

No.
In The
Supreme Court of the United States

EDWIN ARVELO,
Petitioner,
v.

SECRETARY, FLORIDA DEPARTMENT OF
CORRECTIONS, ATTORNEY GENERAL, STATE
OF FLORIDA
Respondent.

On Petition For A Writ Of Certiorari To The
Florida Fifth District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

Patrick Michael Megaro, Esq.*
Jaime T. Halscott, Esq.
Robert Byther, Esq.
Robert Hughes, Esq.
Halscott Megaro, P.A.
Attorneys for Petitioner
33 East Robinson St., Suite 210
Orlando, Florida 32801
(o) 407-255-2164
(f) 855-224-1671
pmegaro@halscottmegaro.com
**Counsel of Record*

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QUESTIONS PRESENTED

1. Whether counsel's failure to move to suppress the Petitioner's testimony given to police, under coercive conditions, is sufficient evidence to find counsel ineffective and find that Petitioner's Sixth Amendment right to effective assistance of counsel was violated.

PARTIES TO THE PROCEEDING

The original parties to this case were Edwin Arvelo (previously Petitioner-Appellant) against the Secretary of the Florida Department of Corrections, (previously Respondent-Appellee). Rule 14.1(b) of the Supreme Court Rules.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Edwin Arvelo, respectfully prays that a writ of certiorari be issued to review the judgment of United States Court of Appeals for the Eleventh Circuit entered in the above-entitled case on August 29, 2017.

DECISIONS BELOW

The August 29, 2017 opinion of the United States Court of Appeals for the Eleventh Circuit, whose judgment is herein sought to be reviewed, is reprinted in the separate Appendix to this Petition, page App. 13.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit to be reviewed was entered August 29, 2017. The instant Petition is filed within 90 days of the date of decision and within 30-days of an extension granted by this Court. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL PROVISIONS,
TREATIES, STATUTES, RULES
AND REGULATIONS INVOLVED¹**

U.S. Const. Amend VI

Fla. Stat. § 794.011

Fla. Stat. § 784.045

STATEMENT OF THE CASE

Edwin Arvelo (hereinafter, “Arvelo” or “Petitioner”) turned twenty-one years old his On August 15, 2006. He stayed up the entire night without sleeping, consumed an entire bottle of whiskey and drugs. The following morning Arvelo drove to work and stopped in a parking garage at approximately 7:05 a.m., where he saw a woman getting into her car. Arvelo went over to her, asked to borrow a cigarette lighter, grabbed her and pulled her into his car, choking her to keep her quiet and to keep her from fighting back. He put her in the back seat of his car, and told her to be quiet or else he would kill her.

Once in the car, Arvelo attempted to start the car, but the ignition would not work. He got out of the car and opened the hood to inspect the engine, and the victim took the opportunity to lock the doors, blow the horn, and call for help from passersby. Arvelo fled the scene, but was apprehended by police a few blocks

¹ Aforementioned provisions are reproduced in the appendix.

away, and identified by the victim as her attacker. The victim gave a sworn statement, in which she told police that she had been abducted and threatened, but did not state that Arvelo had touched her in a sexual manner, made any sexual advances, announced any intention to rape her, or gave any other details that suggested that the motivation for the attack was sexual in nature.

After he was apprehended by police, Arvelo was interrogated by Detective Nick Collins at the Maitland police Department headquarters. At the beginning of the interrogation, Miranda warnings were administered.² From the onset of the interrogation Detective Collins downplayed Arvelo's offense and constantly reassured Arvelo that he wanted to help him fix his "mistake." Arvelo cried throughout the three and one-half hour interview and indicated that he wanted help for his addiction to drugs and alcohol.

During the interview Detective Collins asked whether Arvelo had been drinking, to which Arvelo informed him he had been drinking since the day before to celebrate his birthday. At this time Arvelo did not disclose to the detective that he had also been using marijuana and cocaine. (App. 63). However, he did tell the detective that he had consumed an entire bottle of whiskey by himself. It was at this time in the interview that the following transpired:

² Miranda v. State of Arizona, 384 U.S. 436 (1966).

Detective Collins: So tell me what the urges are and trust me, man; you know

...

Edwin Arvelo: I'm gonna open up, you know, cause I believe you can help me, and I want you to help me, you know. I just don't want to open myself up and just be going this and just end up, you know, locked up doing time. Because everything that I have now is so, you know so important to me, so, and everything that I love and that I have in my life, to just see it slip away, 'cause it's going to slip away and is never gonna come back. But I wanna open up because I want the help, you know.

(App. 241).

Arvelo disclosed to Detective Collins that he grew up in a home where there was physical, mental and sexual abuse, and substantial domestic violence. He confided that he had been sexually abused by his sister when he was eight years old. At one point, Detective Collins asked Arvelo if he had ever been “Baker Acted” before (involuntarily committed for a psychiatric evaluation), and whether Arvelo had ever taken psychotropic medication, which he replied that he had. Detective Collins repeatedly offered what can only be fairly characterized as psychological insight and advice to Arvelo when Arvelo disclosed that he had deviant sexual thoughts:

Detective Collins: Now, the cause of that, you know, now we're looking at the cause and the effect you know. Because you were sexually battered, now there is an effect on something, okay? So I'm trying to get to what effect it had, you know, with you being that, what did it lead to. **Cause what I'm looking to do, remember, is I'm looking to break that cycle, man.**

(App. 253).

Detective Collins then continued to minimize Arvelo's actions and indicated that Arvelo had only minor infractions on his record, and minimized the impact of that record, stating:

Edwin Arvelo: Has anyone spoken to you about my record? Has anyone looked at my record?

Detective Collins: I've looked at your record, your record is . . . dude, your record is two pages, man. Come one what is that you know, indecent exposure. That's anything from peeing in the bushes to, you know, mooning my buddy driving by in a car. Okay, you know what I'm saying.

(App. 258).

Detective Collins began to question Arvelo about the details of the incident and his actions toward the victim. Particular attention was paid to Arvelo's intention in abducting the victim, with Detective Collins repeatedly asking Arvelo what he planned to do with her. In response, Arvelo told Detective Collins that he had thought of sexually assaulting the victim. Detective Collins then built upon this theme, suggesting to Arvelo that because he was the victim of sexual abuse when he was a child, that experience caused him to experience uncontrollable lustful urges that manifested themselves as the attack on the victim, which Arvelo accepted as an explanation. Detective Collins asked Arvelo whether he had touched the victim on her vagina, breasts, removed any of her clothing, or otherwise had any sexual contact with her, which Arvelo pointedly denied.

Detective Collins also deliberately minimized the sentencing consequences Arvelo was facing, repeatedly reassuring him that he was not in serious trouble:

Detective Collins: You ain't in here for something, for something that's going to take your life away, okay, alright?
You're not in here for that, okay.
You're in here for a mistake, right?
Okay. There's a big difference.

...

And sometimes, what seems like a bad thing is not necessarily a bad thing as it can save you.

...

Detective Collins: Okay, exactly. Alright and I'm looking at a young person, and young people make mistakes all the time, okay. I'm not sitting in here with some hardened criminal that's got a 20 year history with a rap sheet longer than my arm, and I sit in here with them all the time. We're not talking about that right? You're not that kind of guy, I'm not sitting here with that kind of guy. I know that. You know that and I know that, okay. I'm sitting in here with a young person that's made a mistake, okay. But I'm looking at a young person that, he's only 21, you know what I'm saying. **You, you, you can get by mistakes as a young person and have a whole life ahead of you.**

(App. 234-237).

At the end of the interrogation, Arvelo asked Detective Collins whether he would be going to jail, and whether he would be able to bond out. Detective Collins, continuing to intentionally deceive Arvelo and minimize the seriousness of the situation, told him, "Yeah, you should get a bond. You kidding, me, man, I have guys in there for murder that get bond \$20,000."

Contrary to what he had told Arvelo about the seriousness of the situation, Detective Collins completed a Charging Affidavit, charging Arvelo with the crimes of attempted murder in violation of Florida Statutes § 782.051(1), and kidnapping with intent to commit a felony in violation of Florida Statutes § 787.01(1)(A)(2). Each of the charges carried a potential sentence of life imprisonment without parole, and a mandatory minimum sentence of twenty-five years imprisonment pursuant to Florida Statutes § 775.082(4a)(ii).

Arvelo was subsequently charged in the Ninth Judicial Circuit Court in and for Orange County, Florida in an Information with Count # 1, kidnapping with intent to commit a sexual battery in violation of Florida Statutes § 787.01(a)(2), Count # 2, attempted sexual battery with a deadly weapon or physical force in violation of Florida Statutes §§ 794.011(3), 774.04, Count # 3, aggravated battery causing great bodily harm in violation of Florida Statutes § 784.045(a)(1), and Count # 4, attempted first-degree murder in violation of Florida Statutes § 782.04(1)(a)(1). Counts #1, #2 and #4 were each punishable by life imprisonment without the possibility of parole. Declared indigent, he was assigned a public defender to represent him.

During the eight months that counsel represented Arvelo, she met with him approximately four times. Their discussions during these meetings focused on the charges, possible sentences, and

changes to court dates. There was no discussion of any defense to the charges, or suppression of the statement; in fact, counsel told Arvelo that she could not think of any defense to his case, and invited Arvelo to come up with his own defense, as she believed the prosecution's case was indefensible. Counsel advised Arvelo to simply enter a plea of no contest to all charges, and throw himself on the mercy of the court. It is undisputed that counsel never moved to suppress the statements Arvelo made to Detective Collins, or make any other substantive motions.

Upon the advice of his public defender, Arvelo entered a no-contest plea to all counts against him. On April 13, 2007, the state court sentence Arvelo to sixty (60) years of incarceration with the Florida Department of Corrections, followed by 15 years of probation. Arvelo timely appealed the Judgment and Sentence to the Florida's Fifth District Court of Appeal, which entered a per curiam affirmance of the Judgment and Sentence on June 3, 2008. The Appellate Court issued its mandate on June 20, 2008.

On April 15, 2009, Arvelo, pro se, filed a Motion for Post-Conviction Relief pursuant to Florida Rule of Criminal Procedure 3.850, which he later amended. In his Amended Motion for Post-Conviction Relief, Arvelo argued that because his counsel failed to advise him of meritorious defenses to the charged crimes prior to his entry of an open plea of nolo contendere his sentence violated his Sixth Amendment right to effective assistance of counsel.

The State Court denied Arvelo's motion without an evidentiary hearing on February 20, 2012. Arvelo appealed the state court's decision, which was affirmed by the appellate court, per curiam, on June 12, 2012.

A petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 was filed in the United States District Court for the Middle District of Florida, which was denied on March 4, 2014. Arvelo filed a timely notice of appeal on April 1, 2014, and moved for a certificate of appealability. On August 28, 2014, the United States Court of Appeals for the Eleventh Circuit granted a certificate of appealability with respect to one claim of ineffective assistance of counsel, thereby permitting Arvelo to appeal. (App. 15).

Ultimately, the Eleventh Circuit reversed the summary denial of the § 2254 petition in a published decision, and remanded to the United States District Court for the Middle District of Florida for an evidentiary hearing. Arvelo v. Secretary, Florida Department of Corrections, 788 F.3d 1345 (11th Cir. 2015).

During the evidentiary hearing held before the District Court, Arvelo's public defender, Catherine Conlon, was questioned about her representation. She testified that her decision forego a suppression motion was made prior to her review of either the audio recording or the video of the interrogation, and likely

before any review of the transcript of the interrogation. During the questioning of Conlon the following transpired:

Q: All right. Do you remember discussing with the defendant any basis for a possible motion to suppress his statement?

A: I have this vague recollection where prior to visiting him at the jail, that I had done some research about whether or not he was so intoxicated, that there would be a good basis for a motion to suppress.

Q: So you did some legal research into the grounds to move to suppress based on intoxication that may make a statement involuntary?

A: I have a vague recollection of that. I can't think of any other case where that was the issue. So I have a vague recollection of that and discussing that I didn't think that the criteria could be met.

Q: Why would that be? Because he -- let me ask you this. **Had you reviewed the video of the interview at that point?**

A: **I don't recall what I had. Whatever the State had provided to me in discovery is what I would have reviewed.**

Q: So you discussed -- you don't have -- let me see if I get this correct. You don't

have a clear recollection of actually discussing it with the defendant, but you do remember researching the issue?

A: I have a vague recollection of it. I don't -- I think it was in this case; but in all fairness, I don't remember.

Q: Now, in this particular case, you had an audio-recorded statement and a video-recorded statement of the interview with Edwin Arvelo, correct?

A: Yes.

Q: Did you listen to the entire video?

A: I don't remember. Whatever I was given by the State is what I looked at and reviewed.

...

Q: Did you ever read the transcript of the audio recording?

A: If the State provided it, I reviewed it.

Q: But as you sit here today, you have no independent recollection of whether you did that or not?

A: No.

Q: Did you ever send out any audio recording or video recording for transcription by your own court reporter service?

A: No.

Q: Did you ever submit the audio or video recording for any expert analysis to see if maybe it had been tampered with or edited in any way?

A: No.

Q: Did you ever submit the audio or the video to any forensic psychologist for review?

A: The only person I would have given it to would have been Dr. Mings, and I don't remember if I did that or not.

Q: You have no recollection of whether you gave Dr. Mings the audio?

A: I have no -- I don't remember

(App. 147-169).

The record conclusively established that neither the audio recording of the interrogation, the video recording, or the transcript of the interrogation was turned over to defense counsel until February 2007 – months after Conlon conducted a 10-minute deposition of Detective Collins which was held on November 27, 2006.

Linda Drane Burdick, the Assistant State Attorney who prosecuted Arvelo, testified that prior to the depositions of November 27, 2006, trial counsel had already been provided the transcript of Arvelo's post-arrest interrogation. However, her testimony was contradicted by a notice of supplemental discovery that she signed on February 20, 2007, which clearly indicated that the transcript and video had been provided after defense counsel had already made the decision to enter a guilty plea. In spite of written documentary evidence to the contrary and her own

signature, Burdick again insisted that it had been previously provided prior to the November 27, 2006 deposition. Burdick was then confronted with the last page of the Maitland Police Department transcript, which conclusively established that the transcript was not completed until February 4, 2007 – approximately two and one half months after the November 27, 2006 deposition had been completed. Assistant State Attorney Burdick was unable to explain the discrepancy.

Similarly, during the evidentiary hearing Conlon was questioned about the sentence that Arvelo received and admitted that had she known Arvelo was going to receive a sixty-year sentence she would have filed the motion to suppress. Further, during questioning she stated:

A: I think 60 is almost a life sentence;
**and, obviously, had I known it was
going to be 60, he would have said go
to trial.**

Q: Say that last part again. I'm sorry. If I
had known?

A: If I had known that the judge was
going to give 60, I'm sure Mr. Arvelo
would have wanted to go to trial.

(App. 191).

Notably, during the evidentiary hearing the District Court inquired as to why counsel did not seek a motion to suppress Arvelo's testimony:

THE COURT: What was the significance of the confession --

THE WITNESS: Okay.

THE COURT: -- to the State's ability to prove its case; and, two, what was the down side of not filing a motion to suppress? I mean, why wouldn't you just do that, unless there's a down side to it?

...

THE COURT: I mean, if you were counsel for him at trial and you had to try this case, wouldn't you be a lot better off not having that confession in front of the jury?

THE WITNESS: Yes.

THE COURT: So why didn't you try?

THE WITNESS: Why didn't I try it?

THE COURT: Yes. What was the down side --

THE WITNESS: He --

THE COURT: -- other than your time?

THE WITNESS: Well, he didn't -- my recollection was that he didn't want to risk going to trial and facing that possible life sentence after trial, because I think after the testimony of the witnesses, the judge could have -- and if there was a conviction, then the judge

could have given him life; and the judge could have heard more evidence through what he had at either the plea and sentencing.

THE COURT: Well, I think what you're telling me is that by the time the suppression issue was ripe between you and your client, he had already decided he would rather plea than take a chance at trial, even if the confession were suppressed? That's what you're trying to tell me, I think.

THE WITNESS: I think I had a discussion with him about the motion to suppress. I guess I didn't think that it was likely to be granted.

...

THE COURT: But if a confession is significant to your client's case, which I think in this case it was at least significant, I don't understand the down side of not filing it and I don't think you've told me one.

(A pause.)

THE WITNESS: I don't think I have an answer as to why I did not do it.

THE COURT: Okay.

(App. 161-163).

After the evidentiary hearing, the District Court again denied relief. Arvelo timely applied for a

Certificate of Appealability, again, to the Eleventh Circuit, which issued an En Banc decision filed on May 10, 2017. (App. 13). The Eleventh Circuit ruled that “Arvelo’s confession was voluntary, the state court would have denied a motion to suppress the confession. Thus, Arvelo was not prejudiced by his trial counsel’s failure to file a motion to suppress – such a motion would not have influenced Arvelo’s decision to enter a plea because it would have failed.” (App. 13).

This timely Petition follows.

REASONS FOR GRANTING THE WRIT

I. TO DETERMINE WHETHER COUNSEL’S FAILURE TO MOVE TO SUPPRESS THE PETITIONER’S TESTIMONY GIVEN TO POLICE, UNDER COERCIVE CONDITIONS, IS SUFFICIENT EVIDENCE TO FIND COUNSEL INEFFECTIVE AND FIND THAT PETITIONER’S RIGHT UNDER THE SIXTH AMENDMENT WAS VIOLATED.

The United States Constitution guarantees each defendant in a criminal prosecution the right to the effective assistance of counsel. U.S. Const. Amend. VI. The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused

to receive Due Process of Law in an adversarial system of justice. United States v. Cronic, 466 U.S. 648, 658 (1984).

This Court has held that “[t]he benchmark of judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984). Under the Strickland standard, ineffective assistance of counsel is made out when the defendant shows that (1) trial counsel’s performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the “counsel guaranteed the defendant by the Sixth Amendment,” and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. Id. at 687.

A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct. “The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Strickland, 466 U.S. at 690. Strickland cautions courts to refrain from

second-guessing counsel's strategic decisions from the superior vantage point of hindsight. Id. at 689. "Strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Id. at 690-691 (emphasis added). At the same time, "virtually unchallengeable" does not mean wholly unchallengeable. See Pavel v. Hollins, 261 F.3d 210, 218 (2d Cir. 2001); see also Phoenix v. Matesanz, 233 F.3d 77, 82 (1st Cir. 2000). Further, courts have held that "[c]ertain defense strategies, however, may be so 'ill-chosen' as to render counsel's overall representation constitutionally defective." Adams v. Balkcom, 688 F.2d 734, 738 (11th Cir. 1982).

This Court held in Hill v. Lockhart, 474 U.S. 52 (1985) in order for the prejudice requirement standard for evaluating claims of ineffective assistance of counsel under Strickland, a defendant "must show that there was reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. (citing U.S. Const. Amend. 6.).

This Court and many other federal courts have recognized the great weight afforded to confessions by defendants in a criminal case. Additionally, the courts have offered opinions warning of the dangers a false or coerced confession may have on the outcome of a criminal matter. In United States v. Rutledge, 900 F.2d 1127 (7th Cir.1990), Judge Posner observed that through promises of non-prosecution, "the government

has made it impossible for the defendant to make a rational choice as to whether to confess—has made it in other words impossible for him to weigh the pros and cons of confessing and go with the balance as it appears at the time.” Id. at 1129. Thus, “if the government feeds the defendant false information that seriously distorts his choice ... then the confession must go out.” Id.

Here, as in Rutledge, Detective Collins’ willful deception and false promises made it impossible for Edwin Arvelo to make a rational choice. All of the false information that Detective Collins fed to Petitioner clearly distorted his perception of the true peril that the confession would put him in. By falsely promising help, minimizing the consequences, and implying that there would be no prosecution, Detective Collins exerted the exact kind of psychological coercion that resulted in Petitioner’s free will being overborne.

Effective assistance of counsel requires that an attorney do more than simply stand next to a client in court as a potted plant. The Supreme Court described the duty to provide effective assistance as follows:

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.

When a true adversarial criminal trial has been conducted - even if defense counsel may have made demonstrable errors - the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: “While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.” United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (CA7), cert. denied sub nom. Sielaff v. Williams, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109 (1975).

United States v. Cronin, 446 U.S. 648, 656-657 (1984) (emphasis added).

Many courts have recognized that “[a] confession is like no other evidence. Indeed, ‘the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him.’” See, e.g. Mansfield v. Sec’y, Dept. of Corr., 679 F.3d 1301 (11th Cir. 2012) (quoting Arizona v. Fulminante, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)); United States v. Carrasco, 540 F.3d 43 (1st Cir. 2008); Zappulla v. New

York, 391 F.3d 462 (2d. Cir. 2004); United States v. Brownlee, 454 F.3d 131 (3d. Cir. 2006); United States v. Gillion, 704 F.3d 284 (4th Cir. 2012); United States v. Avants, 278 F.3d 510, 522 (5th Cir. 2002); McCray v. Metrish, 232 F.3d 469 (6th Cir. 2007); United States v. Felming, 594 F.2d 598 (7th Cir. 1979); Lufkins v. Leapley, 965 F.2d 1477 (8th Cir. 1992); Hayes v. Brown, 399 F.3d 972 (9th Cir. 2005); United States v. Perdue, 8 F.3d 1455 (10th Cir. 1993).

As a result, courts have held that a failure on the part of an attorney to move to suppress incriminating statements taken in violation of a defendant's Constitutional rights constitutes ineffective assistance of counsel. See Martin v. Maxey, 98 F.3d 844, 848 (5th Cir. 1996); Kirkpatrick v. Butler, 870 F.2d 276, 283 (5th Cir. 1989), cert. denied, 493 U.S. 1051 (1990); see also Thomas v. Varner, 428 F.3d 491, 495 (3d Cir. 2005) (ineffective assistance of counsel for failing to suppress unduly suggestive identification); Morrison v. Kimmelman, 752 F.2d 918, 922 (3d Cir. 1985) affirmed on other grounds 477 U.S. 365 ("proper norms of advocacy" required a "timely [motion] to suppress" where there was a valid basis for suppression); Rodriguez v. Young, 906 F.2d 1153, 1161 (7th Cir. 1990) (failure to move to suppress identification "objectively unreasonable"); Cossel v. Miller, 229 F.3d 649, 654-655 (7th Cir. 2000) (holding ineffective assistance of counsel for failure to move to suppress the "pivotal evidence in the case").

Florida courts have also identified a number of factors to consider whether police coercion renders a defendant's confession involuntary. See State v. Sawyer, 561 So.2d 278, 281-82 (2d DCA 1990) (whether the confession was given in a coercive environment...whether psychological coercion was applied...whether the police made threats, promises of leniency, or made statements to delude the suspect as to his or her true position...whether the police exerted undue influence or made direct or implied promises of benefits, accused's emotional condition); State v. Charon, 482 So.2d 392, 393 (3d DCA 1985) ("youth, his inexperience with the law, his lack of counsel"); Thompson v. State, 548 So.2d 198, 204 (Fla. 1989) ("mental weakness of the accused is a factor"); Reddish v. State, 167 So.2d 858, 860 (Fla.1964) ("physical condition of the appellant at the time the confessions were obtained."); Telfort v. State, 978 So.2d 225, 228 (4th DCA 2008) ("an implied promise of leniency was sufficient to render a confession involuntary."); State v. Mallory, 670 So.2d 103 (1st DCA 1996) ("It is fear of material or physical harm, or hope of material award, which renders a confession inadmissible."); Williams v. State, 441 So.2d 653 (3d DCA 1983) ("defendant's confession was wrongfully extracted by law enforcement officers, who deceived defendant and promised to tell of her cooperation.").

An application of these factors to the instant case reveals that not only was there a good-faith basis for counsel to file a suppression motion; it is probable that Petitioner's statements would have been

suppressed in accordance with the law. This Court has not ruled on whether failure to move to suppress a coercive confession is sufficient to show a violation of the Sixth Amendment right to effective assistance of counsel. This case lays the framework for future cases where unlawful interrogations may result in far greater criminal sentences.

The facts of the case now before this Court are shocking and depict a picture of clear and objectively unreasonable assistance of counsel. It is clear from the testimony elicited from trial counsel that her failure to suppress cannot be considered a “sound trial strategy,” which, under Strickland, would be a valid argument. Instead, the evidence and trial counsel’s own testimony clearly show the failure to file a motion to suppress was not a strategy, but rather ineffective representation in violation of the Sixth Amendment.

This Court held in Strickland that we must avoid “the distorting effects of hindsight” and evaluate the reasonableness of counsel’s performance from the perspective of counsel at the time the acts or omissions were made. Strickland, 466 U.S. at 689. Regardless of trial counsel’s hindsight in this matter, her failure to move to suppress the key evidence in the case against her client, obtained by false promises and while he was under the influence of drugs and alcohol, is wholly unreasonable.

The Petitioner in this case is now at the point where he was coerced by false promises and gave

police testimony that was untrue because he wanted help. After he did not receive the help promised to him by police, the Petitioner was then offered no guidance from his court appointed attorney and was convinced that his only option was to beg the court for leniency. The Petitioner has now been convicted and sentence to a de facto life sentence; has petitioned his case before many courts for a decade; and he now must rely on another court to try and undo all of that damage. Having been misguided by police and offered objectively unreasonable assistance of counsel, this Petitioner respectfully request that this Court consider his petition on the merits.

**II. PETITIONER RECEIVED
INEFFECTIVE ASSISTANCE OF
COUNSEL WHERE COUNSEL
FAILED TO MOVE TO SUPPRESS
STATEMENTS MADE TO LAW
ENFORCEMENT IN VIOLATION OF
HIS FIFTH AMENDMENT RIGHTS,
AND THOSE STATEMENTS WERE
DAMAGING AND THE PIVOTAL
BASIS FOR THE AGGRAVATING
CHARGES AGAINST PETITIONER
WHICH RESULTED IN A DE FACTO
LIFE SENTENCE**

This Court set the precedent in Strickland v. Washington, holding that “[t]he benchmark of judging any claim of ineffectiveness must be whether counsel’s

conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result.” Strickland, 466 U.S. at 686. Under the Strickland standard, ineffective assistance of counsel is made out when the defendant shows that (1) trial counsel’s performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the “counsel guaranteed the defendant by the Sixth Amendment,” and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. Id. at 687.

The Seventh Circuit Court of Appeals ruled in Hicks v. Hepp, 871 F.3d 513 (7th Cir. 2017), that in order for a claim of ineffective assistance of counsel, based upon a failure to file a motion to suppress, to succeed the petitioner must demonstrate “[t]hat there was both a reasonable probability that he would have prevailed on the motion to suppress and a reasonable probability that, if his confessions were suppressed, he would have been acquitted.” (citing Bynum v. Lemmon, 560 F.3d 678, 685 (7th Cir. 2009); see also Strickland, 466 U.S. at 694.

This Court held in Bram v. United States, 168 U.S. 532 (1897), “a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by a direct or implied promises, however

slight.” Id. at 542 (internal quotations omitted). In Brady v. United States, 397 U.S. 742 (1970), this Court reasoned that “even a mild promise of leniency,” though not “an illegal act as such,” undermines the voluntariness of a confession “because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess.” Id. at 754. the issue of voluntariness is determined by examining the totality of the circumstances. United States v. Lall, 607 F.3d 1277 (11th Cir. 2010).

Numerous courts have identified factors to be considered in the totality-of-circumstances rubric. See Lall, supra (“a significant aspect of that inquiry here involves the effect of deception in obtaining a confession”); United States v. Thompson, 422 F.3d 1285, 1295-1296 (11th Cir. 2005) (“Sufficiently coercive conduct normally involves subjecting the accused to an exhaustingly long interrogation, the application of physical force or the threat to do so, or the making of a promise that induces a confession”); Coleman v. Singletary, 30 F.3d 1420, 1426 (11th Cir. 1994) (“Mental illness is one factor to be considered in determining whether a waiver was made knowingly”); Fare v. Michael C., 442 U.S. 707, 725 (1979) (defendant’s age, experience, education, background and intelligence are factors to consider in a voluntariness determination); Parker v. Allen, 565 F.3d 1258, 1280 (11th Cir. 2009) (“A confession that

was not the product of free will and rationale intellect or that was made when the individual's will was 'overborne' by physical, psychological, or drug-induced means, is inadmissible").

Here, the record establishes that Petitioner turned twenty-one years old the night before his arrest. To celebrate his birthday, he drank an entire bottle of whiskey, consumed drugs, ate nothing, and stayed up the entire night before the incident, which occurred at approximately 7:00 a.m. Soon after his arrest, he was clearly in an extremely mentally vulnerable state. Finding himself in the kind of legal trouble he had never before experienced due to his lack of criminal record other than a misdemeanor, he disclosed that he had significant psychological problems, was emotional and crying throughout the interview, and begged his interrogator for help, expressing his belief that God had sent Detective Collins to help him.

Taking advantage of an already mentally frail individual who was clearly in the throes of a psychological episode, as well as noticeably intoxicated, Detective Collins repeatedly promised Petitioner that he would help him; that this incident appeared to be a single mistake; and that he just needed to "clear up" this mistake and find out why this incident had occurred. He grossly minimized the seriousness of the charges, telling Petitioner that it

was unlikely he would go to prison for this single mistake in his life, and even promised that he would be bonded out of jail quickly. While feeding Petitioner this false information, Detective Collins simultaneously charged him with felonies that were punishable by a mandatory minimum of twenty-five years imprisonment, and a maximum of life without the possibility of parole, a fact of which Petitioner was clearly unable to comprehend and entirely unaware of at the time he made the statement.

Given this false information and the repeated assurances, the record is clear that Petitioner opened up and incriminated himself only because he believed that in doing so, Detective Collins would fulfill the false promises of leniency and help that Petitioner sought.

With respect to the charges brought against the Petitioner under count numbers one and two, i.e., kidnapping with intent to commit a sexual battery in violation of Florida Statutes § 787.01(a)(2) (count #1); attempted sexual battery with a deadly weapon or physical force in violation of Florida Statutes §§ 794.011(3), 774.04 (count #2), the crux of the case against him was the coercive testimony he offered to investigators. The suppression motion therefore was a critical defense, because without that confession, the prosecution had absolutely no evidence to support any charge that was sexual in nature. The only evidence

corroborating the incident that occurred in the parking garage was that of the victim, whom explicitly told officers that the Petitioner did not touch her sexually, did not make any sexual remarks to her, and she did not believe she was going to be sexually assaulted.

Given the fact that the only evidence in support of counts one and two was the testimony given by the Petitioner, this court can readily assume that he would have been acquitted had the confession been suppressed. The standard set for in Strickland does not require the Petitioner to show that he would have been acquitted on all charges. Instead, the Petitioner merely needs to show that counsel's failure to suppress his coercive testimony resulted in a prejudice against him. It is without question that a thirty (30) year extension to one's sentence due to counsel's failure to move to suppress the prosecution's sole evidence against the petitioner: is prejudicial.

Even if counsel reasonably thought that a motion to suppress would have been ultimately unsuccessful, she still should have moved to suppress as even an unsuccessful motion would have had value to the defense of Edwin Arvelo. Every trial attorney knows full well that a suppression hearing is a golden opportunity to test the credibility of a key witness on the witness stand and to start building a defense. Counsel should have used the opportunity to probe for

and uncover weaknesses in the State's case; she should have locked Detective Collins into sworn testimony that he would have been unable to change at trial without committing perjury or at least subjecting himself to a vigorous impeachment; counsel should have used the opportunity to set up a trial defense to discredit Detective Collins as a liar who used suggestive, coercive, underhanded, and outright dishonest tactics on a clearly-vulnerable Edwin Arvelo to induce him to incriminate himself; counsel should have used the hearing as an opportunity to build up a "false confession" defense to use at trial, develop evidence for an expert to review in preparation of such a defense, and at the very least develop the record to later cast significant doubt on the reliability of the statements themselves to a jury.

In the best-case scenario, the trial court would have suppressed the statements, and Edwin Arvelo would have been in a significantly better position to either litigate his case at trial, or to use suppression as a bargaining chip to negotiate a better outcome. In the worst-case scenario, an unsuccessful motion would have given Arvelo a chance to develop a trial defense, and make an informed decision as to whether to go to trial or negotiate a plea bargain. He would still have had the chance to appeal the issue to a higher court and live to fight another day, and possibly use the possibility to his advantage in plea bargaining. It is clear he would have been in no worse position had

counsel litigated suppression. There was simply no logical, reasonable explanation for counsel to waive the only possible defense he had under any theory.

The only action of counsel was to sacrifice Arvelo and throw him upon the mercy of the court and beg for leniency without bothering to subject the State's case to any sort of meaningful adversarial testing. If suppression was unsuccessful, then counsel could have still used the same factors as a basis for mitigation in sentencing later – except with the added benefit of a record of testimony from the State's witness in support, rather than only a defense mitigation expert. The difference is that a suppression motion would have bore fruit for Arvelo, as opposed to a strategy to do nothing but enter a “blind plea” that resulted in sixty years imprisonment, and a de facto life sentence, which was the same sentence Arvelo would have faced had he gone to trial and been convicted.

By failing to move to suppress, counsel waived the only possible defense Edwin Arvelo had. This failure permeated his case, as the statements were the sine qua non of the case against him. Without those statements in the case, the result would almost certainly have been different in Arvelo's favor. As a consequence, trial counsel, in failing to act as an adversary to the prosecution, rendered ineffective

assistance of counsel that resulted in extreme prejudice.

This error was not harmless. In United States v. Mejia, 545 F.3d 179, 199 (2d. Cir. 2008), the Second Circuit set forth the Federal standard of determining whether error is harmless:

Several factors are relevant when evaluating the error's likely impact: (1) the strength of the Government's case; (2) the degree to which the testimony was material to a critical issue; (3) the extent to which the statement was cumulative; and (4) the degree to which the Government emphasized the inadmissible evidence in its presentation of its case. Though all of these factors are relevant, we have stated that the strength of the Government's case is "probably the single most critical factor."

Id., citing United States v. Reifler, 446 F.3d 65, 87 (2d Cir. 2006).

Here, the strength of the State's case rested almost exclusively upon Appellant's own statements to law enforcement, which would have and should have been suppressed. As argued above, this was the critical evidence in the case, and not merely

cumulative. Without at least some of Arvelo's statements, there was no attempted sexual battery and no kidnapping with intent to commit a sexual battery. Without those charges, instead of facing the thirty years imprisonment that he actually received for the kidnapping charge, he would have faced only a maximum of five years imprisonment for false imprisonment – a difference of twenty-five years. Likewise, the attempted sexual battery charge would have not survived, resulting in fifteen years of probation being cut from his sentence.

CONCLUSION

The great weight of the evidence and the case law governing this matter is in favor of the Petitioner. Through clear and convincing evidence, the Petitioner has shown that his confession was obtained under impermissible conditions and under the false pretense that he would be receiving help if just admitted to things he did not do or plan to do. Without this confession, there can be no doubt that the Petitioner would not have been convicted of the crimes of attempted sexual battery. Accordingly, the Petitioner's sentence would not have received an additional thirty-year sentence and would have been afforded a greater opportunity to prevail at trial. Thus, trial counsel's failure to move to suppress Petitioner's confession was unreasonable, prejudicial, and a violation of his Sixth Amendment rights to effective assistance of counsel.

Respectfully submitted on this 27th day of
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Patrick Michael Megaro, Esq.*
Jaime T. Halscott, Esq.
Robert Hughes, Esq.
Halscott Megaro, P.A.
Attorneys for Petitioner
33 East Robinson St., Suite 210
Orlando, Florida 32801
(o) 407-255-2164
(f) 855-224-1671
pmegaro@halscottmegaro.com
**Counsel of Record*