IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,721

LUIS CARLOS ARANGO, a/k/a
CARLOS LUIS ARANGO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

* *

**SUPPLEMENTAL BRIEF OF APPELLEE
ON REMAND FROM THE UNITED
STATES SUPREME COURT**

JIM SMITH
Attorney General
Tallahassee, Florida

CALIANNE P. LANTZ
Assistant Attorney General
Ruth Bryan Owen Rohde Building
Florida Regional Service Center
Department of Legal Affairs
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONTINUED

OTHER AUTHORITIES

INTRODUCTION

Luis Carlos Arango a/k/a Carlos Luis Arango is the appellant in this Court. He was the defendant in the trial court and the movant in post-conviction relief proceedings. The appellee, the State of Florida, was the prosecution in the trial court. In this brief, the symbol "R" will be used to designate the two volumes of record on appeal originally prepared and transmitted to this Court in this case. The supplemental record will be referred to by the symbol "S.R." The record on appeal from Supreme Court Case Nos. 63,562, 63-563 and 59,678 will be referred to by the symbols "R.T." The transcripts of trial proceedings in the "former" records will be designated by the symbols "T.T."

The parties will be referred to in this brief as they appear before this court. The State of Florida will be referred to as "Appellee" and the defendant as "Appellant." All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE

The appellant, Carlos Luis Arango, a/k/a Luis Carlos Arango was convicted of murder in the first degree and possession of a controlled substance, to-wit: cocaine; in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County in Case No. 80-5372. (R.T. 141-142). Judgment was entered on July 17, 1980. (R.T. 141). On July 18, 1980, the appellant was sentenced to death by electrocution as authorized by §775.082(1), Florida Statutes (1979)(R.T. 143-144). On July 28, 1984,Appellant was sentenced to serve a term of five years' imprisonment in the State Penitentiary, to be served concurrent to his sentence as to the murder conviction. (R.T. 148).

The appellant appealed to this Court. On January 21, 1982, this Court filed an opinion affirming Appellant's convictions and sentences. Rehearing was denied on April 8, 1982. Arango v. State, 411 So.2d 172 (Fla. 1982), cert. denied, ___ U.S. ___, 102 S.Ct. 2973 (1982). Appellant subsequently filed a petition for writ of habeas corpus and appealed from the trial court's denial of a motion for post-conviction relief filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure. On September 1, 1983, this Court denied the petition for writ of habeas corpus, and affirmed the denial of the Rule 3.850 motion with the exception of remanding the case to the trial

court for a hearing on a claimed violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Arango v. State, 437 So.2d 1039 (Fla. 1983).

The appellant filed an "Amended Motion for Post-Conviction Relief Re: Brady" On November 29, 1983. (R. 462-520). Following a hearing where the parties stipulated that the matter could be determined upon a review of the entire record with the addition of deposition testimony and accompanying exhibits. (S.R. 5). On December 2, 1983, the trial court rendered an "Order Denying Defendant's Motion for Post-Conviction Relief Re: Brady Violation." (R. 521). Appellant appealed to this Court from the denial of his motion for post-conviction relief. On January 31, 1985, this Court reversed the trial court's ruling and remanded the case for a new trial. Arango v. State, 467 So.2d 692 (Fla. 1985). This Court held that "the outcome of the trial might have been affected" by the State's nondisclosure of the fact that a gun had been found on the premises of the complex where the appellant's apartment (the murder site) was located. This Court found that the gun should have been disclosed pursuant to the following pre-trial discovery request:

> Any physical evidence or witness statements which corroborate the Defendant's statements to Detective Diaz that other latin males entered the apartment and committed the homicide.

See, Arango v. State, 467 So.2d 692 (Fla. 1985).

Appellee filed a petition for writ of certiorari in the Supreme Court of the United States. On October 7, 1985, the Supreme Court of the United States vacated the judgment of this Court and remanded the case for further consideration in light of United States v. Bagley, 473 U.S. ___, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Florida v. Arango, ___ U.S ___, 106 S.Ct. 41, ___ L.Ed.2d ___(1985). In United States v. Bagley, supra, the Supreme Court of the United States held that the prosecution's failure to disclose requested impeachment evidence would constitute constitutional error only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

STATEMENT OF THE FACTS

Appellee subits that the pertinent facts are as follows:

The trial court found that the pre-trial discovery requests were "general." (S.R. 94-96) Although Appellant's third request for favorable evidence referred to statements made by Appellant to a "Detective Diaz." (R. 518-519). The record does not reflect the involvement of any "Detective Diaz" in this case.

Although a semi-automatic pistol was located on the day after the homicide of Mr. Jario Arango-Posada, the gun was not found at the actual murder scene, the appellant's apartment. The weapon, a .38 Caliber Walther semi-automatic pistol (R. 216) was found outside the back of the apartment complex, on the first floor, downstairs from Appellant's apartment. (R. 113). Officer Deborah Young Wiley and other detectives did not conclude that the weapon was a "third gun." The weapon was interpreted by police officers as "just a gun found." (R. 126). Police ascertained that the weapon purchased from the Tamiami Gun Shop was allegedly registered to one "Antonio Garcia" at an address that could not be found and believed not exist. (See, R. 132-133).

Appellant's theory of defense was that three armed "bandits" or "banditos" forced their way into the apartment and fought with Appellant and the deceased, resulting in the victim's death. He presented this theory to the jury during his testimony at his trial. (See T.T. 716-730). During the course of this testimony, however, Appellant admitted to handling the two guns found on the scene, a .22 caliber pistol with a silencer and a .38 caliber gun. (T.T. 728-730). Appellant also acknowledged placing bullets suited for the .38 caliber gun into his pocket. (T.T. 728-730). Appellant did not deny having blood on his body and underwear; nor did he contest evidence that he had washed up and changed his clothes. (T.T. 728-730).

The victim, Jario Arango-Posada, was found in a state that indicated he had suffered various violent acts. He had been kicked between the legs so as to almost dismember not merely "wound" his penis. He was strangled with a television cord connected to a television that was in operation when Police Officers Gable and McHugh (McQue) arrived on the scene. A towel was stuffed down the victim's throat and he had been hit in the head and body with a blunt instrument. He was also shot twice in the temple with a .22 caliber semi-automatic pistol with a silencer. (T.T. 1-973; T.R. 99-100). The "found gun" was not a .22 caliber weapon.

Dr. Larry Grady Tate, Associate Medical Examiner, testified that the cause of death of the victim was a combination of multiple gunshots wounds to the head, blunt trauma, and strangulation, each being sufficient to case death and all occuring at or before death. (T.T. 624; 665-656). Dr. Tate testified as to having reported to the scene of the homicide and finding the victim on the bed with a copious amount of blood underneath the body and a pillow on top of the face. (T.T. 628). When the pillow was removed, he observed a large white towel stuffed into the victim's mouth and a T.V. cord wrapped tightly around the neck of the victim. (T.T. 629). There was so much blood that the doctor was unable to determine the nature of the wounds. The wounds were later determined to be lacerations due to blunt trauma. (T.T. 630). It was also

determined that the victim suffered two gunshot wounds to the head. (T.T. 631).

The autopsy revealed nine distinct blunt wounds to the forehead and face. (T.T. 640-643). A towel stuffed into the mouth,the size of a baseball, which severely obstructed the airway, making it unable for the victim to scream or yell. (T.T. 646). The T.V. cord was wrapped around the neck tightly enough to leave marks and cut off the air and blood supply, also causing hemorrhaging inside the neck. (T.T. 647). There were no stippling or powder burns on the bullet holes which would be consistent with a silencer having been used. (T.T. 650). There was a tremendous amount of bleeding in the groin area due to the partial tearing away of the penis from the pubic area. (T.T. 651-652).

The police officers who intially reported to the scene did not even notice a balcony (See T.T. 464) as the area was covered by a curtain (R. 99). Civilian witnesses, including those who had summoned the police, present in the apartment building around the time of the homicide heard noises and the sound of glass breaking and did not observe any individuals emerging from the apartment. (T.T. 538-542; 545-550; 555-558).

Appellee respectfully reserves the right to argue additional pertinent facts in the arguemnt portion of this brief.

POINTS INVOLVED ON APPEAL

Appellee respectfully rephrases Appellant's Points Involved on Appeal as follows:

I

WHETHER THE ORDER DENYING APPELLANT'S AMENDED MOTION FOR POST-CONVICTION RELIEF SHOULD BE AFFIRMED WHERE THE RECORD DEMONSTRATES THAT THERE HAS BEEN NO FEDERAL CONSTITUTIONAL ERROR IN THIS CASE DUE TO THE FAILURE OF POLICE TO DISCLOSE THE FINDING OF A GUN IN THE VICINITY OF THE APARTMENT WHERE THE MURDER TOOK PLACE, WHERE THERE IS NOT A REASONABLE PROBABILITY THAT, HAD THE EVIDENCE BEEN DISCLOSED TO THE DEFENSE, THE RESULT OF THE PROCEEDING (TRIAL) WOULD HAVE BEEN DIFFERENT?

II

WHETHER THE TRIAL COURT'S ORDER DENYING APPELLANT'S AMENDED MOTION FOR POST-CONVICTION RELIEF SHOULD BE REVERSED PURSUANT TO APPELLANT'S CLAIM, RAISED FOR THE FIRST TIME ON APPEAL, OF DENIAL OF HIS DUE PROCESS RIGHTS UNDER ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION?

SUMMARY OF THE ARGUMENT

I

The Supreme Court of the United States has vacated the earlier judgment of this Court and remanded the case for further consideration in light of United States v. Bagley, 473 U.S. ___, 105 S.Ct. 3375, 87 L.Ed.2d 487 (1985). Florida v. Arango, ___U.S.___, 106 S.Ct. 41, ___L.Ed.2d___ (1985). This Court previously reversed the trial court's determination by applying the incorrect standard. In Bagley, supra, the United States Supreme Court held that the prosecution's failure to disclose requested impeachment evidence would constitute constitutional error, only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

In the instant case, the judge who made the findings at the hearing as to the appellant's motion for post-conviction relief was the same judge who presided over the appellant's trial. Thus, the trial court's analysis and findings should be given great weight and deference. The record in this case demonstrates that had the defense had access to a gun found in the vicinity of the murder scene, on the day following the homicide, the result of trial

proceedings would not have been affected.

II

The trial court's order denying Appellant's amended motion for post-conviction relief should not be reversed pursuant to Appellant's claim that the suppression of the evidence in question, a found gun, denied him due process as guaranteed by Article I, Section 9 of the Florida Constitution. This point should not be considered by this Court, as it is raised for the first time on appeal. Even if this Court should consider the merits of Appellant's contentions as to this claim. Appellant has not espoused a valid reason to interpret the due process provision of the Florida Constitution in any manner inconsistent with the United States Supreme Court's interpretation of Fifth and Fourteenth Amendment due process guarantees. The trial court's order should clearly be affirmed, under either the State or Federal Constitutions.

ARGUMENT

I

THE ORDER DENYING APPELLANT'S AMENDED MOTION FOR POST-CONVICTION RELIEF SHOULD BE AFFIRMED, AS THE RECORD DEMONSTRATES THAT THERE HAS BEEN NO FEDERAL CONSTITUTIONAL ERROR IN THIS CASE DUE TO THE FAILURE OF POLICE TO DISCLOSE THE FINDING OF A GUN IN THE VICINITY OF THE APARTMENT WHERE THE MURDER TOOK PLACE, AS THERE IS NO REASONABLE PROBABILITY THAT, HAD THE EVIDENCE BEEN DISCLOSED TO THE DEFENSE, THE RESULT OF THE PROCEEDING (TRIAL) WOULD HAVE BEEN DIFFERENT. (Restated).

The Supreme Court of the United States has vacated the earlier judgment of this Court and remanded this case for further consideration in light of United States v. Bagley, 473 U.S. ___, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Florida v. Arango, ___ U.S. ___, 106 S.Ct. 41, ___ L.Ed.2d (1985). In United States v. Bagley, supra, the Supreme Court of the United States held that the prosecution's failure to disclose requested impeachment evidence would constitute constitutional error only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. In addition, part of the Court made the following determination:

> We find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the "no request," "general request," and

> "specific request" case of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.
>
> 473 U.S. at ___,
> 105 S.Ct. at 3384,
> 87 L.Ed.2d at 494.

In United States v. Pflaumer, 774 F.2d 1224, (3d Cir. 1985), the United States Court of Appeals for the Third Circuit also considered a case upon remand from the United States Supreme Court for reconsideration under Bagley supra. In its analysis on remand, the federal appellate court gave deference to the reasoning of the trial judge at the district court level, "especially given the difficulty inherent in measuring the effect of non-disclosure on the course of a lengthy trial covering many witnesses and exhibits." Id at 774 F.2d 1230.

In the case sub judice, the judge who made the findings at the hearing as to the motion in question, was the same judge who presided over the appellant's trial. (S.R. 88-95). The trial court's initial determination took into account testimony he heard at trial. The judge observed the demeanor of the defendant/appellant on the witness stand and could

evaluate his credibility as well as the true, potential effect that the evidence in question may have had upon the trial.

Although this Court's initial determination was based upon the incorrect standard that the "suppressed" evidence may have affected the outcome of proceedings, the trial court's standard and analysis (S.R. 88-95) was closer to the appropriate standard. Thus, as in Pflaumer, supra, this Court should give great weight and deference to the specific findings of the trial court.

The trial court specifically recalled and noted that the case involved a homicide occurring at a condonimum or apartment complex in Dade County and that neighibors heard loud nouises coming from the apartment including words like, "Help," in Spanish. The manager and his wife resided in the adjacent apartment and called the police, in addition to going outside to look at the apartment after hearing the crashing of glass and muffled sounds of gunshots. (S.R. 88, 89). The trial court further recalled that the police arrived a half hour later and entered the apartment through a door left ajar, discovering Mr. Arango, the appellant in the apartment. (S.R. 90). The police found a .22 caliber gun with a silencer, an .38 caliber gun and blood over the place. (S.R. 90). They also saw a kilo of white substance appearing to be cocaine,

$8,000 in cash and the body of the victim with a T.V. cord tied around his neck, with a towel stuffed down his throat, with bullet holes (two bullet holes)in the head made by a .22 caliber gun with a silencer (S.R. 90). The trial court further recalled that Appellant had exercised his right to testify and testified under oath before the jury that he had proceeded,after the homicide,to clean up, to change his shirt, to change his pants and was proceeding to take the guns, the cocaine, the money and leave for a hotel. (S.R. 90).

The trial court further recalled additional facts such as the appellant's testifying about three bandits committing the crime and that he had done three cocaine transactions on the day in question and that three Latin males had come into the apartment, committing the crime. (S.R. 91). All of these factors, in addition to the tooth mark identification of Dr. Souviron and testimony of the neighbors that other individuals were not viewed by neighbors specifically checking the area,were taken into account by the trial court in his conclusion that Appellant was not denied due process of law by the failure of the State to disclose that a gun had been found on the grounds of the apartment complex were the murder took place.

Regardless of this Court's characterization of Appellant's request for evidence,the real question presently

at issue is whether the mere fact that had a gun found in the vicinity of the murder scene on the day following the homicide been disclosed to the defense, the result of the proceeding would have been different. The trial court's analysis, as noted above and supported by the record of actual trial proceedings makes it abundantly clear that the appropriate response to the inquiry is negative.

The Court found the gun in question was not given to Appellant because the lead detective did not feel that it was involved in this crime. (S.R. 94). Contrary to Appellant's repeated assertions in his brief, there was no affirmative secretion of evidence. Although the prosecutor in this case, as in Bagley, supra at 473 U.S. ___ n.4, 105 S.Ct. 3378, n.4, 87 L.Ed.2d 481 n.4, would have probably disclosed the existence of the evidence (gun) had he known about, his theory of prosecution would not necessarily have been altered. The appellant has never effectively demonstrated relevance or materiality of this found gun.

The existence of the found gun clearly does not in any way contradict the circumstanial evidence placed before the jury. As noted by the trial court and supported by the record, Appellant actually testified at his trial as to his theory of defense. Appellant's theory of defense was that three armed "bandits" or "banditos" had forced their way into his

and had fought with Appellant and the deceased.(T.T. 716-718). Appellant allegedly hid in the bathroom and did not exit until he heard what he thought was the kitchen door closing. (T.T. 719). Furthermore, if Appellant was locked in the bathroom,how did he see the alleged exits of the banditos? Moreover, civilian witnesses, including those who had summoned the police, present in the apartment building around the time of the homicide,heard noises and sound of glass breaking and did not observe any individuals emerging from the apartment. (T.T. 538-542; 545-550; 555-558).

Appellant went on to admit, however, that he had handled two guns found on the scene, a .22 caliber gun with a silencer and a .38 caliber gun as well as placing bullets for the .38 caliber gun in his pocket (T. 728-730). He admitted to placing the weapons in a bag as well as to washing blood off and changing his clothes. He did not deny having blood on his body as well as on his underwear. (T.T. 728-730). He was affirmatively found tampering with evidence.

The gun found on the day following the murder was clearly not the murder weapon. The murder weapon was found at the scene of the murder (See T.T. 445-452; 487-494; 581-588; 728-729). If the jury did not believe that the murder weapon, the .22 caliber gun (with the silencer) and the .38 caliber gun were left by the alleged "banditos," it surely would have

made no difference whether an alleged "third" gun was located. Moreover, even though Appellant testified that all three of the alleged bandits were armed, the existence of an additional gun would nonetheless be equally consistent with Appellee's theory of prosecution and the circumstantial evidence presented in support thereof. Appellant's claim that a "third" gun would break the "chain" of circumstantial evidence is totally incorrect. Even if the gun were to be connected to the instant case, it would have been equally reasonable for the jury to ascertain that Appellant had "planted" the found gun and was in the process of removing the other physical evidence from the crime scene when the police made theri way into the apartment. (See T.T. 428-463; 735-746).

The victim was found in a state that indicated he had suffered various violent acts. He had been kicked between the legs so as to almost dismember his penis. He was strangled with a television cord connected to a television that was in operation when Police Officer Gable and McHuge (McQue) arrived on the scene. A towel was stuffed down the victim's throat and he had been hit in the head and body with a blunt instrument. He was also shot twice in the temple with a .22 caliber semi-automatic pistol with a silencer. (T.T. 1-973; T.R. 99-100). Appellant was present in the apartment when the police entered. He was found in, at minimum,the constructive possession of a bag with cocaine, a large amount of

American currency, two guns and a silencer, as well as in possession of bullets in his pocket. He had just completed washing blood off of himself and changing his clothes. He had the victim's teeth marks on the top of his hand, yet did not have any marks below (therefore consistent with the towel being found in the victim's throat). (See also: T.R. 99-100). This evidence can only logically indicate active participation in the crime by Appellant.

As noted previously, the gun is not the "murder" weapon. In fact, the appellant's admissions of attempting to conduct drug deals with the appellant and possession of the weapon, leads more to a presumption that the gun if related to this case at all, was either left by the victim or planted by Appellant, who coincidently was caught red handed, cleaning up the murder scene, actually tampering with truly probative evidence, in possession of cocaine, guns and currency. If the jury did not believe that two guns were in any way indicative of the presence of other individuals, what difference would a "third" gun make? Furthermore, it is reasonable to believe that individuals engaged in transactions involving a large quantity of narcotics and money are likely to be armed. See, State v. Sayers, 459 So.2d 352, 353 (Fla. 3d DCA 1984) and Martinez v. State, 413 So.2d 429 (Fla. 3d DCA 1982). Thus, an "extra" gun with no specific nexus to the murder in question should not in itself be sufficient to actually alter the result of the trial in question.

The found gun cannot in any way dispel the plausible conclusion that even if Appellant did not act alone, he was an active participant. As stated by this Court in State v. Lowery, 419 So.2d 621, 633 (Fla. 1982) all persons participating in a crime are principals of the first or second degree. As noted by §777.011, Fla.Stat. and §3.01 Principals, Fla.Std.Jury Inst. in Crim. Cases, if two or more persons help each other commit a crime and the defendant is one of them, the defendant must be treated as if he had done all of the things the other person did if the defendant, 1) knew what was going to happen; 2) intended to participate actively or by sharing in an expected benefit and 3) actually did something by which the intended to help committ the crime Help means to aid, plan or assist. Thus, even if the found gun was to be linked to this case, the blood and teeth marks on the appellant at minimum implicate him as a principal in the first degree and the result of the trial proceedings would not have differed. See, e.g., the analysis of the United States court of Appeals for the Eighth Circuit in Fryer v. Nix, 775 F.2d 979, 983 (1985) upon remand in light of Bagley, dealing with culpability of principals.

Thus, it is highly speculative of Appellant to presume that the existence of the found gun would be in any way favorable to his defense to the level of affecting the actual result of the trial. Reversal cannot be predicated upon

conjecture. Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974); Jacobs v. Wainwright, 450 So.2d 200, 201 (Fla. 1984); Ford v. Wainwright, 451 So.2d 471, 474 (Fla. 1984). The evidence presented in this case would in no way be disminstered by the finding of the gun in question. Appellant's assertions that the prosecutor deliberately misled the jury is clearly inaccurate. All the evidence of which the prosecutor was aware was disclosed to the jury. The State's closing would not have been altered by the presence of an additional gun that was clearly not the "murder weapon."

The found gun is clearly irrelevant in this context. Even if presented to the jury, it would support the State's theory of prosecution,especially because the appellant was caught red-handed, affirmatively altering the crime scene. The gun, even if connected to this case, would be inconsistent with the evidence presented by the State. The gun, if connected, could have been planted by the appellant who would have known of its location prior to making statements to the police. Thus, it is readily apparent that had the "suppressed" evidence, the found gun, been made available to the defense, the outcome of the trial consistent with the Bagley standard, would not have been altered. Thus affirmance of the trial court's ruling should result under the standard enumerated in Bagley, supra.

Appellee further notes that Appellant was also convicted of and sentenced for possession of the controlled substance, cocaine (T.R. 141). Appellant did not challenge said conviction or sentence pursuant to either his amended motion for post-conviction relief or briefs in this Court. Thus, the convictions and sentence for possession of cocaine should not be affected by any determination as to Appellee's murder conviction and sentence.

II

THE TRIAL COURT'S ORDER DENYING APPELLANT'S AMENDED MOTION FOR POST-CONVICTION RELIEF SHOULD NOT BE REVERSED PURSUANT TO APPELLANT'S CLAIM, RAISED FOR THE FIRST TIME ON APPEAL, OF DENIAL OF HIS DUE PROCESS RIGHTS UNDER ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION. (Restated).

Appellant's second point on appeal is that the failure of police to disclose the found gun to Appellant constituted a violation of his due process rights under Article I, Section 9 of the Florida Constitution. Appellee submits that this claim is without merit and that to the best of undersigned counsel's knowledge, this contention was not raised in the trial court pursuant to Appellant's Amended Motion for Post-Conviction Relief or argument thereupon. (See R. 451-520; S.R. 1-102). In fact, Appellant does not make any record references in his argument indicating that this claim was presented below.

A reviewing court will not consider points raised for the first time on appeal. Castor v. State, 365 So.2d 701, 703 (Fla. 1978). The merits of this claim should therefore not be considered by this Court pursuant to this failure to assert below. See also: Rule 3.390(d), Florida Rules of Criminal Procedure; Hoffman v. State, 474 So.2d 1178, 1181 (Fla. 1985). Appellant's contentions under the Federal

Constitution should not be considered sufficient to preserve claims pursuant to the Florida Constitution. Just as a trial court should not be required to guess which phrase, clause or amendment to the United States Constitution is the basis of an argument, See, Kujawa v. State, 405 So.2d 251, 252, n.3 (Fla. 3d DCA 1981), the trial court was not required to presume that Appellant had claims pursuant to the provision of the Florida Constitution as well as the United States Constitution. Assuming arguendo, that this Court opts to address the merit of Appellant's second claim, Appellant is nonetheless not entitled to relief. Although this Court may adopt more stringent standards in interpreting provisions of the Florida Constitution analogous to provisions in the United States Constitution, Appellant is seeking to have this Court adopt analyses rejected by the United States Supreme Court in United States v. Bagley, supra at 473 U.S. ___, 105 S.Ct. at 3381, 87 L.Ed.2d at 490 and referred to basically in the context of explaining why the Court of Appeals' decision should be reversed in Bagley. Appellee further notes that the repealing of Florida's exclusionary rule and the adoption of the language of Article I, §12 of the Florida Constitution as to searches and seizures is indicative of a will of the people of the State of Florida that provisions of the Florida Constitution analogous to provisions of the United States Constitution be construed in conformity with the Federal Constitution, as interpreted by the United States Supreme Court.

In any event, the record in this case clearly demonstrates that Appellant was not denied due process pursuant to the provisions of Article I, Section 9 of the Florida Constitution. As pointed out in Point I, infra, the failure of the police to disclose the existence of the found gun did not invalidate Appellant's trial. The gun in question although found in the area of the defendant/appellant's apartment complex on the day of the homicide was clearly not the "murder" weapon. The weapon firing the "fatal" shots was a .22 caliber pistol and was found in the appellant's possession at the murder scene. (T.T. 445-452; 487-494; 581-588; 728-729). The appellant was in no way prevented from presenting his alleged defense that three "banditos" or "bandits" had committed the murder. In fact, he took the standard testified in support of his theory of defense. (T.T. 716-730). Appellant has not persuasively established that there found gun was actually linked to the murder. Furthermore, if the jury did not believe that the two guns actually used to shoot the victim were left by the alleged "banditos," it is clear that if surely would have made no difference if a "third" gun had been presented. Thus, it is clear that the appellant's lack of opportunity to present a gun that was not recessarily admissible into evidence did not vitiate trial proceeedings so as deprive him of the guarantees of due process enumerated in the Florida Constitution. Affirmance of the trial court's ruling as to the Amended Motion for Post-Conviction Relief

is therefore warranted, even pursuant to provisions of the Florida Constitution.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the appellee respectfully submits that the trial court's Order Denying Defendant's Motion for Post-Conviction Relief Re: Brady Violation should clearly be affirmed in light of the decision of the Supreme Court in United States v. Bagley, 473 U.S. ___, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Respectfully submitted,

JIM SMITH
Attorney General

CALIANNE P. LANTZ
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **SUPPLEMENTAL BRIEF OF APPELLEE ON REMAND FROM THE UNITED STATES SUPREME COURT** was furnished by mail to **SHARON B. JACOBS, P.A.**, Coconut Grove Bank Building, 2701 South Bayshore Drive, Suite 305, Miami, Florida 33133 on this 31st day of March, 1986.

CALIANNE P. LANTZ
Assistant Attorney General

CPL/dm