

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC06-1490**

NOEL DOORBAL

Petitioner

v.

**JAMES R. Mc DONOUGH
Secretary, Florida Department of Corrections**

Respondent

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION TO THE REPLY BRIEF

The Defendant relies on his Initial Petition to state his position on the following Claims. The Defendant adds the following to support his position:

REPLY FACTS AND GROUNDS FOR RELIEF

CLAIM I

At the Defendant's Huff hearing, as well as in the State's response to the Defendant's Rule 3 Petition, the State argued that the lower court should not provide an evidentiary hearing on *Brady* issues because the claim was procedurally barred where the Defendant's appellate counsel failed to appeal the Brady issue preserved at the Defendant's trial. Now the State complains that the issue simply has no merit. It cites part of this Court's decision in co-defendant Lugo's case, but neglects to remind this Court that it ruled against Lugo on this issue prior to seeing evidence found during post-conviction proceedings. Had this Court been provided the opportunity to review the email sent by Assistant State Attorney Gail Levine to her supervisor prior to its ruling, the type of evidence it spoke of considering but had not knowledge about, the Defendant is confident this Court would not be reviewing this issue

today on appeal. The Defendant is entitled to relief based on this claim, and the State should be barred from raising complaints.

CLAIM II

The State contends that because the Defendant's trial counsel did not complain about needing more time to grieve his father's passing before proceeding to attempt effective representation in a capital trial that appellate counsel is not obligated to raise this significant and preserved issue on direct appeal. Not only the Defendant but also this Court recognized that trial counsel was gravely deficient in preserving issues for appeal during the Defendant's trial. To appellate counsel's credit, some issues were raised on direct appeal that were not preserved, but many issues actually preserved such as the Defendant's motion for a continuance were not raised. The Defendant is entitled to a new trial.

CLAIM III

The Defendant notes several Motions to Withdraw filed by both trial counsels are on the trial docket and in the record in this cause. The State has adequate knowledge of the record and of both trial counsels' tribulations

regarding financial hardship, family problems and the prejudice Defendant experienced because the trial Court denied these Motions. The Defendant's trial counsel were grossly negligent and ineffective throughout their representation in this cause, and the Defendant was denied due process, equal protection and the right to counsel afforded by the State and Federal Constitutions. The Defendant is entitled to relief.

CLAIM IV

Relying on facts the State created or manipulated for trial, it now contends that preserved appellate claims have no merit and were not actually preserved at all. The Defendant's role was defined by the State through the testimony of State witnesses who perjured themselves with or without the State's knowledge to define the Defendant's role. The State wants this Court to believe that the facts in this case are simple to understand and un-debatable. For example, co-defendant Lugo's letters to the Defendant, which were never provided to the jury for their consideration prior to conviction or sentencing, clearly articulated what kind of role the Defendant had in this case, I.E. that of a person who was susceptible to being controlled and told what to do.

In spite of ineffective assistance of counsel and trial court error, the Defendant's Motion to Sever was preserved for this Court's review. While the trial court actually severed all of the other co-defendants' cases except for the Defendant and the now deceased John Mese, the Defendant's jury was placed in the precarious position of having to consider evidence for two defendants – one that was facing the death penalty and one that was not. The jury actually found co-defendant Mese guilty of crimes that the trial court struck down. The Defendant's position is that since the jury was mistaken about the co-defendant's guilt, according to the trial court, the impact of the trial court's failure to sever the case cannot be seen as harmless.

The Defendant's direct appeal counsel should have raised this very serious claim and counsel's representation is therefore ineffective. Prejudice can be shown by the fact that although the Defendant was sentenced to death, the vote was not unanimous. It is more likely than not that the Defendant experienced the wrath of jurors stung by a reversal of verdict following their deliberations. The Defendant's Motion to Sever should have been granted, and the Defendant is entitled to a new trial.

CLAIM V

The State concedes that the Defendant's claim that the Indictment counts should be severed was properly preserved for appellate review. The issue, distinguishable from the claim which was raised in co-defendant's Lugo's direct appeal and ruled upon by this Court, has merit and should be raised in the Defendant's direct appeal.

Requiring individualized consideration and formal review of critical issues and arguments is what guarantees that this Court will not simply apply the facts and rule in one case to another case. By applying RICO to the charges filed against the Defendant, as it did in co-defendant Lugo's case, the State ignored the Defendant's due process and equal protection rights established by the Florida and U.S. Constitutions.¹ Direct Appeal counsel's performance was deficient and the Defendant is entitled to relief on this claim.

¹ It is interesting to note, however, that if the State had not been permitted to create a link between what happened to Mr. Schiller and the events surrounding the killing of Mr. Griga and Ms. Furton, the same Mr. Schiller might not have been available to testify on the State's behalf because he would have been a convicted felon or living outside of the country.

CLAIM VI

The State argues that this claim is without merit and refers to its arguments in Claim I. Preserving *Brady* issues and Motions for New Trial have traditionally been seen as distinct claims however, even when the *Brady* material has been withheld by the State throughout the Defendant's appellate process. Further, in this case, the Defendant's Motion for New Trial encompassed more accurate allegations of *Brady*, but it is clear from the evidence that places the trial court in a position of preparing to testify for Mr. Schiller at the same time as hearing the Motion for New Trial that the trial court denied the Defendant's Motion in error. The Defendant's direct appeal counsel should have raised the Defendant's Motion for New Trial and failure to do so renders counsel ineffective. The Defendant is entitled to relief.

CLAIM VII

The Defendant appreciates the States concession that the Defendant's trial counsel was ineffective throughout the Defendant's trial, but the Defendant maintains that this issue was preserved and was not appropriately raised on direct appeal. Due to appellate counsel's ineffective assistance, the Defendant is entitled to relief.

CLAIM VIII

The Defendant's position on this claim that appellate counsel was ineffective for failing to raise Defendant's Motion to Withdraw penalty phase counsel has merit and was properly preserved. While this Court is aware of sorted affairs between clients and their attorneys/attorneys' staff members, in general, the Defendant's claim rests on the fact that counsel, after abandoning the Defendant during maternity leave without providing the Defendant with an attorney replacement or even substitute, should have been permitted to withdraw when she was so out of touch with the Defendant's case that her secretary began a romantic relationship with the Defendant. Had penalty phase counsel been paying attention to her client, or as important, had counsel been trained to represent the Defendant effectively in the proceedings she accepted responsibility for, the Defendant's Motion would have been filed without merit.

The trial court erred when it refused to grant the Defendant's Motion for Penalty phase counsel to withdraw and merely because it convinced the Defendant and trial counsel to support its decision to deny the Motion does not mitigate or eliminate the trial court's fatal error. It is more likely than not that an experienced and qualified penalty phase attorney, unlike the

Defendant's penalty phase counsel, would have properly investigated and conducted a successful defense, given that the jury's recommendation for death was divided. The Defendant is entitled to relief on this Claim.

CLAIM IX

Appellate counsel should have raised this claim on direct appeal and failure to do so requires relief for the Defendant in this cause. Trial counsel made it clear to the lower court that without the necessary funds to pay the Defendant's mental health expert, the Defendant's witness would essentially disappear – along with his mental health mitigation. Appellate counsel had a sufficient record of the proceedings to detail and analyze this claim for the Court to review in its entirety.

CLAIM X

Although the State concedes that many issues relevant to this claim were not preserved by trial counsel for a direct appeal, the Defendant did manage to preserve numerous issues addressed in this Claim which direct appeal counsel failed to raise, and the Defendant is entitled to a new trial and/or sentencing.

CLAIM XI

Even though the State decided against using illegally obtained statements that the trial court refused to suppress, this claim was properly preserved and should have been raised on direct appeal. The Defendant is entitled to relief.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons and those set forth in the accompanying Initial Brief, a new trial and/or sentencing is warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to (1) AAG Jaggard, (2) ASA Levine, (3) the Honorable David H. Young, (4) Defendant, Noel Doorbal, by United States Mail, this 2nd day of January, 2007.

Melodee Smith
Fla. Bar No. 33121

CERTIFICATE OF FONT AND TYPE SIZE

This petition is word-processed utilizing 14-point Times New Roman type.

Melodee Smith
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