19-5779
Docket No.: (*to be assigned*)

UNITED STATES SUPREME COURT



EDUARDO RODRIGUEZ-LOPEZ
Petitioner,

v.

STATE OF FLORIDA
Respondent,



On Petition for Writ of Certiorari to the District Court of Appeal for the First District, State of Florida

# PETITION FOR WRIT OF CERTIORARI

Eduardo Rodriguez-Lopez
DC No.: 129221
Holmes Correctional Institution
3142 Thomas Drive
Bonifay, Fl. 32425

## QUESTION PRESENTED FOR REVIEW

1. Consistent with the Sixth Amendment, and this Court's decisions in Strickland may the State rely on the plea colloquy as to a prisoner acknowledging that he has been advised of all possible defenses and discussed them with counsel to adequately resolve the claim that counsel failed to advise him of his right to a particular defense?

## PARTIES WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED AND CORPORATE DISCLOSURE STATEMENT

PLEASE TAKE NOTICE, those persons also having an interest in the outcome of the case are as follows:

- Bilbrey, Judge, First District Court of Appeals, State of Florida
- Harris, Virginia, Assistant Attorney General, State of Florida
- Jay, Judge, First District Court of Appeals
- Moody, Ashley B., Attorney General, State of Florida
- Winokur, Judge, First District Court of Appeals, State of Florida
- Whittington, Steven B., Circuit Judge, 4th Judicial Circuit, State of Florida

I hereby certify that no parent or publicly traded company, or corporation, has an interest in the outcome of this appeal.

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## CITATION TO OPINIONS

Order Denying Motion for Post-Conviction Relief, Fourth Judicial Circuit in and for Duval County, State of Florida, August 16th, 2017 (Case No.: 16-2004-CF-6329-AXXX-MA) (Appx. A.)

Per Curiam Affirmed Decision with Written Opinion, First District Court of Appeal, State of Florida, February 12th, 2019 (Case No.: 1D17-3988) (Appx. B)

Per Curiam Affirmed, Denial of Motion for Rehearing, First District Court of Appeal, State of Florida, April 24th, 2019 (Case No.: 1D17-3988) (Appx. C)

## STATEMENT OF THE BASIS FOR JURISDICTION

The First District Court of Appeal for the State of Florida entered a *per curiam affirmed* decision with an opinion on February 15, 2019. The Petitioner filed a rehearing with the state court which was later denied on April 24, 2019. The time for review expires on July 23, 2019. Sup. Ct. Rule 13.

## STATEMENT OF THE CASE

The following is a concise statement of the facts material to the consideration of the questions presented. The review is a final decision rendered by the First District Court of Appeal for the State of Florida in which the question of "Consistent with the Sixth Amendment, and this Court's decisions in Strickland may the State rely on the plea colloquy as to a prisoner acknowledging that he has been advised of all possible defenses and discussed them with counsel to adequately resolve the claim that counsel failed to advise him of his right to a particular defense?" was raised.

The Petitioner filed his Motion for Post-Conviction relief pursuant to Fla. R. Crim. P. 3.850 on June 29, 2016 which reflected the filing date of January 24, 2010 ("First Motion); Petitioner's Motion for Post-Conviction Relief filed pursuant to the same rule on or about April 11, 2010 ("Second Motion"); and Petitioner's Motion to Accept the Attached Amended Motion for Postconviction Relief that combines Petitioner's January 24, 2010 and April 11, 2010 motions for clarity purposes, filed

July 14, 2016 accompanied by the proposed Amended Motion for Post-Conviction Relief.

The lower state court in and for Duval County in the Fourth Judicial Circuit for the State of Florida entered judgment on the Petitioner on June 18, 2007 sentencing him to a period of 45 years based on his plea of guilty to second-degree murder, a lesser-included offense of firs-degree murder.

The Judgment and Sentence became final after direct appeal to the First District Court of Appeal for the State of Florida entered its mandate on July 8, 2008.

The lower state court then on August 10, 2017 entered an order granting the motion seeking to combine the Petitioner's two previous motions for clarity purposes and then an order denying the amended motion for post-conviction relief filed under Fla. R. Crim. P. 3.850. The lower state court did so without an evidentiary hearing. A timely appeal was entered to the First District Court of Appeal for the State of Florida which per curiam affirmed the lower state court's decision and after a rehearing that was denied, issued its mandate following the April 24, 2019 denial.

## ARGUMENT

On September 18, 2006 the Petitioner was convicted of One Count of Second Degree Murder in contravention of Fla. Stat. § 782.04(2) and sentenced to Forty-Five (45) years. The Petitioner subsequently entered a direct appeal with this

Honorable Court which was *per curiam affirmed* on June 11, 2008 with the Mandate issued July 8, 2008.[1]

Afterwards the Petitioner filed a "Motion for Post-Conviction Relief' under Fla. R. Crim. P. 3.850 on January 24, 2010. ("First Motion"). The Petitioner then filed a "Motion for Post-Conviction Relief Rule of Criminal Procedure 3.850" on or about April 14, 2010. ("Second Motion").

The Petitioner ultimately filed an "Amended Motion" that was sent to the lower court in conjunction with a "Motion to Accept the Attached Amended Motion for Post-Conviction Relief that Combines Defendant's January 24, 2010 and April 11, 2010 Motions for Clarity Purposes," this was filed on or about July 14, 2016. ("Amended Motion"). The lower court entered an order denying the Motion for Post-Conviction Relief on August 10, 2017. The Petitioner alleged three grounds for relief: among them was "Counsel was ineffective contrary to the Sixth Amendment of the United States Constitution when counsel failed to advise Defendant of the 'Heat of Passion' affirmative defense before convincing Defendant to accept an Alford plea." Gee v. State, 41 So.3d 1035, 1036 (Fla. 2nd DCA 2010) ("A trial attorney's failure to investigate a factual defense...,which results in the entry of an ill-advised plea of guilty, has long been held to constitute a facially sufficient attack upon the conviction." (quoting Williams v. State, 717 So.2d 1066, 1066 (Fla. 2nd DCA 1998))); Munroe v. State, 28 So.3d 973, 976 (Fla. 2nd DCA 2010) (holding that an evidentiary hearing was required to determine whether counsel performed

[1] Rodriguez v. State, 983 So.2d 1157 (Fla. 1st Dist. 2008)

deficiently in failing to advise the defendant of a potentially viable defense, noting that the defendant's "claim of prejudice-that he would have proceeded to trial-is credible if he can demonstrate that the defense was viable").

In the instant case, however, the plea colloquy does not *conclusively* demonstrate that Petitioner insisted on pleading against his attorney's advice, but claims instead that he plead on counsel's failure to advise as to a reasonable defense premised upon "heat of passion." By neglecting to inform his client as to this viable defense, it effectively lead the Petitioner to believe that he had *no* defense to the crimes charged and thereby induced him to enter into the plea or face a guaranteed conviction.

Similarly here, neither the specifics of the Petitioner's knowledge or abandonment of a defense, was addressed at the plea hearing. Petitioner's claim regarding counsel's failure to raise the defense or advise the Petitioner of the existence of such a defense prior to effectively inducing the Petitioner to plea through threat of a guaranteed conviction for the original charge of first-degree murder. Additionally, the fact that counsel stipulated to the factual basis and the lower court took judicial notice of the clerk's files, adds nothing to support the court's denial. Because those files do not discredit the defense of "heat of passion" that could have been raised at trial. Thus the lower court's mischaracterization of the claim as one of knowledge of the defense is not supported by the record. The opinion by the lower State appellate court stated in pertinent part:

> "The effect of Rodriguez-Lopez's acknowledgement at the plea hearing that he had been advised of all possible defenses and discussed them

> with counsel presents a more difficult question. It can be logically contended that this acknowledgement conclusively refutes the claim that counsel did not advise Rodriguez-Lopez of a particular defense. However, it seems harsh and irrational to impute knowledge of a particular defense, even with such an acknowledgement, when Rodriguez-Lopez alleges that he was unaware of its existence at the time of the plea. The Third District recently split over such a dispute. Sosataquechel v. State, 246 So.3d 497 (Fla. 3d DCA 2018). The majority there found that an acknowledgement at a plea hearing that the defendant discussed defenses with his attorney and was satisfied with his advice "does not adequately resolve" his claim that counsel failed to advise him of his right to claim self-defense. Id. at 499. In contrast, the minority opinion found that such an acknowledgement conclusively refuted the defendant's claim. Id. at 500 (Luck, J., concurring in part and dissenting in part)."
> (Appx. B).

The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process. Maine v. Moulton, 474 U.S. 159, 170, 88 L.Ed.2d 481, 106 S.Ct. 477 (1985); United States v. Wade, 388 U.S. 218, 224, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967). The entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a "critical stage" at which the right to counsel adheres. Argersinger v. Hamlin, 407 U.S. 25, 34, 32 L.Ed.2d 530, 92 S.Ct. 2006 (1972).

This Honorable Court in Iowa v. Tovar, 541 U.S. 77, 158 L.Ed.2d 209, 124 S.Ct. 1379 (2004) held to the question whether must the court specifically advise the defendant that waiving the assistance of counsel in deciding whether to plead guilty entails the risk that a viable defense will be overlooked, is not mandated by the Sixth Amendment.

In arriving to such a conclusion the panel in the written opinion from the First District Court of Appeal for the State of Florida found that "on the day of the

murder, Rodriguez-Lopez waited across the parking lot in a place where he could see the victim's apartment, that he brought the murder weapon (a large knife) with him, and that he was seen 'stalking the victim at her workplace and on her way to work.'" The court however overlooks that state of mind is a key factor in the heat of passion defense. As articulated in Knight v. State, 107 So.3d 449, n.13 (Fla. 5th DCA 2013) "...even in a murder case with ample evidence of premeditation, it would still be possible for a defendant who planned a murder to change his or her mind -- firmly deciding not to commit the murder -- but then kill the person in the heat of passion anyway." This in itself is true because we know that thoughts are not always clear-cut or rational.

The facts presented in Spencer v. State, 645 So.2d 377, 381 (Fla. 1994) are distinct from the Petitioner. The nature and extent of the victim's injuries, from the brutal stabbing to her chest, face, hands and arm; that an eyewitness, Spencer's stepson, who witnessed the vicious attacks and subsequent smashing of the victim's head against a concrete wall of the house, and that Spencer wore plastic gloves during the brutal slaying, was inconsistent with the heat of passion defense articulated in that case. Moreover in Spencer, this was the last of many such violent encounters as stated in the facts. However, in the instant case although the Petitioner was around the victim's apartment there were no prior acts of violence against her. And more importantly that after the stabbing death of the victim Petitioner in immediate remorse and notice of his actions (that were impaired due to his inflamed emotions) turned the knife *on himself.* To establish "heat of passion"

there was an "adequate provocation...as might obscure the reason or dominate the volition of an ordinary reasonable man." Rivers v. State, 75 Fla. 401, 78 So. 343, 345 (1918). The focus should rather point to what transpired in the moment. *See e.g.* Paz v. State, 777 So. 2d 983 (Fla. 3rd Dist. 2000). The adequate provocation was that his sight of the victim was enough to push him over the edge and recount the infidelity that he had experienced with her, when at that point he was not going to go through with the act, the result of that precise moment, made leave for the frail nature of his humanity to take over and impelling him with resolve, through unreasonable fury, as to redress a real or imagined injury that ended in his distraction to commit the fatal act. It was only once he saw, in instant revulsion, his own actions did he attempt to commit suicide in a brutal and painful fashion.

As portrayed in the example by the panel in Knight, whatever mental intent the Petitioner may have had was gone but the killing still occurred in a heat of passion. The facts of the instant case are unique enough to warrant a heat of passion defense that the cold record can ill refute and the Court may have overlooked them in considering that they conclusively refute a heat of passion defense and thus the ineffectiveness of counsel.

Consequently, the Petitioner would humbly request that this Honorable Court revisit the question whether the acknowledgement of a plea hearing is insufficient to resolve the claim of counsel failure to advise of a particular defense as this Court points out to the decision of the Third District in Sosqtaquechel v. State, 246 So.3d 497 (Fla. 3rd DCA 2018). It is the Petitioner's position that it does

not, since he could not have been ill-advised of a defense he had no knowledge about and moreover an open court acknowledgement would be inadequate to waive *all* defenses even those defenses counsel failed to put a client on notice of.