guilt. He further argued that the consent given to search his home and provide statements to the police was the product of this fraud perpetrated upon him by the police. (R1-109-134).

The trial court found that the testimony of the three police officers that their inquiries of Mr. Casey were solely in furtherance of a stolen vehicle investigation was not credible. The trial court relied upon the case law cited by the defense in the previously described motions to suppress and in Mr. Casey's "Omnibus Memorandum" filed in support of those motions to suppress which cited well-established case law that a "consensual search is unreasonable under the Fourth Amendment... if the consent was induced by fraud, deceit, trickery or misrepresentation." *See United States v. Peters*, 153 F.3d 445, 451 (7th Cir. 1998). (R6-109-133). Accordingly, the trial court entered an order suppressing all evidence obtained in or as a result of the search of Mr. Casey's residence, Mr. Casey's pre-trial statement and Mr. Casey's "blood draw" and the results therefrom. (R6-160-61).

In the trial court's oral pronouncement of its ruling, the trial court stated as follows:

What is particularly disturbing to this Court is not only does it appear that the officers were being less than candid with the defendant, but that they were being less than candid with this Court. They continued to maintain in the suppression hearing that the purpose in taking the defendant to the station was to question him and to get his consent regarding the search of his car and apartment as part of a stolen vehicle investigation.

(R6-1130). The trial court concluded its oral pronouncement with these words:

Gentlemen, I understand this is a vehicular homicide case and I have gone back and forth on this issue, but I keep going back to the fact that I had officers, experienced officers in this Court who I did not find to be candid and I just won't abide by it. Therefore, the evidence is suppressed.

(R6-1131).

The trial court's written order suppressing the evidence was to the same effect:

This Court personally presided over the suppression hearings, and paid close attention to the testimony, demeanor, and credibility of the witnesses. What is particularly troubling to the Court is not only that the police officer witnesses were less than candid in their dealings with the defendant, but also that they were less than candid in their testimony before the Court. As the Court noted in its oral pronouncement, the story told by the police officer witnesses was simply not credible.

(R1-160-61).

II. The State's Appeal of the Order Suppressing Evidence.

The State appealed from the Order granting Mr. Casey's motions to suppress.

In the State's brief on appeal, the State relied heavily upon the police officers'

testimony at the suppression hearing that “[i]t was the Defendant, not the police, who first suggested that his car had been stolen.” (State’s Brief, Case No. 3D02-04, page 17).² The State further argued in its brief that “[t]he trial court erred in discounting the testimony of the police officers [because] [t]he Defendant did not testify to rebut any of the testimony of the police officers.” (State’s Brief, Case No. 3D02-04, page 17).

This Court agreed with this argument of the State, reversed the trial court’s order granting Mr. Casey’s motions to suppress, and stated as follows:

We reverse the order granting the defendant’s motion to suppress. A trial court is required to accept evidence which has not been impeached, discredited, controverted, contradictory within itself or physically impossible. *See State v. Moreno*, 558 So.2d 470 (Fla. 3d DCA 1990); *State v. G.H.*, 549 So.2d 1148 (Fla. 3d DCA 1989).

Here, the only evidence presented at the suppression hearing was the testimony of the police officers. The testimony of the police officers was not impeached, discredited, controverted, contradictory within itself or physically impossible. Therefore, the trial court was required to accept this evidence, and it was error to grant the motion to suppress. *See State v. Fernandez*, 526 So.2d

² More specifically, the State argued in its brief as follows:

The entire argument by the Defendant in the trial court turned upon the premise that the police concocted a story about his car being stolen and thus deceived the Defendant into waiving constitutional protections. The problem with this argument is that it is built upon a faulty premise. It was the Defendant, not the police, who first suggested that his car had been stolen. (State’s Brief, Case No. 3D02-04, page 17).

192 (Fla. 3d DCA 1988). Accordingly, we reverse the order below.

State v. Casey, 821 So.2d 1187, 1188 (Fla. 3d DCA 2002). (R2-207-208). Thus, this Court held that, under well-established case law, because Mr. Casey did not testify so as to discredit the police officers' testimony that it was Mr. Casey, not the police, who first suggested that his car had been stolen and that they were merely pursuing a stolen vehicle investigation when they obtained consent to search his home and car, the trial court was required to accept the police officers' testimony.

III. The Proceedings in the Trial Court After the Reversal of Its Order Granting the Motions to Suppress.

As explained in more detail later herein, after this Court reversed the trial court's Order granting Mr. Casey's motions to suppress, Mr. Casey's trial counsel, Milton Hirsch, and the defense forensic psychologist in this case, Dr. Michael Rappaport, advised Mr. Casey to flee the country. Thereafter, on May 29, 2004, Mr. Casey left the country and attempted to obtain permanent residency status in Chile. Eventually, Chile deported Mr. Casey as a result of an arrest warrant that had been issued in this case.

When Mr. Casey arrived in the United States, he was charged in the trial court with failure to appear while released on bond in violation of Fla.Stat. § 843.15, Case No. 06-032696. Hirsch continued to represent Mr. Casey in the instant case and also filed a notice of appearance to represent him in the "failure to appear" case.

On October 17, 2006, just minutes before jury selection was to begin, the trial court asked both parties if there could be a resolution of the case before trial. The prosecutor offered the score sheet sentence of 11 years and six months on the DUI/Manslaughter charge, 11 years and six months on the Leaving the Scene of an Accident with Death charge to run concurrent with the DUI/Manslaughter sentence, and a term of one year to run consecutive to the sentences for DUI/Manslaughter and Leaving the Scene of an Accident with Death for the "Failure to Appear" charge. On the advice of Hirsch, Mr. Casey pled guilty and was sentenced to a total of 12 years and six months in State prison with a permanent revocation of his driver's license. (R5-885-89; 926-953).

IV. The Motion for Post-Conviction Relief.

(A) The Written Rule 3.850 Motion.

On November 8, 2006, about three weeks after Mr. Casey was sentenced, Mr. Casey, through counsel, timely filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. In his motion, Mr. Casey asserted that Hirsch rendered ineffective assistance of counsel because he was operating under an actual conflict of interest at the time that Mr. Casey pled guilty.

Specifically, Mr. Casey swore that Hirsch and the defense psychologist referred to him by Hirsch advised him to flee the country. Because of this fact, Hirsch was forced to choose between his client's interest in proceeding to trial and

Hirsch's interest in not chancing that his own misconduct would be made known to the trial court. Mr. Casey pointed out that a guilty plea by him would solve Hirsch's problem by obviating the need for Mr. Casey to testify at trial so as to explain his flight. In short, in his Rule 3.850 motion, Mr. Casey swore that Hirsch had a conflict of interest when he advised him to plead guilty because a guilty plea would have the effect of "seal[ing] the defendant's lips and leav[ing] Hirsch's unethical behavior a secret." (R5-892-96).

On January 8, 2007, Mr. Casey, through counsel, filed a sworn addendum to his Rule 3.850 motion in which he claimed that Hirsch rendered ineffective assistance of counsel because he failed to call Mr. Casey as a witness at the previously described hearing on Mr. Casey's motions to suppress. In the addendum, Mr. Casey swore as follows:

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. Prior counsel filed a Motion to Suppress Statement and Physical Evidence in this cause. A hearing was held on the motion and *counsel neglected to call the Defendant as a witness to establish record evidence of the averments in the motion, despite the fact that the Defendant wished to testify.*
3. The Court granted the Motion, apparently because it simply did not believe the testimony of the police officers. The State prevailed on appeal. See *State v. Casey*, 821 So2d. 1187 (3DCA 2002). The Court reversed because

“the testimony of the police officers was not impeached, discredited, controverted, contradictory within itself, or physically impossible”. The Court cited a series of controlling precedent, which counsel should have been aware of, that held that a Court was “required to accept” such evidence. There was no record evidence introduced by the Defendant to support the allegations of police misconduct plead in the motion. Had counsel done so, the suppression order would have been affirmed and the State would have been unable to continue the prosecution.

4. Counsel provided ineffective assistance of counsel by not calling the Defendant as a witness so that there would be record evidence to support the allegations raised in the motion, particularly where the Defendant had previously advised counsel he wished to testify.

(R5-909-910) (emphasis added). Mr. Casey further asked the trial court to take judicial notice of the prior Order, motions, memoranda and testimony pertaining to his suppression motions. (R5-911).

B. The Evidentiary Hearing on the Rule 3.850 Motion.

(1) Evidence Concerning Mr. Casey’s Right to Testify.

On January 8, 2007, the trial court held an evidentiary hearing on Mr. Casey’s Rule 3.850 motion. At that hearing, Mr. Casey testified that, from 1:30 a.m. until 5:00 or 6:00 a.m. on March 11, 2001, he was drinking in nightclubs, but thereafter his “memory stops,” perhaps from being slipped a pill, and he does not recall driving home. He explained that, for all he knows, someone else drove him home in his car. (R10-1531). Thus, if he had gone to trial, his defense would have been that there was

insufficient proof that he was the driver. (R10-1548). As previously explained, the description of the driver given to the police was of a black male and Mr. Casey is a fair-skinned blonde haired Caucasian. (R6-1005-06; R10-1628).

Mr. Casey further testified that, when he retained Hirsch to represent him, he (Mr. Casey) consistently maintained that these facts were true and never vacillated from them. (R10-1525-1526).

Mr. Casey additionally testified that, prior to the hearing on his motions to suppress, he read those motions and the facts in them were true. He explained that, when the police arrived at his apartment, they falsely told him that they were investigating the theft of his car. The police showed him that his car was not in its parking space in his apartment to make him believe that it was stolen. Mr. Casey further testified that the police misled him because he repeatedly asked them if they knew where his car was located and they misleadingly failed to tell him that they knew where it was located or that they had impounded it. (R10-1527-1528, 1532). Mr. Casey explained that he cooperated with the police only because he wanted to assist them in finding his allegedly stolen car. (R10-1528-29).

Mr. Casey also testified that he told Hirsch that he wanted to testify at the suppression hearing as to these facts and the facts pled in his motions to suppress. (R10-1533-34). However, Hirsch said, "No, out of the question." Mr. Casey testified that he does not know why Hirsch refused to let him testify. (R10-1533-34).

At the hearing on the Rule 3.850 motion, Hirsch testified that Mr. Casey was very consistent in his narrative of the events that led him to consent to the search of his apartment and to make pre-trial statements to the police. Hirsch explained that Mr. Casey told him that the police had misled him to believe from the outset that they were searching for his allegedly stolen car and needed his cooperation and information for that purpose - - not that he was a suspect in a vehicular homicide investigation. On that basis, Mr. Casey consented to the search of his apartment and made pre-trial statements to the police. (R10-1594-1595).

Hirsch further testified that he made a strategic decision to not allow Mr. Casey to testify at the suppression hearing because he thought that there was no factual dispute regarding the conduct of the police officers. However, Hirsch ignored that there was a significant factual dispute regarding the conduct of the police officers, i.e., the police officers testified that it was Mr. Casey - not them - who first suggested that his car had been stolen, but Mr. Casey claimed that it was the police officers who told him they thought his car had been stolen.

Hirsch did not deny that Mr. Casey asked to testify at the suppression hearing. According to Hirsch, he (Hirsch) "briefly" discussed with Mr. Casey that he (Hirsch) had decided that it was best to not put on any evidence after the police officers testified. Hirsch claimed that Mr. Casey did not object during this discussion. (R.10-1597-98). However, Hirsch never testified that Mr. Casey actually *agreed* to waive

his right to testify at the suppression hearing. Michael Haber, who was engaged by Hirsch to be co-counsel for Mr. Casey, testified at the hearing that Mr. Casey always consistently stated to both he and Hirsch that he (Mr. Casey) wanted to testify at his trial. (R10-1635).

Notably, at the suppression hearing, the trial court made no inquiry about whether Mr. Casey was intelligently, voluntarily and knowingly waiving his right to testify and, at that hearing, Hirsch volunteered nothing about how the decision not to testify was made or who made it. (R6-1119).

(2) Evidence Concerning The Conflict of Interest.

At the Rule 3.850 hearing, Mr. Casey testified that he paid Hirsch \$65,000.00 in legal fees to defend him because he wanted to “stay and fight the case.” (R10-1506-07). However, as Mr. Casey explained, on about November 2003, at a meeting at Hirsch’s office, Hirsch said, “If I were you, I would disappear. You speak Spanish, you travel a lot, you know prison is not going to be good for you and that could be where you go.” (R10-1511). At the meeting, Hirsch also told Mr. Casey to go have a session with the psychologist referred by Hirsch, Dr. Rappaport. Mr. Casey had stopped seeing Dr. Rappaport because he was expensive and not really helping him. After Mr. Casey left Hirsch’s office, he broke down and cried because it seemed like Hirsch had given up. (R10-1511).

Mr. Casey further testified that he did not initially follow Hirsch's instruction to have a session with Dr. Rappaport. However, Hirsch sent a letter to Mr. Casey again telling him to go see Dr. Rappaport. Accordingly, Mr. Casey finally obeyed Hirsch's instruction and made an appointment with Dr. Rappaport. Mr. Casey explained that Dr. Rappaport started off the session by saying that he knew that Mr. Casey had met with Hirsch and that he (Dr. Rappaport) was there to clearly convey the message that he should flee. At that meeting, Dr. Rappaport said, "I know you met with Milton. You know, he gave you a message. Do you have any doubts? I just want you to know that you can be a fugitive...it's not difficult." (R10-1512). Mr. Casey additionally testified that Dr. Rappaport told him that "fake I.D.s" and plastic surgery are available and that he could keep a "low profile." (R10-1512-13, 1554). Dr. Rappaport also told Mr. Casey that eventually he would be able to sneak back into the United States and that he had a client who succeeded in doing so after he was a fugitive. (R10-1555). Mr. Casey testified that, after this therapy session, he was shocked but felt for the first time that he had to flee as Hirsch and Dr. Rappaport had advised him to do because he understood that his attorney was "one of the best criminal defense attorneys" and now his therapist, designated by Hirsch, was giving him the same advice. (R10-1513).

Subsequently Mr. Casey was permitted to travel on many court-approved trips outside the country related to his job. Mr. Casey testified that, when he would go to

court to obtain permission to travel, Hirsch would say things to him like, “oh, you’re still here” and “nice to see you.... I wasn’t expecting you to show up here.” (R-1514). In addition, on one occasion when Mr. Casey appeared in court at a hearing on a motion, Hirsch said, “I heard property is cheap in Argentina these days” and, “what’s the weather down there in South America like?” Mr. Casey explained that it was “clear as day what the message was.” (R10-1515).

Mr. Casey testified that he told his family that Hirsch had advised him to flee and his family was not comfortable with him doing so. Accordingly, in May 2004, Mr. Casey and his mother met with Hirsch. Mr. Casey testified that, at that meeting, Hirsch told him that he only had a ten percent chance of being found not guilty. In addition, Hirsch said, “If I had a magic wand,...you would disappear.” Furthermore, as Mr. Casey’s mother was walking out of Hirsch’s office, Hirsch put his arms around her and said “just send him to Argentina.” (R10-1518-19, 1539).

Mr. Casey asserted his Fifth Amendment right to remain silent when asked by the prosecutor if he made a tape-recording of that May meeting between himself, his mother and Hirsch. (R10-1538). Mr. Casey said he had listened to that tape-recording two years ago. (R10-1539). Mr. Casey also asserted his Fifth Amendment right to remain silent when asked if he made a tape-recording of one of his sessions with Dr. Rappaport. However, he testified that he was aware that such a tape-recording existed. (R10-1539-1540).

Thereafter, that same month of May 2004, Mr. Casey fled and attempted to obtain permanent residency status in Chile. Mr. Casey testified that he never would have done so but for Hirsch advising him to do it. Eventually, Mr. Casey was told by Chilean authorities that he had visa problems and would be deported. Mr. Casey testified that, at that time, he sent an e-mail to Hirsch notifying him of the situation and asking him for his advice as to what he should do. Mr. Casey's Chilean attorneys also contacted Hirsch and asked him to send affidavits to be used to fight the deportation order and assist Mr. Casey in avoiding returning to the United States. Hirsch responded by sending them the affidavits they requested. (R10-1520, 1524, 1554).

Subsequently, Mr. Casey was deported to Miami. Mr. Casey testified that, the next day, Hirsch, Haber, and Dr. Rappaport met with him at the Dade County Jail. Mr. Casey further testified that Dr. Rappaport said, "Why didn't you change your name?" (R10-1520-21).

Mr. Casey explained that, on the day that he signed the plea agreement, he realized, before he signed that agreement, that evidence of his flight was going to be admitted if he went to trial and that this meant that Hirsch's illegal involvement in his flight would need to "come out." He knew that the truth had not been told about Hirsch and Dr. Rappaport's conduct. However, his attorneys were standing on either side of him and he was too intimidated to say anything to the trial court. (R10-1522-

24). (R10-1550, 1553-54). The next day, Mr. Casey contacted David Markus, Esq. and, about three weeks later, Mr. Markus filed Mr. Casey's Rule 3.850 motion. (R10-1523).

Sean Casey's mother, Genevieve Casey, testified that, on May 12, 2004, she and Sean met with Hirsch because Sean had told her about Hirsch advising him to flee and she wanted to find out why he would give such advice. She further testified that, at that meeting, Hirsch told them that Sean had no chance of acquittal and that he would be subjected to a lengthy term of imprisonment. During the meeting, Hirsch said that he wished he could put Sean on another planet and make Sean disappear if he was in her shoes. As she was walking out of the meeting, Hirsch was walking beside her and made a reference to Argentina. She felt that Hirsch was telling Sean to flee. (R10-1564-66, 1574-77). Genevieve Casey asserted the Fifth Amendment when asked if she tape recorded that meeting or listened to a tape-recording of that meeting. (R10-1575).

Genevieve Casey additionally testified that, on May 13, 2004, she and Sean met with Dr. Rappaport who told them that Sean should listen to Hirsch's advice and flee the country. (R10-1566-67).

According to Hirsch, he did not tell Mr. Casey to flee and did not tell him to go to Argentina. Hirsch testified that he met with Mr. Casey and his mother and told them that statistically 90 percent of DUI manslaughter cases result in some kind of

conviction. Hirsch further testified that he listened to a tape recording of that meeting. According to Hirsch, at the meeting, Genevieve Casey became overwrought and he then told her that he would give anything if he could just make the case against Sean disappear but he could not. (R10-1603-05).

Hirsch acknowledged that he referred Mr. Casey to Dr. Rappaport and that he and Dr. Rappaport spoke about Mr. Casey. (R10-1626).

Hirsch testified that, when Mr. Casey failed to appear for a court proceeding, he made no effort to find out why or whether Sean was alive or dead. Indeed, he never even bothered to contact Genevieve Casey to tell her about it until sometime later when he received a telephone call from a bondsman wanting to be made whole. Hirsch conceded that he should have telephoned Genevieve Casey earlier to see if Mr. Casey was dead or alive since that would have been the normal thing for an attorney to do if he really did not know what had happened to his client. (R10-1611-12).

Hirsch testified that, in 2006, Mr. Casey and Mr. Casey's Chilean attorney who was fighting the deportation order contacted Hirsch. Thereafter, in order to assist them in fighting Mr. Casey's return to the United States, Hirsch provided them with a certified copy of the docket sheet and an affidavit summarizing the public record of Mr. Casey's case. (R10-1613-15).

Hirsch further testified that, after Mr. Casey pled guilty in this case, Mr. Casey's post-conviction counsel, Mr. Markus, telephoned him and said that Mr.

Casey had tape recorded a meeting with Hirsch at his office. (R.10-1624-25). At the hearing on Mr. Casey's Rule 3.850 motion, Hirsch was asked if he had an objection to that tape being played in court. Hirsch responded that he thought that the tape was inadmissible under Florida law. (R10-1625). Over the defense's objection, the trial court ruled that the tape was inadmissible. (R10-1646-60).

Mr. Haber testified that he was unaware that Hirsch had told Mr. Casey to flee. (R10-1632-1637).

Dr. Rappaport testified that Hirsch referred Mr. Casey to him and he saw him 38 times. Dr. Rappaport further testified that, during some of these sessions, Mr. Casey discussed fleeing. Dr. Rappaport conceded that the possibility of Mr. Casey fleeing was discussed during a session he had with Mr. Casey and Genevieve Casey. However, Dr. Rappaport claimed that he did not advise Mr. Casey to flee or tell Genevieve Casey that Mr. Casey should flee. According to Dr. Rappaport, he did not tell Hirsch about Mr. Casey's discussions about fleeing. (R10-1638-1644).

(3) The Trial Court's Order Denying Mr. Casey's Rule 3.850 Motion.

At the conclusion of the hearing on Mr. Casey's Rule 3.850 motion, the trial court denied it. The trial court's reasons for the denial of this motion will be described and addressed in the Argument Section below.

SUMMARY OF THE ARGUMENT

I. Mr. Casey was denied his fundamental constitutional right to testify at his suppression hearing. He made it plain to his trial counsel that he wanted to testify at that hearing. Trial counsel does not deny that Mr. Casey wanted to testify at that hearing and does not deny that he refused to let him do so. Accordingly, Mr. Casey was denied his fundamental constitutional right to testify at the suppression hearing.

II. In his motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850, Mr. Casey asserted that his trial attorney rendered ineffective assistance of counsel because he refused to allow him to testify at a pre-trial suppression hearing. Because trial counsel refused to allow Mr. Casey to testify at the suppression hearing, the testimony of the police officers at the suppression hearing was not controverted so the trial court was required to accept this testimony. But for Hirsch's refusal to allow Mr. Casey to testify at the suppression hearing, the testimony of the police officers at that hearing would have been controverted and the trial court's Order granting Mr. Casey's motions to suppress would have been affirmed by this Court. Thereafter, the State would have had insufficient evidence to prosecute Mr. Casey.

III. In Mr. Casey's Rule 3.850 motion, he swore that his trial counsel and the defense psychologist referred to him by trial counsel advised him to flee the country. Because of this fact, trial counsel was forced to choose between his client's interest

in proceeding to trial and trial counsel's interest in not chancing that his own misconduct would be made known to the trial court. Mr. Casey pointed out that a guilty plea by him would solve trial counsel's problem by obviating the need for Mr. Casey to testify at trial so as to explain his flight. In short, in his Rule 3.850 motion, Mr. Casey swore that trial counsel had a conflict of interest when he advised him to plead guilty because a guilty plea would have the effect of "seal[ing] the defendant's lips and leav[ing] trial counsel's unethical behavior a secret." At the Rule 3.850 hearing, Mr. Casey's counsel proffered that a tape recording existed of Mr. Casey's trial counsel advising Mr. Casey to leave the country and requested that the tape be admitted. Mr. Casey and his mother also testified to the existence of the tape recording. Trial counsel admitted that a tape recording of him talking to Mr. Casey and his mother existed but claimed that he did not ever tell Mr. Casey to leave the country. Over the defense's objection, the trial court ruled that the tape was inadmissible. However, the trial court erred in failing to admit the tape because Mr. Casey's trial attorney lacked a justified expectation of privacy in his communications on that tape.

IV. Mr. Casey's trial counsel had a conflict of interest which deprived Mr. Casey of effective assistance of counsel. That conflict stemmed from trial counsel's advice to Mr. Casey that he should flee the country.

ARGUMENT

I.

MR. CASEY WAS DENIED HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO TESTIFY AT HIS SUPPRESSION HEARING.

A defendant in a criminal case has a constitutional right, grounded in the Due Process Clause of the Fifth Amendment, the Sixth Amendment Compulsory Process Clause, and the Fifth Amendment's guarantee against compelled testimony, to take the witness stand and testify in his own defense. *See Rock v. Arkansas*, 483 U.S. 44, 51 (1987); *Torres-Arboledo v. State*, 524 So.2d 403, 410 (Fla. 1988). This constitutional right to testify applies at suppression hearings. *Ferguson v. State*, 926 So.2d 469 (Fla. 3d DCA 2006). The decision to testify by a defendant in a criminal case belongs to the defendant, not his counsel. *Rock*, 483 U.S. at 52.

Mr. Casey was denied his fundamental constitutional right to testify at his suppression hearing. Mr. Casey testified at the hearing on his Rule 3.850 motion that he told Hirsch that he wanted to testify at that hearing. Hirsch did not deny that Mr. Casey wanted to testify at that hearing. Hirsch admitted that he refused to let Mr. Casey testify at that hearing. Furthermore, Hirsch never testified that Mr. Casey agreed with Hirsch's refusal to let him testify.

Notably, at the suppression hearing, the trial court never inquired about whether or not Mr. Casey waived his right to testify at that hearing. In addition, the

testimony of Hirsch's co-counsel, Mr. Haber, that Mr. Casey consistently stated to both he and Hirsch that he wanted to testify at his trial strongly supports the credibility of Mr. Casey's testimony that he told Hirsch that he wanted to testify at the suppression hearing and never waived his right to do so.

Accordingly, for all of the foregoing reasons, Mr. Casey plainly was denied his fundamental constitutional right to testify at the suppression hearing.

II.
DEFENSE COUNSEL RENDERED INEFFECTIVE
ASSISTANCE OF COUNSEL WHEN HE REFUSED
TO ALLOW MR. CASEY TO TESTIFY AT
THE SUPPRESSION HEARING.

In *Strickland v. Washington*, 466 U.S. 668, 685 (1984), 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. *Accord Provenzano v. State*, 616 So.2d 428, 431 (Fla. 1993). Counsel's performance is deficient where it falls below an objective standard of reasonableness. *Strickland*, 466 U.S. 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; *McLin*, 827 So.2d 948, 958 (Fla. 2002).

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). *Accord Provenzano, supra; McLin, supra*. A single error of counsel may violate a defendant's 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).

In the trial court's "Order Denying Motion to Vacate Conviction and Sentence," the trial court stated as follows:

With respect to the issue of the defendant's failure to testify or present witnesses at any pre-trial hearings, the court finds that these were strategic or tactical decisions made by the defendant and his attorney.

R5-924). The trial court based this finding upon Hirsch's testimony at the hearing on the Rule 3.850 that he made a strategic decision to not allow Mr. Casey to testify at the suppression hearing. Specifically, Hirsch claimed that there was no factual dispute between Mr. Casey's claim that the police officers misled him to believe that they were investigating his stolen car to obtain his cooperation and the testimony of the police officers at that hearing so there was no reason for Mr. Casey to testify at that hearing. (R10-1597-98). This claim fails. The record plainly shows that such

a factual dispute existed and, accordingly, Mr. Casey needed to testify in order the prevail on his motions to suppress.

More specifically, in Mr. Casey's pre-trial motions to suppress, Hirsch repeatedly wrote that the police officers "couched" their questions to Mr. Casey "in such a way as to suggest that his car had been stolen." (R1-36). Thus, Hirsch himself argued that the defense theory for the motion to suppress was that the police officers - not Mr. Casey - suggested that Mr. Casey's car had been stolen in order to manipulate him into cooperating with them in a stolen vehicle investigation and thereby gain his consent to search his apartment and car and be debriefed. However, the police officers directly contradicted Hirsch's argument by testifying at the suppression hearing that it was *Mr. Casey* who told them that he believed his car was stolen. (R6-1009-10, 1025). Mr. Casey undisputedly wanted to testify at the suppression hearing that the police officers falsely told him when they arrived at his apartment that they were investigating the theft of his car. Such testimony would have directly contradicted this testimony of the police. (R10-1527-29, 1532).

On appeal, this factual dispute and the fact that Mr. Casey never testified about it was a material issue. Indeed, as previously explained, the State argued in its brief as follows:

The entire argument by the Defendant in the trial court turned upon the premise that the police concocted a story about his car being stolen and thus deceived the Defendant

into waiving constitutional protections. The problem with this argument is that it is built upon a faulty premise. It was the Defendant, not the police, who first suggested that his car had been stolen.

(State's Brief, Case No. 3D02-04, page 17). The State further argued in its brief that "[t]he trial court erred in discounting the testimony of the police officers *[because] [t]he defendant did not testify to rebut any of the testimony of the police officers.*"

(State's Brief, Case No. 3D02-04, page 17) (emphasis added).

As a result of this argument by the State, this Court reversed the trial court's Order granting Mr. Casey's motions to suppress and explained:

We reverse the order granting the defendant's motion to suppress. A trial court is required to accept evidence which has not been impeached, discredited, controverted, contradictory within itself or physically impossible. *See State v. Moreno*, 558 So.2d 470 (Fla. 3d DCA 1990); *State v. G.H.*, 549 So.2d 1148 (Fla. 3d DCA 1989).

Here, the only evidence presented at the suppression hearing was the testimony of the police officers. The testimony of the police officers was not impeached, discredited, controverted, contradictory within itself or physically impossible. Therefore, the trial court was required to accept this evidence, and it was error to grant the motion to suppress. *See State v. Fernandez*, 526 So.2d 192 (Fla. 3d DCA 1988). Accordingly, we reverse the order below.

(R2-207-208).

Notably, this Court cited *State v. Fernandez*, 526 So.2d 192 (Fla. 3d DCA 1988) in support of its holding. In *Fernandez*, as in this case, the trial court entered an order suppressing evidence on the basis that the testimony of the police officers at the suppression hearing was not credible. This Court subsequently vacated that order of the trial court and explained that, because the testimony of the police officers was uncontroverted and essentially unimpeached, the trial court was required to accept the testimony of the police officers as true. The *Fernandez* Court pointed out that “[a] court must accept evidence which, like the material testimony of the police officers, is neither impeached, discredited, controverted, contradictory within itself or physically impossible.” *Id.* (citations omitted). The *Fernandez* Court relied upon case law dating dating back to 1927 for this well-established rule of law. *Id.*³

³ There was also another factual dispute pertaining to the suppression issue that existed. One of the grounds argued by Mr. Casey was that his statements should be suppressed because the police undisputedly failed to advise him of his *Miranda* rights when he was in custody and not free to leave. (R1-60). The State claimed and Officer Hundevadt testified at the suppression hearing that, prior to Mr. Casey’s signing the consent to search his apartment and making his taped statements to the police, he was free to go. Mr. Casey would have testified that, at the time he was first contacted by the police at his apartment, he had in his possession a ticket, a passport and other travel documents for a business trip he had previously scheduled for later that day to South America. He would have further testified at the suppression hearing that the police impounded all of his travel documents, including his passport, before he signed the consent to search his apartment and made his taped statements to the police. (R1-125, fn.3). On appeal from the trial court’s Order granting the motions to suppress, the State argued that Mr. Casey was not in custody at the time he gave the statement and signed the consent form arguing that “[t]here was no testimony by the Defendant that he at any time did not feel that he was free
(continued...)

Thus, it is pellucidly clear that, under controlling precedent of which Hirsch should have been aware, because Hirsch refused to allow Mr. Casey to testify at the suppression hearing, the testimony of the police officers at the suppression hearing was uncontroverted and this Court had no choice but to vacate the trial court's order granting the motions to suppress. But for this refusal by Hirsch, the trial court's order granting the motion to suppress would not have been vacated by this Court.

Furthermore, the trial court's ruling that Hirsch's refusal to allow Mr. Casey to testify at the suppression hearing was a "strategic or tactical decision" and, therefore, did not constitute ineffective assistance of counsel, was made in a vacuum because the trial judge who made that ruling, the Honorable Judge Leonard Glick, was not the judge who presided over the suppression hearing and *did not review the transcript of the suppression hearing or the motions to suppress before making this ruling*, although he was asked to take judicial notice of them by Mr. Casey's post-conviction counsel. (R10-1664-1665).

The Honorable Daryl E. Trawick presided over the suppression hearing and entered the Order granting the motions to suppress. (R6-100). Judge Glick acknowledged at the hearing on the Rule 3.850 motion that, "I wasn't at the litigation [on the motions to suppress] and I don't know what the witnesses testified to." (R10-

³(...continued)
to leave. The police officer testified that Defendant was not under arrest and that he was free to go." (State's Brief Case No. 3D02-04, page 22).

1665). With respect to Hirsch's claim that he made a reasonable strategic decision that Mr. Casey's testimony would add nothing to the motions to suppress, Judge Glick responded, "I don't know. I wasn't there. See, that's the problem that we have." (R10-1665). However, when Mr. Casey's counsel asked Judge Glick to read a transcript of the suppression hearing and the motions to suppress before making a finding regarding this claim of Hirsch, Judge Glick responded that the Attorney General's office might have a copy of that transcript but then, minutes later, he denied Mr. Casey's Rule 3.850 motion *without even reading that transcript or Mr. Casey's motions to suppress*. (R10-1665, 1674-75).

Hirsch should have been aware of the controlling precedent holding that a trial court is required to accept evidence which has not been controverted and, accordingly, he should have called Mr. Casey as a witness at the suppression hearing to contradict the testimony of the police officers. Hirsch's decision not to call Mr. Casey as a witness at that hearing should not have been excused by the trial court as a reasonable strategic decision because that decision had to have been made in ignorance or disregard of this controlling case law. "[A] tactical strategic decision [of trial counsel] is unreasonable if it is based on a failure to understand the law." *Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir. 2003). *Accord Antunes-Salgado v. State*, ___ So.2d ___, 2008 WL 2901861 (Fla. 2d DCA 2008) (holding that there was no reasonable strategic reason for defense counsel not to have objected to

inadmissible testimony where he conceded that he failed to research the admissibility issue and, therefore, his omission was based upon ignorance of the law).

If Mr. Casey had testified at the suppression hearing, the trial court's suppression order would have been affirmed and the State would have had insufficient evidence to prosecute Mr. Casey. Indeed, at the Rule 3.850 hearing, the prosecutor, through leading questions, elicited testimony from Hirsch that the trial court's suppression order meant that "the case was over" "[a]nd the State couldn't proceed without a reversal of that motion to suppress." (R10-1598).

Notably, after the police tricked Mr. Casey into consenting to be interviewed and allowing the search of his apartment and car, they discovered in his apartment his clothing with shards of broken glass on it that was consistent with a broken windshield. (R6-1039-45, 1086-90). This clothing with broken glass became the *only* evidence that the prosecution had to show that Mr. Casey was the driver of the car involved in the fatality. Thus, Hirsch's refusal to allow Mr. Casey to testify at the suppression hearing plainly "undermine[d] confidence in the outcome." See *Strickland*, 466 U.S. at 694 (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."). Accordingly, for all of the foregoing reasons, this refusal of Hirsch plainly constituted ineffective assistance of counsel.

III.
THE TRIAL COURT ERRED IN REFUSING TO
ADMIT A TAPE RECORDING OF A CONVERSATION
SUPPORTING MR. CASEY'S CLAIM THAT
DEFENSE COUNSEL ADVISED HIM TO FLEE.

In Mr. Casey's Rule 3.850 motion, he swore that Hirsch and the defense psychologist referred to him by Hirsch advised him to flee the country. Because of this fact, Hirsch was forced to choose between his client's interest in proceeding to trial and Hirsch's interest in not chancing that his own misconduct would be made known to the trial court. Mr. Casey pointed out that a guilty plea by him would solve Hirsch's problem by obviating the need for Mr. Casey to testify at trial so as to explain his flight. In short, in his Rule 3.850 motion, Mr. Casey swore that Hirsch had a conflict of interest when he advised him to plead guilty because a guilty plea would have the effect of "seal[ing] the defendant's lips and leav[ing] Hirsch's unethical behavior a secret." (R5-892-96).

As previously explained, both Mr. Casey and his mother testified at the Rule 3.850 hearing that Hirsch and a psychologist referred by Hirsch, Dr. Rappaport, expressly and directly told Mr. Casey to flee the country. (R10-1510-13, 1564-66, 1574-77). In addition, both Mr. Casey and his mother described a meeting with Hirsch in May 2004 after Hirsch had advised Mr. Casey to flee, in which Hirsch told Mr. Casey that he had a very low chance of being acquitted if he went to trial and that, if he [Hirsch] could do so, he would make Mr. Casey disappear. In addition,

both Mr. Casey and his mother testified that, at that meeting, Hirsch told Mr. Casey's mother to send Mr. Casey to Argentina. (R10-1518-19, 1539, 1564-67, 1574-77).

Mr. Casey testified that he was aware that a tape recording existed of this May 2004 meeting between himself, his mother and Hirsch. Indeed, Mr. Casey testified that he had listened to that tape recording. However, Mr. Casey asserted his Fifth Amendment right to remain silent when asked by the prosecutor if he had made a tape recording of that May 2004 meeting and an additional tape recording of one of his sessions with Dr. Rappaport. (R10-1538-40).

At the hearing on the Rule 3.850 motion, Hirsch denied telling Mr. Casey to flee. Hirsch acknowledged that a tape recording existed of a meeting with Mr. Casey and Mr. Casey's mother, Genevieve Casey, in May 2004 and that he had listened to that tape. According to Hirsch, at the meeting, Genevieve Casey became overwrought and he then told her that he would give anything if he could just make the case against Sean disappear but he could not. (R10-1603-05). At the hearing on Mr. Casey's Rule 3.850 motion, Hirsch was asked if he had an objection to that tape being played in court. Hirsch responded that he thought that the tape was inadmissible under Florida law. (R10-1625).

At the Rule 3.850 hearing, Mr. Casey's counsel proffered that, on the tape, Hirsch advised Mr. Casey to leave the country and, accordingly, the tape should be admitted. (R10-1648,1652-54). However, over the defense's objection, the trial

court ruled that the tape was inadmissible. (R10-1646-60). The trial court's explanation for this ruling was as follows:

I find that this lawyer had an expectation of privacy and I don't think when he entertained the client and the client's mother, that in the giving of advice, whatever the advice might have been, *short of truly aiding and abetting in some criminal nepharious deed*, that he would ever expect that people were recording surreptitiously his conversation, his advice and his offering of options to people.

(R10-1659) (emphasis added). The trouble with this explanation of the trial court is that Mr. Casey's counsel proffered and Mr. Casey and his mother testified that, on the tape, Hirsch did solicit and "aid and abet some criminal nepharious deed," namely, the crime of the failure of a defendant to appear while released on bond which is prohibited by Section 843.15 of the Florida Statutes. Mr. Casey testified that, after Hirsch told him to flee, Hirsch told him to meet with Dr. Rappaport who then gave Mr. Casey specific instructions on how to be a fugitive such as obtaining "fake I.D.s" and plastic surgery and keeping a "low profile." These actions of Hirsch plainly would constitute soliciting and aiding and abetting the crime of failing to appear while released on bond.

Under these circumstances, Hirsch had no reasonable expectation of privacy in his tape-recorded oral communication to Mr. Casey suggesting that he flee. In the absence of a reasonable expectation of privacy, Hirsch's oral expectations were *not*

protected under Section 934.03 of the Florida Statutes and, therefore, the tape recording of that conversation should have been admitted at the Rule 3.850 hearing.

As stated in *State v. Inciarrano*, 473 So.2d 1272, 1275 (Fla. 1985):

Section 934.02(2) in defining oral communication, expressly provides: 'Oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception ***under circumstances justifying such expectation*** From this language, it is clear that the legislature did not intend that every oral communication be free from interception without the prior consent of all the parties to the communication.

An oral communication is protected under section 934.03 if it satisfies two conditions: "A reasonable expectation of privacy under a given set of circumstances depends upon one's actual subjective expectation of privacy ***as well as whether society is prepared to recognize*** this expectation as reasonable." *Inciarrano*, 473 So.2d at 1275 (holding that the defendant had no reasonable expectation of privacy in an oral communication involving the commission of a criminal act and, therefore, a tape recording of that oral communication was admissible). *See also Jatar v. Lamaletto*, 758 So.2d 1167 (Fla. 3d DCA 2000) (holding that attorney lacked a justified expectation of privacy in his oral communication involving the commission of a criminal act so a tape recording of his oral communication about that criminal act was admissible).

Although Hirsch undoubtedly had a subjective expectation of privacy, here, as the Florida Supreme Court concluded in *Inciarrano*, his expectation was not justified where his oral communication involved the commission of a criminal act. Society is not prepared to recognize as reasonable an expectation of privacy in such activity. *See Id.*

Accordingly, the trial court erred in failing to admit the tape recording of Hirsch's May 2004 meeting with Mr. Casey and his mother. This error gravely prejudiced Mr. Casey because the tape recording would have unequivocally shown that Mr. Casey's claim that Hirsch had a conflict of interest because he told Mr. Casey to flee.

IV.
DEFENSE COUNSEL HAD A CONFLICT OF
INTEREST WHICH DEPRIVED MR. CASEY
OF EFFECTIVE ASSISTANCE OF COUNSEL.

As previously explained, in his Rule 3.850 motion, Mr. Casey asserted that, because Hirsch and the defense psychologist referred to Mr. Casey by Hirsch advised him to flee the country, Hirsch was forced to choose between Mr. Casey's interest in proceeding to trial and Hirsch's interest in having Mr. Casey plead guilty so that Hirsch's own misconduct in advising Mr. Casey to flee would not be made known to the trial court. The trial court erred in finding Hirsch's testimony that he did not advise Mr. Casey to flee to be credible.

On its face, this testimony by Hirsch was not credible because Hirsch conceded that, after Mr. Casey fled, he did not even call Mr. Casey's mother to see if she knew what happened to him. Hirsch further conceded that this would have been the normal thing for an attorney to do because, otherwise, he would have no way of knowing if Mr. Casey was dead or alive. Hirsch testified that he had no means to try to locate Mr. Casey but this simply is not credible. He could have contacted the local hospitals if, as he claimed, he thought Mr. Casey was "seriously injured, hospitalized or dead." (R10-1611-12). Accordingly, the trial court should have found that Hirsch's testimony was not credible and that he, in fact, had a conflict of interest in this case that violated Mr. Casey's Sixth and Fourteenth Amendment rights

A. Counsel's Conflict Of Interest In This Case Was A *Per Se* Violation Of The Sixth And Fourteenth Amendments.

The right of an accused to counsel is beyond question a fundamental right. *See e.g. Kimmelman v. Morrison*, 477 U.S. 365 at 377 (1986); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The right to counsel includes a "correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981); *Hunter v. State*, 817 So.2d 786, 791 (Fla. 2002). *See also Cuyler v. Sullivan*, 446 U.S. 335, 345 (1980).

In *United States v. Williams*, 372 F.3d 96, 102 (2d Cir. 2004), the Court recognized that, where trial counsel is implicated in the same or closely related

criminal conduct for which a defendant has been charged, the conflict of interest is so severe that it is a *per se* conflict of interest that is unwaivable and requires a new trial without a showing of prejudice. The *Williams* Court primarily relied upon *United States v. Fulton*, 5 F.3d 605, 611 (2d Cir. 1993) and *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984).

In *Fulton, supra*, in the middle of defendant Fulton's trial, the government informed the court in an *ex parte* conference that the government witness on the stand had previously stated that he had once imported heroin for Fulton's trial counsel. This implicated Fulton's trial counsel in the very crime for which Fulton was being tried. After affording Fulton the opportunity to consider this conflict and whether or not he wanted to continue to be represented by this attorney, the trial court permitted Fulton to waive the conflict and Fulton's counsel continued to represent Fulton at his trial. Fulton was subsequently convicted.

On appeal from the denial of habeas relief, the Second Circuit reversed finding that Fulton's attorney suffered from a *per se* conflict of interest which was unwaivable. *Id.* at 612-614. The Second Circuit reasoned that, where it is alleged that defense counsel engaged in the same or similar crimes for which a defendant stood trial, the conflict "so permeates the defense that no meaningful waiver can be obtained." *Id.* at 613. "In such a case, we must assume that counsel's fear of, and desire to avoid, criminal charges ... will affect virtually every aspect of his or her

representation of the defendant.” *Id.* The *Fulton* Court additionally reasoned as follows:

The conflict here involves a bias arising out of counsel’s powerful self-interest in avoiding criminal charges or reputational damage and is thus of a different character than other conflicts.... Advice as well as advocacy is permeated by counsel’s self-interest, and no rational defendant would knowingly and intelligently be represented by a lawyer whose conduct was guided largely by a desire for self-preservation.

Id.

In *United States v. Cancilla, supra*, an allegation was made at the trial, assumed to be true on appeal, that unknown to the defendant, the defendant’s trial counsel “may have himself conspired with someone connected to the” fraudulent insurance scheme used by the defendant. The Court held that a *per se* conflict of interest existed. 725 F.2d at 871. The Court reasoned that, given “the similarity of counsel’s criminal activities to [the defendant’s] schemes and the length between them, it must have occurred to counsel that a vigorous defense might uncover evidence or prompt testimony revealing his own crimes.” *Id.* at 870.

As in the previously described cases, the conflict of interest affecting Hirsch’s representation was a *per se* violation of Mr. Casey’s Sixth and Fourteenth Amendment rights requiring the vacating of Mr. Casey’s conviction.

B. Actual Conflict Of Interest.

Even assuming *arguendo* that the conflict of interest affecting Hirsch's representation of Mr. Casey was not a *per se* conflict, this conflict nevertheless violated the Sixth and Fourteenth Amendments because it was an actual conflict of interest that had to have an adverse effect on Hirsch's performance. As previously explained, the Sixth Amendment guarantees criminal defendants the right to the effective assistance of counsel. *Mickens v. Taylor*, 535 U.S. 162, 164 (2002); *Wheat v. United States*, 486 U.S. 153, 162-63 (1988). Subsumed in the right to the effective assistance of counsel, is the right to counsel unimpaired by conflicting loyalties. *Id.* Indeed, the duty of unfettered loyalty is among the most basic of a defense attorney's responsibilities. *Reynolds v. Chapman*, 253 F.3d 1337, 1342 (11th Cir. 2001).

Claims of conflicted representation are, hence, given special consideration on appellate or collateral review because a conviction obtained under these circumstances cannot reasonably be regarded as fundamentally fair. *Mickens*, 535 U.S. at 164-165. As such, when, despite the Constitution's guarantee, "the defendant's attorney actively represents conflicting interests," courts forego a case by case inquiry into the fairness of the trial and presume prejudice against a defendant if the conflict had an adverse effect on the lawyer's performance. *Id.*; *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980); *Reynolds*, 253 F.3d at 1347.

“An actual conflict of interest exists when an attorney engages in wrongful conduct related to the charge for which the client is on trial.” *Fulton*, 5 F.3d at 609. *See also Williams*, 372 F.3d at 105 (holding that defense counsel’s representation of defendant at his criminal trial was burdened by an actual conflict of interest where defense counsel and defendant allegedly engaged in criminal activity jointly); *United States v. Urbana*, 770 F.Supp. 1552 (S.D.Fla. 1991)(holding that defense counsel has an actual conflict of interest when he faces potential liability for the same charges for which his client is standing trial or when he has independent personal information regarding the facts underlying his client’s charges).

When, as in this case, defense counsel participates in criminal activity relating to the charges against the defendant, it creates an actual conflict. “[T]he attorney may fear that a spirited defense could uncover convincing evidence of the attorney’s guilt or provoke the government into action against the attorney. *Moreover, the attorney is not in a position to give unbiased advice to the client about such matters as whether or not to testify or to plead guilty and cooperate since such testimony or cooperation from the defendant may unearth evidence against the attorney.*” *Fulton*, 5 F.3d at 610. (emphasis added).

Thus, Hirsch’s representation of Mr. Casey was burdened by an actual conflict of interest that plainly adversely affected Hirsch’s performance. Hirsch knew that,

if Mr. Casey went to trial and testified, there was a possibility that the evidence of Hirsch's advice to flee would be revealed. Accordingly, Hirsch had a strong incentive to get Mr. Casey to forego a trial and enter into a plea agreement.

"[C]ourts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *See Wheat*, 486 U.S. at 160. Accordingly, Mr. Casey's convictions must be vacated.

CONCLUSION

For all of the foregoing reasons, this Court must reverse the trial court's denial of Mr. Casey's Rule 3.850 motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of August 2008 to Rolando Solar, Assistant Attorney General, Suite 950, 444 Brickell Avenue, Miami, Florida 33131.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief complies with the font requirements of Fla.R.App.P. 9.210(a)(2) for computer-generated briefs.

MARCIA J. SILVERS

