IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1532

DANIEL LUGO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

Defendant was charged by indictment with: conspiracy to commit racketeering (RICO), RICO, first degree murder of Krisztina Furton, first degree murder of Frank Griga, kidnapping of Ms. Furton, kidnapping of Mr. Griga, attempted extortion of Ms. Furton and Mr. Griga, grand theft of Mr. Griga's car, attempted first degree murder of Marcelo Schiller, kidnapping of Mr. Schiller, armed robbery of Mr. Schiller, burglary of Mr. Schiller's home, grand theft of Mr. Schiller's home furnishings, grand theft of Mr. Schiller's car, possession of the vehicle identification plate removed from Mr. Schiller's car, first degree arson, extortion of Mr. Schiller, nine counts of money laundering, six counts of forgery, six counts of uttering a forged instrument and conspiracy to commit a first degree felony. (R. 61-112)[1] The matter proceeded to trial on January 22, 1998. (R. 248) After hearing the evidence, the jury found Petitioner guilty as charged on all counts. (T. 12730-35) The trial court adjudicated Petitioner in accordance with the verdict. (T. 12743-44)

This Court summarized the evidence adduced at trial as:

> [Defendant's] case involves an intricate set of facts, which at times involved many persons. Most of

[1] The symbols "R." and "T." will refer to the record on appeal and transcript of proceedings from Defendant's direct appeal, FSC Case No. 93,994, respectively.

the criminal charges in this case are related to the abduction, extortion, and attempted murder of Marcelo (Marc) Schiller, or to the abduction, attempted extortion, and murders of Frank Griga and Krisztina Furton.

Abduction, Extortion, and Attempted Murder of Marc Schiller [FN1]

In the early 1990s, Marc Schiller was a wealthy Miami businessman who owned an accounting firm, Dadima Corporation. His business interests expanded into providing services that were reimbursed by Medicare. Schiller hired Jorge Delgado [FN2] to assist him with his business pursuits, and the two became close friends. Delgado often visited Schiller's home for both business and social reasons. Eventually, Schiller sold the Medicare-related portion of his business to Delgado, which retained the name "Dadima Corporation" after the sale. [FN3] Schiller selected a new name of "D.J. & Associates" for his accounting business. For a period of time after he sold the Medicare portion to Delgado, Schiller performed consulting work for Delgado and Dadima Corporation. [FN4]

Delgado exercised at Sun Gym in the Miami area, where [Defendant] was employed. [FN5] The two became good friends, and at times [Defendant] would accompany Delgado on visits to Schiller's home. Delgado also came to know [Defendant's] codefendants, Noel Doorbal and John Mese. Schiller believed [Defendant] to be an unsavory character, and expressed his concern to Delgado.

By 1994, a rift had developed between Schiller and Delgado. Schiller had been questioning Delgado's accounting practices with regard to Dadima Corporation, and was also concerned with transactions involving some bank accounts. During a meeting with a banker at a local restaurant, the conflict expanded as Delgado refused to respond to questions and became angry with Schiller. Thereafter, Schiller advised Delgado that he was severing all business ties and, on the advice of [Defendant], Delgado hired John Mese to be his replacement accountant. [FN6]

In the September-October 1994 time frame, [Defendant] advised Delgado of his belief that Schiller had been cheating Delgado with regard to the

billing operations that Schiller had been performing for Delgado and the Medicare business. Delgado testified that [Defendant] showed him documentation which purported to prove that Schiller had been cheating Delgado. [Defendant] asserted to Delgado that Schiller had also been cheating [Defendant]. Schiller flatly denied accusations of cheating Delgado in the billing operation when Delgado confronted Schiller with the claim. [Defendant] and his cohorts subsequently generated a plot to kidnap Schiller, with the goal of forcing him to sign over assets equivalent in value to that which Delgado and [Defendant] believed to be owed to them. [FN7] Delgado asked [Defendant] to do whatever he could to recover the value Schiller owed to both of them, but Delgado expressed that he did not want to be involved in any of the scheming. However, Delgado nevertheless became deeply involved in a plan to kidnap Schiller. He informed [Defendant], Doorbal, and two men recruited by [Defendant] from Sun Gym (Stevenson Pierre and Carl Weekes) of details concerning Schiller's home, [FN8] family, cars, and personal habits. The group agreed to secretly observe Schiller to learn his daily routine to implement the plan. Testimony at trial established that [Defendant] was the unquestioned mastermind of the plan to abduct and extort money from Schiller. Stevenson Pierre observed [Defendant's] role to be that of a general in a military operation. The group eventually purchased or otherwise procured handcuffs, walkie-talkies, and a stun gun (among other items) to aid in the abduction plan.

After several failed attempts at locating and capturing Schiller, on November 15, 1994, the group finally succeeded in abducting him from the parking lot of the delicatessen restaurant he owned in the Miami area. Doorbal and Weekes grabbed Schiller, and Weekes subdued Schiller, shocking him with a stun gun. Another cohort, Sanchez, assisted Doorbal and Weekes in forcing Schiller into a waiting van. Inside the van, Schiller was handcuffed and duct tape was placed over his eyes. A gun was placed at Schiller's head, and his wallet and jewelry removed as the van proceeded to a warehouse that Delgado had rented. He also received additional shocks with the stun gun and he was kicked. [Defendant] arrived at the warehouse

shortly after Doorbal and the others arrived with Schiller.

Schiller's captors demanded a list of his assets which Schiller initially refused to provide. The refusal resulted in his being slapped, shocked with the stun gun, and beaten with a firearm. Weekes questioned Schiller about his assets, based on information provided by [Defendant] and Delgado. Schiller testified that after he again refused to provide the requested information, he was told that he was going to engage in a game of Russian Roulette. A gun was placed to his head, the cylinder was turned, and the trigger was pulled twice but no bullets fired. [FN9] Schiller's captors proceeded to read a highly accurate list of his assets to him, demanding that he corroborate what they already knew and that he add to the list assets of which they were not aware. The captors also apprised Schiller that they knew the alarm code for entry into his home. Because his assailants possessed such detailed knowledge of his assets and his home, Schiller surmised that Delgado must have been involved in the plot. Schiller also came to recognize [Defendant's] voice, despite [Defendant's] efforts to disguise the identity. Schiller testified that [Defendant's] speech often had a very recognizable lisp-like trait.

The captors further threatened that if Schiller did not cooperate, his wife and children would also be abducted and his wife raped in his presence. Schiller was eventually compelled to agree to cooperate but only if his wife and children were allowed to leave the country unharmed. In the ensuing days, Schiller began signing over his assets, including a quitclaim deed for his home, various documents granting access to his checking, [FN10] savings, and IRA accounts, and authorization for changing the beneficiary of his million-dollar insurance policies. [FN11]

During Schiller's captivity, [Defendant] and Doorbal entered Schiller's home and removed many furnishings and other items. [Defendant], Delgado, and Weekes also began charging thousands of dollars to Schiller's credit cards. Money in Schiller's safe in his home was divided among Doorbal, Weekes, and Pierre. Three weeks into Schiller's captivity, Doorbal and Delgado convinced [Defendant] that Schiller must be killed, because he had likely surmised the

identities of some, if not all, of his captors. A plan was then developed to kill Schiller but to give the appearance that Schiller's death resulted from the operation of his automobile under the influence of alcohol.

In the fourth week, Schiller was forced to consume large amounts of alcohol to make him intoxicated. [Defendant] drove Schiller's Toyota 4-Runner into a utility pole on a Miami-area street to create the impression that Schiller had been involved in an accident resulting from driving while intoxicated. Doorbal and Weekes accompanied [Defendant], and Schiller was placed in the front seat of the 4-Runner after it had been driven into the pole. [Defendant] and Doorbal then poured gasoline on the vehicle and set it ablaze. [Defendant], Doorbal, and Weekes had planned to exit the scene in another vehicle that Weekes had driven to the scene, but they noticed that Schiller had somehow managed to exit his burning vehicle and was staggering in the roadway. Schiller had not been securely bound in the seat of the vehicle. At the urging of [Defendant] and Doorbal, Weekes used his vehicle to strike and run over Schiller. The three left the scene of these events believing they had killed Schiller. [Defendant] later instructed Stevenson Pierre to drive by the scene to determine if there was any police activity.

Miraculously, Schiller survived this attempt to take his life. He remembered awakening in a Miami hospital having a broken pelvis, ruptured bladder, bruises and burns, and temporary paralysis. [Defendant] and the others eventually learned that Schiller had survived, so they visited the hospital where they thought Schiller was recuperating, with a plan to suffocate him while he lay in his hospital bed. Unknown to [Defendant] and the others, based upon a well-founded fear for his safety, Schiller had already arranged to be airlifted to a New York hospital to complete his recuperation. [Defendant], Doorbal, and some of the other captors proceeded to empty Schiller's home of the remaining furnishings and valuables. A black leather couch and computer equipment were among the articles pilfered.

Schiller's testimony at trial included not only a description of the events surrounding his abduction and captivity, but also testimony as to the assets

that had been extorted from him and his attempts to recover those assets. He also stated that while he signed an agreement with [Defendant] and his cohorts, indicating that the events surrounding his "abduction" were actually the result of a failed business deal, he had always intended to report the incident to the police. [FN12] He thought that signing the agreement was an expeditious way to recover much of the value of the assets that had been extorted from him. Schiller further testified that he never willingly gave any of his assets to [Defendant], Doorbal, Mese, Torres, or anyone associated with them. He noted that the quitclaim deed to the home that he and his wife owned was forged, because on the date indicated for his wife's purported signature, she was actually in South America.

Schiller identified several items of property that belonged to him or his wife and which police found in [Defendant's] possession. Among the items were computer equipment, furniture, and keys to a BMW automobile. He also stated that drafts on his checking account, which were payable to John Mese or to entities related to Sun Gym, must have been those signed by him when he was blindfolded during his captivity because he never willingly signed the drafts. [FN13] A forensic accountant confirmed that after an extensive review of records pertaining to corporations and accounts controlled by [Defendant], Doorbal, [FN14] or Mese, it was clear that money and assets formerly in Schiller's control had been laundered. [FN15]

Abduction, Attempted Extortion, and Murders of Frank Griga and Krisztina Furton [FN16]

Frank Griga was also a wealthy Miami-area businessman, who accumulated much of his fortune from "900" lines in the phone industry. He and his girlfriend, Krisztina Furton, were both of Hungarian heritage. [Defendant's] codefendant, Noel Doorbal, learned of Griga through Doorbal's girlfriend at the time. Doorbal was quickly enthralled when shown a picture of a yellow Lamborghini owned by Griga and when he learned of Griga's enormous wealth. Doorbal determined that Griga would be a prime target for kidnaping and extortion, and soon convinced

[Defendant] to join his idea. Delgado was aware that [Defendant] and Doorbal intended to kidnap and extort a rich "Hungarian couple." [Defendant] was a full participant in the plot and he told his girlfriend, Sabina Petrescu, that he intended to kidnap a Hungarian who drove a yellow Lamborghini or Ferrari. [Defendant] also related to Petrescu that he worked for the Central Intelligence Agency (CIA), and that Doorbal was a killer who assisted him in his CIA missions. Petrescu testified that [Defendant] and Doorbal had at their disposal a suitcase with handcuffs and syringes [FN17] to use in the kidnaping.

Through an intermediary, [Defendant] and Doorbal arranged a business meeting with Griga to discuss Griga's interest in investing in phone lines in India. The Indian investment scheme was totally bogus and designed as a scheme for [Defendant] and Doorbal to ingratiate themselves with Griga and to gain his confidence. At the first meeting, Griga indicated his lack of interest but [Defendant] and Doorbal persisted.

In May 1995, [Defendant] and Doorbal gathered the suitcase containing handcuffs and syringes and made another visit to Griga's home, under the guise of presenting a computer to him as a gift. [FN18] [Defendant] and Doorbal each had a concealed firearm during this visit, as they intended to execute the abduction plan at this time. This first attempt was aborted after only a fifteen-minute stay. Doorbal was irate that [Defendant] did not follow through with the abduction, but he was placated with the news that [Defendant] had arranged another meeting with Griga for later that day.

When [Defendant] and Doorbal returned to Griga's home on May 24, 1995, they had concocted the scheme of inviting Griga and Furton to dinner, with the further goal of luring them to Doorbal's apartment, where the abduction and extortion would begin. [FN19] Between 10 and 10:30 p.m, [FN20] Judi Bartusz, a friend of Griga's, saw [Defendant] and Doorbal leave Griga's home in a gold Mercedes, while Griga and Furton left in the Lamborghini. [FN21]

On May 25, Delgado met [Defendant] and Doorbal at Doorbal's apartment. [Defendant] informed him that Griga was already dead: Doorbal had killed Griga after the two became involved in a scuffle in and around the

downstairs computer room in Doorbal's apartment. [FN22] Griga's body had been placed in a bathtub in Doorbal's apartment. [FN23] [Defendant] related that when Furton had heard the scuffling between Doorbal and Griga, she rose from her seat in the living room and began to scream when she realized that Griga had been seriously injured. [Defendant] restrained her and subdued her with an injection of Rompun. [Defendant] expressed his anger toward Doorbal for having killed Griga before the extortion plan had been completed.

[Defendant] and Doorbal subsequently turned their focus toward Furton. They suspected that she must know the code to enter Griga's home. Knowledge of the code would allow [Defendant] and Doorbal to enter Griga's home with the hope of gaining access to valuables and, most importantly, bank account information for access to much of his wealth. Doorbal carried Furton down the stairs from the second floor of the apartment. Furton was barely clad, wearing only the red leather jacket that she had worn when she left Griga's home the night before, and a hood covered her head. Not long after Doorbal placed Furton near the bottom of the stairs, although handcuffed, she began screaming for Griga. At [Defendant's] direction, Doorbal injected Furton with more horse tranquilizer, causing her to scream again. [Defendant] and Doorbal then questioned Furton about the security code for Griga's home. Eventually, Furton refused to answer more questions. Doorbal injected her yet again with additional horse tranquilizer. Delgado testified that at this point, corrections officer John Raimondo arrived to "take care of the problem." [Defendant] informed Delgado that Raimondo had been solicited to kill Furton and to dispose of her body along with Griga's, but Raimondo did neither. He left Doorbal's apartment, referring to [Defendant] and Doorbal as "amateurs."

Armed with what he believed to be the access code for Griga's home security, [Defendant] took Petrescu to attempt entry while Doorbal and Delgado stayed behind. After failing to gain access to Griga's home, [Defendant] called Doorbal on his cellular phone. As the two talked, Petrescu heard Doorbal say, "The bitch is cold," which she believed was Doorbal's indication that Furton was dead. [FN24] [Defendant] returned to Doorbal's apartment, carrying some mail he had taken from Griga's mailbox. [Defendant] instructed Delgado

that he should return home, but bring a truck to Doorbal's apartment the next morning.

When Delgado arrived with the truck on the morning of May 26, he noticed that Griga's body had been placed on a black leather couch that had been removed from the home of Marc Schiller. [FN25] Furton's body was placed in a transfer box. The couch and the transfer box were loaded onto the truck. Neither body had been dismembered at this point.

[Defendant], Doorbal, and Delgado proceeded with the bodies to a Hialeah warehouse. Delgado noticed a yellow Lamborghini stored there. [FN26] He served as a lookout while [Defendant] and Doorbal went to purchase items including a chain saw, hatchet, knives, buckets, flint (for igniting a fire), fire extinguisher, and a mask respirator. [FN27] When they returned, [Defendant] and Doorbal began dismembering the bodies of Griga and Furton. They used both the chain saw and the hatchet. [FN28]

Doorbal received a message on his pager and had to leave the warehouse, so Delgado drove him to his apartment. When Delgado returned to the warehouse, [Defendant] was attempting to burn the heads, hands, and feet in a drum. This attempt was largely unsuccessful and resulted in such a large amount of smoke that the fire extinguisher was used to smother the fire. [Defendant] and Delgado next went to Doorbal's apartment to remove everything, including the blood-stained carpeting, from the area where Doorbal and Griga had struggled. The items removed also included computer equipment stained with Griga's blood. The items were placed in the storage area of [Defendant's] apartment. [FN29]

By May 27, 1995, [Defendant] had traveled to the Bahamas in an attempt to access money that Griga had deposited in bank accounts there. His efforts were unsuccessful and he returned to Miami. On May 28, 1995, [Defendant], Doorbal, and Mario Gray disposed of the torsos and limbs of Griga and Furton. [Defendant] subsequently fled on a second trip to the Bahamas, where he was captured in early June 1995. He was apprehended in part due to information supplied to the police by his girlfriend, Sabina Petrescu.

At trial, the State presented more than ninety witnesses. [Defendant] presented no witnesses or evidence on his behalf during the guilt-innocence

phase. The trial judge denied [Defendant's] motions for judgment of acquittal. The jury convicted [Defendant] of all thirty-nine criminal counts with which he was charged, [FN30] and he was adjudicated guilty on all thirty-nine counts. [Defendant's] motion for new trial or, in the alternative, for arrest of judgment, was denied.

* * * *

FN1 The criminal charges that flow from these facts are referred to as the "Schiller counts."

FN2 Jorge Delgado was a codefendant with [Defendant]. In exchange for sentences of fifteen and five years, respectively, for his roles in the attempted murder of Schiller and the murders of Griga and Furton, he testified for the State.

FN3 Eventually, however, Delgado changed the name of the company.

FN4 At various times, [Defendant] also did some billing work for both Schiller and Delgado.

FN5 Both [Defendant] and his codefendant, Noel Doorbal, were avid bodybuilders.

FN6 Mese was [Defendant's] codefendant, along with Doorbal. All three were tried together, though separate juries decided the fate of Doorbal and Mese.

FN7 Prior to creating the plot to kidnap Schiller, Delgado had expressed concerns to Schiller that the Medicare-related business that Delgado had purchased from Schiller might have been involved in Medicare fraud when Schiller was the owner. Delgado feared that he might have been inadvertently involved in continuing the fraud after he purchased the business from Schiller. Schiller denied that he was ever involved in Medicare fraud. Delgado indicated that he rejected the idea of suing Schiller for the money he claimed because a legal action brought against Schiller might expose the fraudulent activity.

FN8 Schiller had previously told Delgado the code for the alarm system at his home.

FN9 Schiller did not know if the gun was loaded or not. He also had tape over his eyes during these incidents, as he did for the vast majority of his captivity. On another occasion, Schiller's captors placed a gun in his mouth.

FN10 These documents included drafts on his checking account.

FN11 The beneficiary was changed to the name of Lillian Torres, [Defendant's] ex-wife. Torres was also listed as the putative "owner" of Schiller's home when the quitclaim deed was executed. At the time of [Defendant's] trial and conviction, Torres had not been charged with any crime. The quitclaim deed and the change in beneficiary for the life insurance policies were notarized by codefendant John Mese.

FN12 Miami-area police agencies became thoroughly involved in the investigation of the crimes.

FN13 Certain documents listed John Mese as president and secretary of Sun Gym.

FN14 Doorbal was not convicted of money laundering.

FN15 When police executed search warrants at Doorbal's apartment, they found the following items: computer equipment and jewelry belonging to Schiller, receipts for purchases on Schiller's credit card, a receipt relating to the changing of locks at Schiller's home, and handcuffs. Moreover, after executing a search warrant at [Defendant's] apartment, they found the following: a set of keys for a BMW automobile, an executed deed for Schiller's home, and a letter concerning a wire transfer from one of Schiller's accounts.

FN16 We will refer to the criminal charges that stemmed from these facts as the "Griga-Furton counts."

FN17 [Defendant] and Doorbal used a substance known as Rompun, a tranquilizer sometimes given to horses, to

subdue Griga and Furton later in the kidnaping episode.

FN18 Petrescu rode with [Defendant] and Doorbal to Griga's home. At trial she supplied many of the details of what happened during this visit.

FN19 A warehouse had been rented to hold Griga and Furton captive for an indefinite period, if necessary.

FN20 Later, Delgado received a call from [Defendant] inquiring whether Delgado knew how to drive a Lamborghini, because [Defendant] was having trouble attempting to do so.

FN21 Bartusz testified that Griga was wearing jeans, crocodile boots, and a silk shirt. Furton was wearing a red leather dress, red jacket, and red shoes, and was carrying a red purse. These items, along with other incriminating evidence discussed infra, were subsequently discovered after police executed a search warrant at [Defendant's] apartment.

FN22 The record reflects that, at some point before he was killed, Griga was injected with Rompun. Dr. Allan Herron, a veterinarian, provided expert testimony that the presence of horse tranquilizer in Griga's brain and liver indicated that he was alive when he was injected. Rompun slows respiration and heart rate, and causes salivation, vomiting, and a burning sensation. Dr. Herron stated that there are no clinical uses for Rompun in humans.
Medical examiner Dr. Roger Mittleman testified that Griga was a homicide victim. While he could not pinpoint the exact cause of death, he opined that Griga died from one or more of the following causes: an overdose of horse tranquilizer; asphyxia from strangulation, with the overdose of horse tranquilizer contributing to the asphyxiating effect; or blunt force trauma to his skull and the consequent bleeding (exsanguination) from this blunt force.

FN23 Delgado eventually noticed that blood was not only on the walls and carpet of the computer room, but also on much of the equipment and furnishings.

FN24 Dr. Mittleman, the medical examiner, opined that the effects from horse tranquilizer were consistent with the cause of her death. He also stated that her death was consistent with asphyxia.

FN25 [Defendant] gave this black leather couch as partial payment to Mario Gray for his assistance in disposing of the bodies of Griga and Furton and other items. [Defendant] knew Gray from Sun Gym.
Gray assisted in disposing of the torsos and limbs (legs and arms) of both Griga and Furton, which were tightly packed in 55-gallon drums. He also found the site in southern Dade County where the body parts would be disposed. The drums were placed about 100 meters apart. On June 9, 1995, one day after being apprehended in the Bahamas, [Defendant] led police to the spot where the torsos and limbs were buried. He did not give any indication, however, of the location of the heads, hands, and feet of Griga and Furton.

FN26 Police eventually found Griga's yellow Lamborghini abandoned far off a Miami-area roadway.

FN27 Upon executing a search warrant at the warehouse in June 1995, police found the following items: fire extinguisher, flint, an owner's manual for a chain saw, and a mask respirator. They also found Griga's auto club card and numerous receipts with his name on them.
In July 1995, acting on an anonymous tip, police found a collection of human heads, hands, and feet in the Everglades off Interstate 75, along with a knife and a hatchet. The appendages were matched to Griga and Furton. Although [Defendant] and Doorbal had attempted to pull all of the teeth out of the human heads to prevent police from positively matching them to Griga and Furton, one tooth remained in one of the heads. The tooth and head were matched to Griga. Doorbal also told Delgado that he and [Defendant] had chopped off the fingertips from each of the hands, to prevent police further from matching the hands to Griga and Furton. Expert testimony confirmed that the fingertips had indeed been separated from the hands.

FN28 Delgado served as a lookout while [Defendant] and Doorbal dismembered the corpses. He noticed that

[Defendant] and Doorbal were packing the body parts tightly into drums. He also noticed a collection of heads, hands, and feet in a bucket. He was certain that the chain saw had been used. He surmised that the hatchet must also have been employed, because he heard several loud thumps consistent with those made by a hatchet. Expert testimony confirmed that the corpses were indeed at least partially dismembered by use of a hatchet.

FN29 When police executed a search warrant at [Defendant's] apartment, they found not only the blood-stained computer equipment, but also the following items covered with blood: television, gloves, towels, carpet and padding, and clothing. The blood on these items was matched to Griga. During the search, police also found a computer printout listing Griga's bank accounts, Griga's driver's license, thirty syringes (some filled and some not), a vial marked "Rompun," a stun gun, duct tape, binoculars, and several firearms and ammunition.
Further, police found the following incriminating items when they executed search warrants at Doorbal's apartment: Rompun and several foreign passports bearing [Defendant's] photograph but names other than "Daniel Lugo."

FN30 Those charges were: first-degree murder (two counts), conspiracy to commit racketeering, racketeering, kidnaping (two counts), armed kidnaping, attempted extortion, grand theft (three counts), attempted first-degree murder, armed robbery, burglary of a dwelling, first degree arson, armed extortion, money laundering (nine counts), forgery (six counts), uttering a forged instrument (six counts), possession of a removed identification plate, and conspiracy to commit a first-degree felony.
In the analysis which follows, it is convenient to discuss the criminal charges against [Defendant] as related to the set of events in which they transpired. Therefore, the following charges are denominated as the "Schiller counts" (those surrounding the abduction, extortion, and attempted murder of Miami businessman Marc Schiller): conspiracy to commit racketeering; racketeering; attempted first-degree murder; armed kidnaping; armed robbery; burglary of a

> dwelling; grand theft (two counts); possession of a removed identification plate; first-degree arson; armed extortion; money laundering (nine counts); forgery (six counts); and uttering a forged instrument (six counts).
> The following charges are denominated as the "Griga-Furton counts" (those related to the abduction, attempted extortion, and murder of Frank Griga and Krisztina Furton): conspiracy to commit racketeering; racketeering; first-degree murder (two counts); kidnaping (two counts); attempted extortion; grand theft; and conspiracy to commit a first-degree felony.

Lugo v. State, 845 So. 2d 74, 84-91 (Fla. 2003).

A penalty phase proceeding commenced on June 9, 1998. (R. 12925) The State presented only victim impact evidence at the penalty phase. (T. 12958-92) Defendant presented the testimony of his mother, Carmen Lugo, who stated that Defendant's father once threw a bowl of cold spaghetti at Defendant and on a separate occasion beat Defendant with a hanger, and Santiago Gervacio, a friend of Defendant's. (T.13008-09, 13023, 13045-55) Additionally, Mrs. Lugo testified that Defendant's father was alcoholic before being forced to stop drinking due to diabetes. (T. 13019-23) Mrs. Lugo also testified that Defendant raised four abandoned children of his ex-wife's sister, who had died of AIDS. (T. 13015) Although Defendant divorced Torres, he remained supportive and loving toward her sister's children. (T. 13016-17) Gervacio reiterated that Defendant had been kind and loving father toward his four adopted children, as well as the two children he had with his second wife. (T. 13049-50, 13053-54)

Gervacio also testified that he had observed Defendant to have a passive personality and had never seen Defendant commit a violent act against someone. (T. 13048) Mrs. Lugo and Gervacio both averred that Defendant was a loving and dutiful son to both his parents and would often get medicine for his father. (T. 13055, 13037, 13027)

After considering the evidence, the jury recommended that Petitioner be sentenced to death, by a vote of 11 to 1, for each of the murders. (T. 13173-74) The trial court followed the jury's recommendation and imposed death sentences for each of the murders. (R. 5493-5514) The trial court found 5 aggravators applicable to both murders: prior violent felonies, including the contemporaneous murder of the other victim and the kidnapping, robbery and attempted murder of Schiller; during the course of a kidnapping; avoid arrest; for pecuniary gain; and CCP. (R. 5493-5503) The trial court also found the heinous, atrocious and cruel (HAC) aggravator applicable to the Furton murder. (R. 5499-5502) The trial court gave great weight to each of the aggravators. (R. 5493-5503) In mitigation, the trial court found that Defendant had exhibited acts of kindness in the past, little weight; that Defendant's execution would have a tremendous impact on his mother and some of his children, little weight; that he behaved appropriate in court, little weight;

that Defendant revealed the location of the torsos, very little weight; and that Defendant would spend the rest of his life in prison, little weight. (R. 5504-12) It also considered and rejected the claims that Defendant had no significant prior criminal history, that he was a minor accomplice, that Defendant's sentence should be mitigated because Doorbal physically killed the victims, that Defendant was an abused child, that Defendant could teach computer skills to other inmates, and that Defendant's sentence was disproportionate given the lesser sentences of Delgado and Mese. *Id.*

The trial court also sentenced Petitioner to 30 years imprisonment for the conspiracy to commit RICO, RICO, arson and extortion, life imprisonment for the kidnaping and attempted first degree murder, life imprisonment with a 3 year minimum mandatory provision for the armed robbery and armed kidnaping, 15 years imprisonment for the burglary, grand theft, conspiracy to commit a felony and each count of money laundering, 5 years imprisonment for the attempted extortion, each grand theft auto, possession of removed identification plate, each count of forgery and each count of uttering a forged instrument. (R. 5512-14) All of the sentences were to be served consecutively. (R. 5514)

Petitioner appealed his convictions and sentences to this Court, raising 15 issues:

I.
WHETHER DEFENDANT WAS DENIED A FAIR TRIAL BY THE IMPROPER JOINDER OF COUNTS.

II.
WHETHER THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTIONS FOR RACKETEERING.

III.
WHETHER DEFENDANT WAS DENIED A FAIR TRIAL BY THE PROSECUTOR'S IMPROPER OPENING STATEMENT.

IV.
WHETHER DEFENDANT WAS DENIED A FAIR TRIAL WHERE COUNSEL FOR CO-DEFENDANT DOORBAL WAS ABLE TO QUESTION WITNESSES ADVERSELY TO DEFENDANT.

V.
WHETHER DEFENDANT WAS DENIED A FAIR TRIAL BY THE INTRODUCTION OF EVIDENCE CONCERNING DEFENDANT'S CONVICTION AND PROBATION IN A FEDERAL CASE.

VI.
WHETHER THE TRIAL COURT ERRED WHEN IT PROHIBITED DEFENSE COUNSEL FROM QUESTIONING DEFENDANT'S EX-WIFE ABOUT THE FACT THAT SHE APPEARED AT THE STATE ATTORNEY'S OFFICE WITH A LAWYER.

VII.
WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL AND REQUEST FOR DISCOVERY CONCERNING THE PROSECUTION'S FAILURE TO DISCLOSE VICTIM SCHILLER'S FEDERAL CRIMINAL INVESTIGATION AND CASE AND THE PROSECUTION'S FAILURE TO DISCLOSE AN INVESTIGATION INVOLVING THE MEDICAL EXAMINER.

VIII.
WHETHER DEFENDANT WAS DENIED A FAIR TRIAL BY THE PROSECUTOR'S CLOSING ARGUMENT.

IX.

WHETHER DEFENDANT'S CONVICTIONS MUST BE REVERSED DUE TO THE CUMULATIVE EFFECT OF CUMULATIVE ERRORS.

X.

WHETHER DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE PROSECUTOR'S IMPROPER PENALTY PHASE ARGUMENTS.

XI.

WHETHER THE TRIAL COURT'S SENTENCE OF DEATH SHOULD BE VACATED SINCE DEATH WAS A DISPROPORTIONATE SENTENCE IN THIS CASE.

XII.

WHETHER THE TRIAL COURT'S SENTENCING ORDER HAS ERRORS THAT, BOTH INDIVIDUALLY AND CUMULATIVELY, REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE AND A REMAND FOR RESENTENCING BY THE TRIAL COURT.

XIII.

WHETHER THE TRIAL COURT ERRED IN ORDERING ALL SENTENCING TERMS AND MINIMUM/MANDATORY TERMS TO RUN CONSECUTIVELY TO EACH OTHER.

XIV.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING AN UPWARD DEVIATION IN THE SENTENCING GUIDELINES AND ORDERING ALL TERMS OF IMPRISONMENT TO BE RUN CONSECUTIVELY TO EACH OTHER.

XV.

WHETHER CAPITAL PUNISHMENT AS PRESENTLY ADMINISTERED VIOLATES THE STATE AND FEDERAL CONSTITUTION.

Initial Brief of Appellant, FSC Case No. SC93,994. During the pendency of the direct appeal, Defendant attempted to file numerous supplemental briefs and pleadings, both pro se and through counsel. This Court rejected all of these pleading except for one supplement brief filed by counsel, raising one issue:

> WHETHER DEFENDANT'S SENTENCE OF DEATH VIOLATED APPRENDI V. NEW JERSEY, AND SHOULD, THEREFORE, BE VACATED.

Amended Supplemental Brief of Appellant, FSC Case No. SC93,994.

On February 20, 2003, this Court affirmed Defendant's convictions and sentences. *Lugo v. State*, 845 So. 2d 74 (Fla. 2003). The Court rejected all of the issues on their merits. Defendant then sought certiorari review in the United States Supreme Court, which was denied on October 6, 2003. *Lugo v. Florida*, 540 U.S. 920 (2003).

On October 18, 2004, Defendant served his initial motion for post conviction relief. (PCR. 360-429)[2] That motion included a claim that Defendant was not competent to proceed with post conviction proceedings. *Id.* The State responded that Defendant had not properly raised the issue of competency but that evaluations regarding competency should be ordered in an abundance of caution. (PCR-SR. 58-77)[3] The lower court appointed Dr. Suarez and Dr. Jacobson to evaluate Defendant for competency. (PCR-SR. 78-81) Both doctors found Defendant competent and noted that Defendant denied any history of abuse.

[2] The symbols "PCR." and PCR-SR." will refer to the record on appeal and supplemental record on appeal in this matter.

[3] The documents related to the competency proceedings and the State's response to the amended motion for post conviction relief were not included in the record on appeal. The State is moving to supplement the record with these documents. As such, the page numbers are estimates.

(PCR-SR. 82-91) Dr. Jacobson, a psychiatrist, diagnosed Defendant with antisocial personality disorder. (PCR-SR. 90) Based on the parties' stipulation to the experts' reports, the lower court found Defendant competent to proceed. (PCR. 234)

On April 21, 2005, Defendant filed his amended motion for post conviction relief, raising 7 claims:

> I.
> [DEFENDANT] WAS DENIED A FAIR TRIAL BECAUSE OF A JUROR'S NONDISCLOSURE DURING VOIR DIRE REGARDING BEING A VICTIM OF VIOLENT CRIME.
>
> II.
> [DEFENDANT'S] TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO IMPROPER "GOLDEN RULE" ARGUMENTS MADE BY THE PROSECUTOR.
>
> III.
> TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO ADEQUATELY INVESTIGATE AND PRESENT EVIDENCE OF SEVERAL NONSTATUTORY MITIGATORS.
>
> IV.
> DEFENDANT WAS DENIED HIS RIGHTS TO CONSULAR RELATIONS UNDER ARTICLE 36 OF THE VIENNA CONVENTION AND IS ENTITLED TO DISMISSAL OF THE INDICTMENT OR SUPPRESSION OF EVIDENCE AS A RESULT THEREOF.
>
> V.
> [DEFENDANT] WAS DENIED EFFECTIVE ASSISTANCE OF A CAPABLE MENTAL HEALTH EXPERT.
>
> VI.
> [DEFENDANT] IS ENTITLED TO POST-CONVICTION RELIEF BECAUSE THE PROSECUTION WITHHELD POTENTIALLY USEFUL INFORMATION FROM HIS WHICH IMPEACHED VICTIM/WITNESS MARC SCHILLER.
>
> VII.
> DEFENDANT IS ENTITLED TO POST-CONVICTION RELIEF BECAUSE HE WAS TRIED AND SENTENCED UNDER AN

UNCONSTITUTIONAL SENTENCING SCHEME IN CONTRAVENTION OF *APPRENDI* AND *BLAKELY*.

(PCR. 564-621) On June 16, 2007, the State responded to the amended motion. (PCR-SR. 92-158) The State argued that the claims were procedurally barred, facially insufficient and lacked merit. *Id.*

The lower court held a *Huff* hearing on September 7, 2005. At the hearing, Defendant asserted that he had sufficiently alleged that Juror Willard Schlehuber incorrectly identified the crime of which he had been a victim to be entitled to a juror interview. (PCR-SR. 8-12) The State responded that the claim was barred and that Defendant was relying upon the wrong standard in claiming that the pleading was sufficient. (PCR-SR. 12-16) With regard to Claim II, the State pointed out that the issue had been raised on direct appeal and denied because the comments did not rise to the level of fundamental error. (PCR-SR. 19) Defendant argued that counsel could be deemed ineffective for failing to preserve the issue. (PCR-SR. 20-21) Regarding Claim III, Defendant asserted that there was no proper waiver colloquy regarding Defendant's decision to limit counsel's investigation into mitigation. He further asserted that there was evidence that could have been presented as mitigation about Defendant's upbringing. (PCR-SR. 22-28) The State responded that claim regarding the "waiver" colloquy was

procedurally barred and without merit as a matter of law, as Defendant did not waive all mitigation. (PCR-SR. 29) Moreover, the record affirmatively showed that counsel did investigate mitigation and presented much of what Defendant claimed he was ineffective for failing to present. (PCR-SR. 29-31)

With regard to the Vienna Convention claim, Defendant asserted that he was prejudiced because had he been notified of his right to contact the United States Consulate, the Consulate would have had to inform Defendant of his right to counsel. (PCR-SR. 32-35) With regard to Claim V, Defendant argued that *Ake v. Oklahoma*, 470 U.S. 68 (1985), required that a psychiatrist be appointed and that he had retained Dr. Mosman, a psychologist, who stated that the defense expert from the time of trial had been incorrect in finding Defendant antisocial. (PCR-SR. 35-38) The State responded that *Ake* did not require the appointment of only psychiatrists and that the claim was insufficiently pled with regard to what mental health evaluation should have been conducted and what the results of an allegedly proper evaluation would have been. (PCR-SR. 38-39) When the trial court inquired what mental condition had been found, Defendant was unable to provide one. (PCR-SR. 39-40)

With regard to the issue of Medicare fraud, Defendant asserted that Schiller had lied when he denied committing

Medicare fraud and that the State knew it was a lie because it knew he was being investigated for Medicare fraud. (PCR-SR. 40-43) The State pointed out that the issue had been raised and rejected on direct appeal and that the e-mail changed nothing about the facts. (PCR-SR. 43-44) With regard to the *Ring* claim, Defendant relied on his motion. (PCR-SR. 44)

During the course of the hearing, the lower court indicated it was summarily denying Claim II, IV and VII. (PCR-SR. 22, 35, 44) After hearing all of the arguments, the lower court summarily denied Claims I, II, and IV through VII. (PCR-SR. 45-47) It granted a hearing on Claim III but ruled that Defendant could not call Lucretia Goodridge in support of the claim because counsel had stated on the record at trial that he was not calling her because of her involvement in the commission of the crimes. (PCR-SR. 45-46) It set the evidentiary hearing for December 1, 2005. (PCR-SR. 48)

Because of a scheduling conflict with counsel, the evidentiary hearing was continued until January 23, 2006 on November 17, 2005. (PCR. 193) On December 27, 2005, Defendant moved for leave to amend his amended motion for post conviction. (PCR. 929-47) The motion sought to add four additional claims:

> I.
> [DEFENDANT'S] CONVICTION WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT BECAUSE THE ARREST AFFIDAVIT WAS BASED UPON FALSE STATEMENTS AND MATERIAL OMISSIONS OF

FACT.

II.

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO SEEK SUPPRESSION OF EVIDENCE OBTAINED IN VIOLATION OF [DEFENDANT'S] FOURTH AMENDMENT RIGHTS.

III.

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT [DEFENDANT'S] ARREST IN THE BAHAMAS VIOLATED HIS INDIVIDUAL RIGHTS UNDER THE VIENNA CONVETION, RESULTING IN PREJUDICE AND REQUIRING THE SUPPRESSION OF EVIDENCE OBTAINED AS THE FRUIT OF THE UNLAWFUL ARREST.

IV.

DEFENDANT WAS DENIED HIS RIGHTS UNDER THE SELF-EXECUTING EXTRADICTION TREATY WITH THE BAHAMAS.

(PCR. 933-47) The motion for leave to amend asserted that the "good cause" why the claims regarding the arrest and extradiction had not been raised earlier was that "counsel for Defendant failed to timely identify those claims as factually supported and legally viable" despite Defendant having urged counsel to raise the claims. (PCR. 930) He asserted that the "good cause" for failing to raise the Vienna Convention claim was that the United States Supreme Court had granted certiorari in *Sanchez-Llamas v. Oregon*, 546 U.S. 1001 (2005), and *Bustillo v. Johnson*, 546 U.S. 1002 (2005). (PCR. 931)

The State responded to the request for leave to amend and argued that Defendant's allegations regarding why the claims had not been timely filed did not show good cause. (PCR. 948-53) At the hearing on the motion, Defendant asserted that he had not

filed the claims regarding the arrest and extradition because of his "lack of diligence." (PCR. 1463) The claim regarding the Vienna Convention was based on the granting of certiorari to consider whether the Convention created privately enforceable rights. (PCR. 1463)

The State responded that Defendant was basically asserting ineffective assistance of post conviction counsel was good cause for failing to raise the arrest and extradition claims and that ineffective assistance of post conviction counsel was not good cause. (PCR. 1465) With regard to the Vienna Convention claim, the State argued that the granting of certiorari did not affect this Court's prior determinations regarding the lack of viability of Vienna Convention claims and that even if the law did change, the change in law would not support the ineffective assistance of counsel claim alleged. (PCR. 1465-66) After considering these arguments, the lower court denied leave to amend. (PCR. 1467)

The matter then proceeded to the evidentiary hearing on January 23, 2006. (PCR. 1469-1595) At the hearing, Defendant offered into evidence his grade school diploma, his high school honors certificates and his college transcript. (PCR. 1092-1102, 1475) Defendant then presented the testimony of Robert Holdman, O'Neal Tutein, Charles Spinelli, Cindy Velez, Ron

Guralnick, David Wasser and himself.

Holdman testified that he had previously been an Assistant District Attorney in the Bronx and was presently a trial court judge there. (PCR. 1476) He had known Defendant in 1982, when they both played football for Fordham University. (PCR. 1476) He and Defendant had competed for a spot on the defensive line. (PCR. 1476-77) He believed that Defendant was a good teammate, hard worker and good guy. (PCR. 1477) They occasionally shared meals, either when they ran into one another on campus at lunch or while traveling with the team. (PCR. 1477)

He also considered Defendant to be a fair competitor, who always treated Holdman well, and a trustworthy person. (PCR. 1478) Holdman never heard of Defendant committing acts of violence, crimes or acts of dishonesty, immorality or selfishness before he learned of Defendant's commission of these crimes. (PCR. 1479) He did not know Defendant to use drugs or alcohol. (PCR. 1479)

However, Holdman stated that Defendant quit the football team after Defendant's sophomore year, such that they were only on the team together for one year. (PCR. 1478) Thereafter, Holdman's only contact with Defendant was running into him around campus. (PCR. 1478-79) Holdman had not seen Defendant since 1988. (PCR. 1479)

Holman stated that his first contact about the case was about six months before the evidentiary hearing while he was still working as a prosecutor. (PCR. 1480) Had he been contacted at the time of trial, he would have been willing to provide the same testimony he provided at the hearing. (PCR. 1480-81)

On cross, Holdman admitted that he had never been to Defendant's home. (PCR. 1483) He may have been introduced to Defendant's family after a football game but did not know them and did not even know their names. (PCR. 1483-84) After the spring of 1983, Holdman had seen Defendant no more than a dozen times, did not know whether Defendant had graduated, did not know that Defendant had moved to Florida and had never spoken to Defendant by phone. (PCR. 1484)

Holdman was somewhat familiar with the facts of the case. (PCR. 1491) He considered the facts of the case to show that Defendant had committed acts of violence, dishonesty, selfishness and immorality. (PCR. 1491-92) Knowing the facts of the case changed his opinion of Defendant's character. (PCR. 1492)

Tutein testified that he was presently a social worker with Hillsborough County but that he had been the Associate Athletic Director and a football coach at Fordham University from 1981 to

1985. (PCR. 1494) When he was a football coach, Defendant had been a member of the team, and Tutein had recruited Defendant. (PCR. 1494) Defendant had been recruited because he was a decent football player and had attended a Catholic high school. (PCR. 1495) Tutein believed that Defendant was an upstanding young man and a very hard worker, who took good care of himself, lived in the weight room and was liked by the other players when he was on the football team. (PCR. 1495) However, Tutein considered Defendant very quiet and found it hard to get close to him. (PCR. 1495) Tutein noted that Defendant did not live on campus and did not participate in the same activities as other players. (PCR. 1496)

Tutein believed Defendant was a fair competitor, honest and trustworthy. (PCR. 1497) He never knew Defendant to be involved in criminal activity or acts of violence, dishonesty, selfishness or immorality. (PCR. 1497) He never heard of Defendant abusing drugs or alcohol. (PCR. 1498)

Tutein was first contacted about this matter by an investigator during the post conviction proceedings. (PCR. 1498) Tutein admitted that he was focused on caring for his ill parents at the time of trial but stated that he would have been willing to testify about Defendant's character when he was a football player had he been contacted. (PCR. 1499-1500)

Tutein testified that he had no contact with Defendant after Defendant left college. (PCR. 1496) Tutein stated that he knew of the crimes of which Defendant had been convicted but that such knowledge did not affect his testimony. (PCR. 1495)

On cross, Tutein testified that he had known Defendant in 1982. (PCR. 1501) He had absolutely no idea of what type of person Defendant had become after that time. (PCR. 1501) He stated that his memory of Defendant's character was inconsistent with Defendant's commission of the crimes. (PCR. 1500-01) Tutein evaded the question of whether knowing of Defendant's criminal activity changed his opinion of Defendant's character by stating that he was only testifying about what Defendant was like in 1982. (PCR. 1501-02)

Spinelli testified that he presently owned a couple of insurance agencies and had practiced securities and corporate law for 13 years before going into business. (PCR. 1503) He knew Defendant when they were both on the Fordham football team. (PCR. 1504) He believed that Defendant had been a hard working dedicated team member who was a fair competitor, honest and trustworthy. (PCR. 1504) He considered Defendant to have been a friend to himself and other teammates. (PCR. 1504)

Spinelli never knew Defendant to commit crimes or acts of violence, immorality or dishonesty. (PCR. 1505) He believed

Defendant was generous and did not use drugs or alcohol. (PCR. 1505)

Spinelli had not been contacted at the time of trial. (PCR. 1506) However, he asserted that he would have been willing to testify had he been contacted. (PCR. 1506)

On cross, Spinelli admitted that his entire contact with Defendant was that they had been on the same football team for two years in college. (PCR. 1507) Spinelli had never socialized with Defendant and had no contact with Defendant after Defendant left the football team. (PCR. 1508)

Spinelli admitted that he did not believe in the death penalty. (PCR. 1509) He acknowledged that he had stated that people changed over time. (PCR. 1509-10) He believed that the crimes of which Defendant stood convicted were inconsistent with his opinion of Defendant's character. (PCR. 1509-10) He also evaded questions concerning his opinion of Defendant's present character by stating that he was only opinining about what Defendant was like in college. (PCR. 1511)

Guralnick testified that he was Defendant's trial counsel. (PCR. 1512) Guralnick stated that he had asked the trial court to discuss mitigation with Defendant because Defendant did not want to present any witnesses in mitigation. (PCR. 1512-13) Guralnick acknowledged that the transcript of the discussion

between the trial court and Defendant about mitigation only addressed family members but stated that Defendant had told him not to present any mitigation. (PCR. 1513-14) Guralnick admitted that Defendant eventually relented and that he had presented mitigating evidence. (PCR. 1514)

Guralnick stated that he had not gone to New York to look for mitigation. (PCR. 1514) However, he stated that Defendant gave him no indication that there would be any useful mitigation to be found in New York. (PCR. 1515) Guralnick stated that he knew that Defendant had done well in school and had played football at Fordham from talking to Defendant himself. (PCR. 1515) Guralnick refused to speculate about whether he would have presented coaches and teammates to testify about Defendant's character when Defendant was in college. (PCR. 1515-16)

Guralnick stated that he presented evidence that Defendant had been a good student in college through Defendant's mother. (PCR. 1518) Guralnick believed that Defendant's mother made a decent and sympathetic witness. (PCR. 1518) Guralnick stated that he did not believe presenting evidence of Defendant's having played football would be very helpful in this case. (PCR. 1518) Guralnick also did not believe that presenting evidence about Defendant's character years before the crime

would have been helpful. (PCR. 1519)

Guralnick stated that he had interviewed one of Defendant's prior girlfriends. (PCR. 1519) However, he decided not to present her testimony as she appeared stupid and gullible. (PCR. 1519-20)

Guralnick recognized his handwriting on the list of names of Defendant's family members, girlfriends and friends. (PCR. 1520-21) Guralnick stated that he had contacted several of the people on the list and called two of them to testify. (PCR. 1521-22) Guralnick believed the list was complied in response to his request that Defendant give him a list of names of people who might have something helpful to say. (PCR. 1523)

Guralnick recalled speaking to one of Defendant's sisters, who asked that her name not be mentioned, stated that she only had negative things to say about Defendant and made herself unavailable. (PCR. 1526-27) Guralnick stated that he presented evidence about Defendant's religious activities through his mother because a family member would know such information better than a friend. (PCR. 1527)

On cross, Guralnick stated that he had been an attorney for 38 years and had represented many people charged with first degree murder and facing the death penalty. (PCR. 1529) Guralnick had a good relationship with Defendant and discussed

the evidence and matters of strategy with Defendant. (PCR. 1530) Defendant was vocal about the strategies he wanted employed, and Guralnick considered Defendant very bright. (PCR. 1530) In fact, Defendant sent Guralnick notes about matters he wanted pursued and matters he did not want pursued. (PCR. 1530-31)

Guralnick was aware of Defendant's wives and could not call Lillian Torres or Lucrecia Goodridge because they were implicated in Defendant's criminal activities. (PCR. 1532-33) Defendant's first marriage had ended badly so Guralnick did not plan to call Defendant's first wife. (PCR. 1532)

Guralnick stated that he considered it silly to call a person who dated Defendant when she was 15 and Defendant was 18 to say that Defendant was a good guy at that time. (PCR. 1535) He stated that presenting evidence of child abuse would be helpful. (PCR. 1537) Guralnick stated that Defendant had told him that he was abused and that he investigated the allegation but found no support for it. (PCR. 1537-38)

Guralnick stated that Defendant had a good life, went to college, was a good student and played football from what he knew. (PCR. 1538) Guralnick recalled having gotten records of Defendant's attendance at a private high school. (PCR. 1538-39) Guralnick stated that he did not believe that showing that

Defendant had every opportunity but became a criminal anyway would have been helpful. (PCR. 1539) Guralnick stated that presenting witnesses who had similar backgrounds and went on to become attorneys would have been used against him by comparison by the prosecutor. (PCR. 1539-40)

Guralnick stated that he always discussed his client's background with his client. (PCR. 1540) He recognized his notes detailing Defendant's background. (PCR. 1541)

Velez testified that she met Defendant when they both played basketball when they were young. (PCR. 1546) She eventually started dating Defendant. (PCR. 1546) She met Defendant's mother and knew that he came from a normal, average, middle class family. (PCR. 1547) At the time she knew Defendant, he did not drink, use drugs or stay out late. (PCR. 1547) They dated for about a year when Velez was 16 before Velez's mother sent her to Puerto Rico to stop her from dating Defendant. (PCR. 1548)

Velez stated that Defendant was a wonderful person with a great heart and very good with people. (PCR. 1548) Defendant was very healthy and lived a health lifestyle when he was young. (PCR. 1549) She knew of one time Defendant had gone to church. (PCR. 1549) Velez never knew Defendant to commit crimes or acts of violence, dishonesty, selfishness or immorality. (PCR. 1549-

50) Velez believed that Defendant could contribute to society. (PCR. 1550)

Velez stated that she was not contacted by Defendant's attorney at the time of trial. (PCR. 1552) However, she stated that she would have been willing to testify if called. (PCR. 1553)

After Defendant was convicted, she had visited him in prison on more than one occasion. (PCR. 1545-46) She had also spoken to Defendant on the phone and exchanged letters with him. (PCR. 1546)

On cross, Velez admitted that she met another man in Puerto Rico after her mother sent her there and had a child with this man. (PCR. 1554) During the time she was in Puerto Rico, she had no contact with Defendant. (PCR. 1554) She admitted that she was ill and not traveling in 1998. (PCR. 1555)

In 2002 or 2003, Velez started to question some decisions she had made in her life and decided to contact people she had known. (PCR. 1556) As a result, she searched the internet for Defendant and found him in 2003. (PCR. 1557-58) Velez admitted that she knew only a little bit about the nature of Defendant's convictions. (PCR. 1559-60) She had only spoken to Defendant briefly about his convictions. (PCR. 1560) Velez stated that her only concern about the nature of Defendant's criminal

activity was her concern with trying to save Defendant's life. (PCR. 1560-61) Velez acknowledged that Defendant's crimes were inconsistent with her view of Defendant. (PCR. 1561-62)

Wasser testified that he had been a licensed investigator since 1985. (PCR. 1563) He met with Defendant in prison and obtained information about the witnesses from him. (PCR. 1564-65) He then located the other witnesses who testified through basic investigative techniques. (PCR. 1564)

On cross, Wasser admitted that Defendant was reluctant to provide information about mitigation originally. (PCR. 1568-69) Instead, Defendant wanted to pursue other issues. (PCR. 1569-70)

Defendant testified that he did not tell Guralnick that he did not want to call non-family members to testify concerning mitigation. (PCR. 1578) He stated that Guralnick did not ask for the names of Defendant's college classmates or his girlfriends from New York. (PCR. 1578)

On cross, Defendant admitted that Guralnick had asked him to provide him with the names of possible witnesses but that Defendant had responded that he could not recall any names. (PCR. 1579) Guralnick asked him for a list of family members' names and Defendant claimed just to have put his friend Santiago Gervacio's name on the list gratuitously. (PCR. 1579)

After presenting this evidence, Defendant argued that he had shown that there was valid evidence of nonstatutory mitigation that Guralnick was deficient for failing to investigate and present because he relied on Defendant to provide information about mitigation. (PCR. 1582-87) He asserted that the manner in which the evidence in the post conviction proceeding was presented was superior to the manner in which the evidence had been presented through Defendant's mother and friend from the time of the murders. *Id.*

The State responded that Guralnick had made a reasonable decision not to investigate and present this evidence as he had been accurately informed that Defendant had nothing bad in his past and had been a good student and football player. (PCR. 1587) The State further argued that Defendant had not shown prejudice. (PCR. 1588-90) Spinelli, Holdman and Tutein barely knew Defendant at all even when they had contact with him and knew nothing about him as an adult. (PCR. 1588-89) Velez was not even shown to be available, as she admitted that she was ill and not traveling at the time of trial. (PCR. 1588) Moreover, presentation of this evidence would have invited an unfavorable comparison between the witnesses who had the same advantages as Defendant but became attorneys and business people and Defendant. (PCR. 1589) Further, given the extremely aggravated

nature of these crimes, the asserted mitigation would not create a reasonable probability of a life sentence. (PCR. 1590)

On March 29, 2006, the lower court entered its order denying Defendant's motion for post conviction relief. (PCR. 1124-46) It found that the claim regarding Juror Schlehuber was procedurally barred, facially insufficient and without merit. (PCR. 1133-34) It determined the issue regarding the comment in closing was also procedurally barred and facially insufficient. (PCR. 1135) It determined that Defendant had not proven that counsel was ineffective for failing to investigate and present nonstatutory mitigation. (PCR. 1136-41) It determined that Defendant lacked standing to raise the Vienna Convention claim, which was also procedurally barred and did not allow for the remedy Defendant sought. (PCR. 1141-42) It determined that the claim regarding the mental health evaluation was facially insufficient. (PCR. 1142-43) It found the ***Brady*** claim was procedurally barred and the ***Giglio*** claim was facially insufficient. (PCR. 1144-45) It determined that the ***Ring*** claim was procedurally barred and lack merit. (PCR. 1145-46)

Defendant subsequently moved for rehearing. (PCR. 1201-19, 1247-78) The lower court denied the motion for rehearing. (PCR. 1317) This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied the claim regarding counsel being ineffective for failing to investigate and present nonstatutory mitigation. Defendant failed to prove either deficiency or prejudice.

The lower court properly denied the claim regarding Juror Schlehuber as it was procedurally barred and insufficiently plead. It also properly found the claim regarding the comment in closing to be barred and without merit as a matter of law. The Vienna Convention claim was properly denied because Defendant lacked standing to assert the claim, it was procedurally barred, it was facially insufficient and the remedies Defendant sought were unavailable as a matter of law.

The *Brady* and *Giglio* claims were properly rejected as procedurally barred and without merit. The lower court did not abuse its discretion in refusing to grant leave to amend, as Defendant did not show good cause for the failure to have alleged the barred and meritless claims earlier.

ARGUMENT

I. THE DENIAL OF THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT NONSTATUTORY MITIGATION SHOULD BE AFFIRMED.

Defendant asserts that the lower court erred in denying his claim that his counsel was ineffective in failing to investigate and present evidence regarding Defendant's alleged good character when he played college football and evidence regarding Defendant's lack of history of substance abuse. Defendant argues that counsel was deficient because he was required to investigate these areas to be effective. However, the lower court properly denied the claim.

In denying this claim after an evidentiary hearing, the lower court held:

> Defendant alleges that his trial counsel was ineffective in that he failed to adequately investigate and present evidence of five nonstatutory mitigators.[4] Those five nonstatutory mitigators are separately set out in Defendant's motion along with the names of witnesses and their expected testimony as to each mitigator. At the case management conference/*Huff* hearing, the court granted an evidentiary hearing on this claim.
>
> * * * *

[4] The other three alleged mitigators were that Defendant had been religious, that Defendant had shown good citizenship by successfully completing his federal probation and that Defendant was abused as a child. However, Defendant presents no argument regarding the denial of these claims in his brief. As such, these claims have been waived. *See Anderson v. State*, 822 So. 2d 1261, 1268 (Fla. 2002)(failure to brief issue is a waiver of the issue).

B) DEFENDANT SHOWED EARLY POTENTIONAL DEMONSTRATED BY ATHLETICS

Defendant alleges that his trial counsel was ineffective for failure to investigate his background and present evidence of his participation in school athletics at the penalty phase of trial. Defendant presented a number of witnesses at the evidentiary hearing who to [sic] testified he played college football and he was of good character at that time.

Defendant first called Robert Holdman, who testified that he met Defendant in 1982 at Fordham University where they played on the same football team for one year. At that time, Mr. Holdman was a freshman and Defendant was a sophomore. While they were teammates, Defendant, who was older, looked out for Mr. Holdman and was good to him. He further testified Defendant was a good teammate, a hard worker, honest, trustworthy and a fair competitor. Defendant stopped playing football after that year and Mr. Holdman had very little, if any, contact with him after the spring of 1983.

Defendant presented the testimony of Camile [sic] Tutein, who was the head football coach at Fordham University from 1981 until 1985. He recruited Defendant from St. Javier [sic] High School to play on the Fordham team. Defendant played on the team for two seasons, 1981 and 1982. He remembered Defendant was an outstanding player, a hard worker, committed to the football program, not a trouble maker, very quite [sic], and that he lived in the weight room. Coach Tutein indicated that it was really hard to get close to Defendant but the other players liked him. He further testified that after Defendant left Fordham they had no further contact.

Defendant then called as a witness Charles Spinelli, who knew Defendant at Fordham when they played on the same football team for two years. He testified that as a teammate Defendant was hard working, always showed up from practice, and was a dedicated player. He admitted that his only contact with Defendant was about football, that they did not socialize, and he did not know that Defendant had moved to Miami.

Cindy Velez testified that when she and Defendant dated in 1981, she knew that he played on the football team at Fordham University.

Defendant's trial counsel, Ronald Guralnick, testified that he was aware Defendant had played college football however; he did not look for witnesses who knew Defendant from the football team. He testified that he did not think being a good football played [sic] would have made much difference under the facts of the case. He further testified, in his opinion, showing Defendant had every opportunity in life but ended up convicted of murder would have looked horrible and had a more negative effect on the jury. He indicated, and the record reflects, the testimony was presented through Defendant's mother that he played football (T. 13024) Even though Defendant had requested he not do so, trial counsel testified that he chose to use Defendant's mother as a mitigation witness to show Defendant's background. It was his opinion that she was a powerful sympathetic witness.

The decision to present evidence that Defendant played football though [sic] his mother was a tactical decision. It is very logical and counsel was not ineffective in choosing this strategy. Defendant had no contact with her former teammates and coaches after he left Fordham. Defendant committed these crimes over 10 years after he left Fordham. Defendant cannot show that he was prejudiced and entitled to postconviction relief. The trial court found six aggravating circumstances regarding Furton, even adding the mitigation as presented at the evidentiary [hearing] Defendant had not shown that there was [a] reasonable probability that []he would not have received [the] death penalty. He failed to show prejudice under *Strickland*.

The claim is denied.

C) DEFENDANT AVOIDED THE USE OF DRUGS AND ALCOHOL

Defendant alleges that his trial counsel was ineffective for failure to present evidence that he abstained from use drugs and alcohol which demonstrated his appreciation of the values of life and good health. In his motion Defendant names his sister, Minerva Lugo, as a witness who is and was available to testify that he never took drugs, drank alcohol, or used steroids even though he was a body builder.

At the evidentiary hearing Defendant did not call Minerva Lugo to testify. Testimony was presented

> regarding Defendant's non-use of drugs or alcohol through several witnesses. Defendant's college football teammate Robert Holdman testified he never knew Defendant of abuse drug or alcohol. Coach Tutein testified that Defendant did not use drugs or alcohol. Cindy Velez testified that Defendant lived a healthy life style and did not use drugs or alcohol. Defendant had no contact with these witnesses for at least 10 years prior to the commission of the murders. They had no knowledge of whether he used drugs after he left Fordham.
>
> Defendant has clearly failed to show that presentation of the fact that he did not use drugs or alcohol would have affected the outcome of the case. He had not met his burden to show prejudice under *Strickland*.
>
> This claim is denied.

(PCR. 1137-38)

In reviewing the denial of a claim of ineffective assistance of counsel after an evidentiary hearing, this Court is required to give deference to the lower court's findings of fact to the extent that they are supported by competent, substantial evidence. *Stephens v. State*, 748 So. 2d 1028, 1033-34 (Fla. 1999). However, this Court may independently review the lower court's determination of whether those facts support findings of deficiency and prejudice to support a holding that counsel was ineffective. *Id.* The determination that counsel made a strategic decision is a finding of fact. *Bolender v. Singletary*, 16 F.3d 1547, 1558 n.12 (11th Cir. 1994); *see Windom v. State*, 886 So. 2d 915, 923 (Fla. 2004).

Here, the lower court's findings of fact with regarding the testimony of the witnesses offered as potential mitigation witness are fully supported by competent, substantial evidence. Each of the witnesses the lower court named did, in fact, testify in accordance with the lower court's description of their testimony regarding their limited knowledge of Defendant's character years prior to the crime. (PCR. 1476-1511, 1546-62)

Moreover, Guralnick did testify that he was aware that Defendant had played football at Fordham and done well in school. (PCR. 1515) He did state that he presented evidence about Defendant's school performance through Defendant's mother and that he did consider her a decent and sympathetic witness. (PCR. 1518) He did testify that he did not believe that presenting evidence that Defendant had played football and Defendant's character years before the crime would have been helpful. (PCR. 1518) He stated that he considered calling a person someone had dated as a teenager silly. (PCR. 1535) He stated that he did not believe that presenting evidence that showed Defendant had every opportunity in life but became a criminal anyway would not have been helpful. (PCR. 1539) He also stated that he believed presenting witnesses who had similar backgrounds and went on to become successful people would have been used against him by the State. (PCR. 1539-40)

As such, there is also competent, substantial evidence to support the lower court's finding that counsel made a strategic decision had not investigate and present evidence of Defendant having played football through witnesses other than Defendant's mother. This is particularly true, as counsel's performance is presumptively strategic and effective, and Defendant bore the burden of presenting affirmative evidence to overcome that presumption. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *see Marcolini v. State*, 673 So. 2d 3, 4 (Fla. 1996); *see also Francis v. Franklin*, 471 U.S. 307, 314 n. 2 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 517 (1979); *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 157 (1979).

Because the lower court's findings of fact are supported by competent, substantial evidence, this Court is required to defer to those findings. *Stephens*, 748 So. 2d at 1033-34. Further, given these findings of fact, the lower court was correct to find that Defendant had failed to establish that his counsel was deficient for failing to present evidence about Defendant's brief college football career through anyone other than Defendant's mother. *Dufour v. State*, 905 So. 2d 42, 57 (Fla. 2005); *Griffin v. State*, 866 So. 2d 1, 9 (Fla. 2003)("Trial counsel is not deficient where he makes a reasonable strategic decision to not present mental mitigation testimony during the

penalty phase because it could open the door to other damaging testimony."); *Ferguson v. State*, 593 So. 2d 508, 510 (Fla. 1992).

Moreover, the lower court was correct to find that Defendant did not show that he was prejudiced by the failure to present additional witnesses about the football career or the evidence that Defendant did not use drugs or alcohol. As the lower court noted, counsel had Defendant's mother testify that Defendant played football, did well in school and won a football scholarship to college. (T. 13013-14, 13024) Counsel also had Defendant's mother and his friend at the time of the murders, Santiago Gervacio, testify that Defendant was not violent or a liar and that Defendant was a good and generous friend, son, father and husband. (T. 13014-19, 13028, 13047-55, 13058)

Moreover, the presentation of evidence that Defendant played football and was considered to be a good person by people who knew him when he did so would have invited a negative comparison to Defendant. The witnesses who knew Defendant from his college football team went on to become attorneys, a successful business man and a social worker. Defendant did not take these same opportunities and become a productive member of society. Instead, he chose to lead a life of crime, beginning with securities fraud, continuing into Medicare fraud and

culminating in being the leader of a RICO organization and conspiracy, the objective of which was the kidnapping, torture and murder of wealthy individuals for their money. Presenting individuals who had the same opportunities that were given to Defendant and took those opportunities to better themselves and society while Defendant squandered the opportunities given to him because he wanted to be a criminal would have only cast Defendant in a bad light.

Further, in exchange for the negative comparison invited by the presentation of these witnesses, Defendant also would have received little benefit. The witnesses Defendant presented at the evidentiary hearing had little, if any, contact with Defendant after he stopped playing football in 1983. The crimes of which Defendant was convicted in this case were not committed until 1994 and 1995. As such, these witnesses had no opportunity to know anything about Defendant's character or actions for more than a decade before the crimes. Moreover, these witnesses generally had little contact with Defendant even when they knew him. Spinelli admitted that his entire contact with Defendant had been associated with being members of the same football team and that he had never even socialized with Defendant. (PCR. 1509-10) Holdman associated with Defendant as part of football team activities and occasionally ate lunch with

Defendant when they bumped into one another on campus. (PCR. 1476-77) He had never been to Defendant's home and was not sure he had ever even been introduced to Defendant's family. (PCR. 1483-84) In fact, the relationship between Defendant and these witnesses was so negligible that Defendant admitted that he did not remember their names at the time of trial, and Wasser, Defendant's post conviction investigator, admitted that he located witnesses by getting a roster of the football players from the time Defendant was on the team and contacting them. (PCR. 1565, 1579) Moreover, the testimony of these witnesses was generally that Defendant played football in college, appeared to be a nice guy at the time and was not known to use drugs and alcohol. Given the length of time between the witnesses' contact with Defendant and anything associated with this matter, the superficial nature of the witnesses' contact with Defendant when they were in contact and the content of the witnesses' testimony, the evidence these witnesses presented was extremely weak mitigation.

However, the aggravating in this matter was extremely strong. In sentencing Defendant to death, the trial court found five aggravating circumstances regarding Mr. Griga and six aggravating circumstances regarding Ms. Furton. The prior violent felony aggravator was supported by the crimes committed

against Schiller while he was held captive for a month and tortured and the murder of the other victim. The murders here were committed during the kidnapping of Ms. Furton and Mr. Griga so that they too could be held captive and tortured for their assets. Defendant had always planned to kill Ms. Furton and Mr. Griga to prevent them from reporting their kidnapping and torture. These facts supported the during the course of a kidnapping, avoid arrest, pecuniary gain and CCP aggravators. Moreover, the suffering Ms. Furton endured as she was held captive and injected with a painful animal tranquilizer, which caused Ms. Furton to be unable to breathe, supported the HAC aggravating circumstance.

Given the cumulative nature of much of the testimony presented, the negative comparison between Defendant and the witnesses the presentation of these witnesses would have invited, the weakness of the mitigation provided by these witnesses and the strength of the aggravating in this matter, the lower court properly determined that the presentation of the post conviction evidence would not have created a reasonable probability that Defendant would not have been sentenced to death. ***Willacy v. State***, 32 Fla. L. Weekly S377, S380 (Fla. Jun. 28, 2007)(counsel not ineffective for failing to present mitigation that would have been a "double edged sword"); ***Evans***

v. State, 946 So. 2d 1, 13 (Fla. 2006)(same); *Johnson v. State*, 921 So. 2d 490, 501 (Fla. 2005)(counsel not ineffective for failing to present evidence that would not create a reasonable probability that "the jury 'would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'")(quoting *Strickland v. Washington*, 466 U.S. 668, 695 (1984); *State v. Riechmann*, 777 So. 2d 342, 356 (Fla. 2000)(failing to present cumulative evidence is not ineffective assistance); *Valle v. State*, 705 So. 2d 1331, 1335 (Fla. 1997)(same). The lower court should be affirmed.

Despite the fact that the lower court's rejection of these claims is based on factual findings fully support by the record and conclusion that are entirely in accordance with the law, Defendant believes that counsel cannot be deemed ineffective unless he conducts a "thorough investigation." However, the law does not support this assertion.

In *Strickland*, 466 U.S. at 691, directly defined the duty that counsel had to follow to be effective was "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." The Court further stated that "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

Id. In *Wiggins v. Smith*, 539 U.S. 510 (2003), the case upon which Defendant's heavily relies, the Court reiterated that this was the duty imposed for counsel to be considered effective and that it was not altering the nature of counsel's duty:

> In finding that Schlaich and Nethercott's investigation did not meet *Strickland*'s performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*. 466 U.S., at 689, 80 L Ed 2d 674, 104 S Ct 2052. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Id.*, at 690-691, 80 L Ed 2d 674, 104 S Ct 2052. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.*, at 691, 80 L Ed 2d 674, 104 S Ct 2052.

Id. at 533. In fact, the United States Supreme Court has rejected claims that counsel was ineffective for failing to investigate mitigation more thoroughly on many occasions. *Strickland*, 466 U.S. at 699; *Burger v. Kemp*, 483 U.S. 776, 794 (1987); *Darden v. Wainwright*, 477 U.S. 168, 186 (1986). Thus, the law does not support Defendant's assertion that counsel was deficient merely because he did not investigate the mitigation that Defendant believes he should have as thoroughly as

Defendant believes he should have. The lower court should be affirmed.

Further, counsel's investigation regarding mitigation was reasonable. Counsel stated that he spoke to Defendant extensively about Defendant's background and recognized his notes regarding Defendant's background. (PCR. 1540-41, 1086-88) He recalled getting high school records. (PCR. 1538-39) He spoke to one of Defendant's girlfriends, knew of Defendant's ex-wives and made decisions about them based on their involvement in this matter and the nature of Defendant's relationship with them. (PCR. 1532-33) He obtained a list of potential mitigation witnesses from Defendant and interviewed several of them. (PCR. 1520-23) He interviewed many of Defendant's family members. (R. 4422-4526, 4563-4637) He had Defendant's mental health evaluated for mitigation. (R. 4891-61) Through this investigate, counsel knew that Defendant had done well in school, was considered a nice guy by at least one of his friends and had played football. Counsel's decision not to investigate these issues further was reasonable.

The cases relied upon by Defendant do not compel a different result. In *Wiggins*, the Court found that counsel's decision to limit their investigation into Defendant's family background was not reasonable because the limited investigation

that counsel had conducted showed that Defendant had been horrible abused as a child, which would have been powerful mitigation, and counsel's statement that they were concentrating on Defendant's lack of responsibility for the crime was inconsistent with their actions at the time of trial. *Wiggins*, 539 U.S. at 523-27. In *State v. Lewis*, 838 So. 2d 1102, 1109-10 (Fla. 2002), counsel's penalty phase investigation consistent of limited interviews with the defendant's mother and father and an evaluation by a mental health expert, who had requested documentation that was not provided so that he could reach an opinion. In *Ragsdale v. State*, 798 So. 2d 713, 718-19 (Fla. 2001), counsel's investigation consisted of reviewing the file of the defendant's prior attorney and having his wife make a few calls to family members. In *Riechmann*, counsel had conducted no penalty phase investigate at all and presented no evidence at the penalty phase. *Riechmann*, 777 So. 2d at 350. As all of these cases involved considerably less investigation, they do not support Defendant's assertion that counsel's investigation was not reasonable. The lower court should be affirmed.

Even if Defendant had shown that the lower court erred in finding counsel was not deficient for failing to investigate and present additional evidence about Defendant's football career,

the lower court should still be affirmed.[5] As seen above, the lower court found that Defendant was not prejudiced by the failure to investigate and present the mitigation about which Defendant complains because its presentation did not create a reasonable probability that Defendant would not be sentenced to death. As argued above, this finding was proper. As the Court noted in *Strickland*, it is not even necessary for a court to determine if counsel was deficient when there is no prejudice from the alleged deficiency. *Strickland*, 466 U.S. at 697. Thus, since the lower court properly determined that there was no prejudice, it should be affirmed.

II. THE LOWER COURT PROPERLY SUMMARILY DENIED THE CLAIM CONCERNING JUROR SCHLEHUBER.

Defendant next asserts that the lower court erred in summarily denying his claim that he was entitled to relief based on the alleged nondisclosure of information by a juror during voir dire or based on counsel's alleged ineffectiveness in failing to present this issue in a motion for new trial. Specifically, Defendant asserts that Juror Schlehuber's alleged failure to disclose that he had been the victim of a battery purportedly would have provided a basis for either a cause or

[5] As seen above, the lower court did not reach a conclusion concerning whether counsel was deficient for failing to investigate evidence of Defendant's lack of substance abuse. (PCR. 1138)

peremptory challenge. He contends that if the issue is procedurally barred, his counsel was then ineffective for failing to investigate and present the issue in a motion for new trial. However, the lower court properly denied this claim, as it is procedurally barred, was not sufficiently pled and was without merit.

This Court has held that claims of juror misconduct are procedurally barred in post conviction litigation because they could have and should have been raised on direct appeal. *Elledge v. State*, 911 So. 2d 57, 77 n.27 (Fla. 2005); *Happ v. Moore*, 784 So. 2d 1091, 1094 & n.3 (Fla. 2001); *Brown v. State*, 755 So. 2d 616, 637 (Fla. 2000); *Gaskin v. State*, 737 So. 2d 509, 512-13 & n.5 & 6 (Fla. 1999). As such, Defendant's claim of juror misconduct is procedurally barred and was properly denied.

While Defendant suggests that *Ellege* did not address the issue of whether a substantive claim of juror misconduct was barred in post conviction, the opinion belies this assertion. This Court directly stated, "Likewise, any substantive claim pertaining to juror misconduct is procedurally barred as it could have and should have been raised on direct appeal." *Elledge*, 911 So. 2d at 77 n.27. Defendant also asserts that the claim cannot be procedurally barred because it was not raised at trial. However, Fla. R. Crim. P. 3.851(e)(1) specifically

states that it "does not authorize relief based upon claims that could have and should have been raised at trial and, if properly preserved, on direct appeal." *Johnson v. State*, 921 So. 2d 490, 508 n.13 (Fla. 2005); s*ee Thomas v. State*, 838 So. 2d 535, 539 (Fla. 2003)(noting that this provision requires Defendant to raise claims pretrial and not "blindside" the State years later in post conviction proceedings). In fact, this Court stated in *Ellege* that "any substantive claim of juror misconduct" was barred even though Defendant was claiming that the facts were outside the record and needed to be developed. *Elledge*, 911 So. 2d at 77 & n.27. Thus, the lower court properly rejected these arguments. It should be affirmed.

Further, Defendant suggests that *Buenoano v. State*, 708 So. 2d 941 (Fla. 1998), and *Johnson v*. State, 804 So. 2d 1218 (Fla. 2001), hold that juror misconduct claims are cognizable in initial motions for post conviction motions. However, this is untrue.

Buenoano held nothing more than that a claim that was available years earlier cannot be raised in an untimely and successive motion for post conviction relief when the factual basis for the claim had been available for years. *Buenoano*, 708 So. 2d at 952. Since no claim may be raised in a successive and untimely motion for post conviction relief until it is based on

evidence that could not have been discovered until recently or a fundamental change of constitutional law,[6] it only makes sense that the courts ruled on whether the claim was properly filed first. Having determined that the claim was not even properly filed, there was no reason to determine whether the claim would provide a basis for relief if it had been properly filed.

In *Johnson*, this Court determined that the lower court properly found that a defendant was not entitled to public records into the jurors backgrounds. *Id.* at 1224-25. While *Johnson* made the statement in the context of a successive motion for post conviction relief, it cited to *Arbelaez v. State*, 775 So. 2d 909 (Fla. 2000), in which this Court had reached the same conclusion regarding a request in connection with an initial motion for post conviction relief. *Johnson*, 804 So. 2d at 1225.

Thus, neither *Buenoano* nor *Johnson* hold that juror misconduct claims are not procedurally barred in post conviction proceedings. As noted above, this Court has repeatedly held that such claims are barred. The lower court should be affirmed.

Even if the claim was not procedurally barred, Defendant would be entitled to no relief. In *State v. Rodgers*, 347 So. 2d

[6] Fla. R. Crim. P. 3.851(d)(2)("No motion shall be filed or considered" outside of the time limit provided without meeting the above conditions); Fla. R. Crim. P. 3.850(b)(same).

610 (Fla. 1977), this Court considered and rejected a claim that a juror's incorrect answer during voir dire was sufficient to overturn a criminal conviction. This Court held, "in the absence of evidence that the defendant was not accorded a fair and impartial jury or that his substantive rights were prejudiced by the participation and misconduct of the unqualified juror, he is not entitled to a new trial." *Id.* at 613. In *Lowrey v. State*, 705 So. 2d 1367 (Fla. 1998), this Court recognized an exception to *Rodgers* for cases in which a juror was under prosecution by the State at the time of his jury service. However, this Court made clear that it did "not overrule *Rodgers*; [it was] simply carving out an exception based on the unique circumstances presented." *Id.* at 1370; *see also Coleman v. State*, 718 So. 2d 827, 830 (Fla. 4th DCA 1998).

Here, Defendant made no attempt to show that he was not accorded a fair and impartial jury or that his substantive rights were prejudiced by Mr. Schlehuber's service. Instead, he merely asserts that there might be grounds to challenge Mr. Schlehuber for cause or by a peremptory challenge. However, showing that a defendant might have wanted to use a peremptory challenge[7] against Mr. Schlehuber would not show that Defendant

[7] It should be remembered that Defendant exhausted his peremptory challenges during voir dire. (T. 4720) As such, to strike Mr.

was deprived of a fair and impartial jury because the denial of a peremptory challenge does not give rise to a claim that the jury was not impartial. *Ross v. Oklahoma*, 487 U.S. 81 (1988).

Moreover, being the victim of a crime does not automatically disqualify a person from serving on a jury. §§40.01 & 40.013, Fla. Stat. (1997). As such, Defendant would have needed to show that Mr. Schlehuber's status as a victim rendered him biased in this matter. *See Brown v. State*, 818 So. 2d 652 (Fla. 3d DCA 2002); *Brown v. State*, 755 So. 2d 737 (Fla. 4th DCA 2000).[8] However, Mr. Schlehuber was part of the venire when the trial court inquired if the veniremembers could be impartial despite being crime victims and was assured that they could. (T. 4413-15) Moreover, he disclosed on his jury questionnaire that he had been a crime victim and stated that the justice system did not work properly in that case because "2 people were 'interviewed' But nothing came of it." Thus, far from revealing a veniremember who was sympathetic to the State, the record reflects that Mr. Schlehuber was angry with the State. As Defendant did not sufficiently allege bias, the lower

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Schlehuber, Defendant would have been forced to accept one of the veniremembers he did challenge peremptorially.

[8] Contrary to Defendant's suggestion, *Chester v. State*, 737 So. 2d 557 (Fla. 3d DCA 1999), does not hold a veniremember is excusable for cause merely because he was a crime victim. Instead, the determination there that the juror was excusable for cause was based on her statements that prior victimization made her biased.

court properly denied the claim. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). It should be affirmed.

Even if Defendant were correct that he did not need to show that a juror was biased or that he was prejudiced, he would still be entitled to no relief. The allegedly undisclosed information was not material and Defendant did not exercise diligence in attempting to discover the information. This Court has made clear that not all failures to disclose information in voir dire are material. Instead, the focus is on whether the information was material to the juror service in the particular case at hand. *Roberts v. Tejada*, 814 So. 2d 334, 341-42 (Fla. 2002).

Despite Defendant's claims that Mr. Schlehuber might had sympathized with Schiller because they were victims of similar crimes, Defendant fails to note that Schiller was also the victim of a theft but that he did not even consider this sufficiently material to ask Mr. Schlehuber about his report that he had been the victim of a theft. Moreover, there is nothing similar about an argument and fist fight over a dispute regarding where a delivery should be made and kidnapping a person, holding them for a month, torturing them the entire time, taking everything the person ever had and then attempting to kill them, allegedly because the person cheated an associate

in a business deal. This is particularly true, considering that Defendant allowed Cynthia Font, a victim of burglary and robbery; Carmela Ferrara, a victim of a grand theft auto; Gisela Ducal, a victim of a burglary; Cynthia Morgan, whose sister was raped and who wallet was stolen; and David Lepow, the victim of a burglary and robbery,[9] to sit on the jury despite Defendant being charged with similar offenses and without even questioning most of these individuals about the offenses. Given the lack of similarity between the cases, the lack of follow up even though the crime reported was a crime with which Defendant was charged and the fact that Defendant allowed numerous crime victims to sit on the jury, it cannot be said that the information here was material to jury service in this case. *Murphy v. Hurst*, 881 So. 2d 1157 (Fla. 5th DCA 2004); *Birch v. Albert*, 761 So. 2d 355 (Fla. 3d DCA 2000); *Garnett v. McClellan*, 767 So. 2d 1229 (Fla. 5th DCA 2000); *James v. State*, 751 So. 2d 682 (Fla. 5th DCA 2000). The claim would have been properly denied even if Defendant were correct that *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995), provided the standard against which to evaluate this claim.

Even if the question could be considered material,

[9] Given that many of the crime victims he allowed to sit were female, including Ms. Morgan who did not disclose a crime on her questionnaire, attempting to strike Mr. Schlehuber would be problematic. *See Melbourne v. State*, 679 So. 2d 759 (Fla. 1996).

Defendant was still entitled to no relief because he did not pursue the matter diligently during voir dire. Mr. Schlehuber responded that he had been the victim of a crime, which he labeled a theft. Despite this, Defendant did not question him about the facts and circumstances of this crime. In fact, while a few veniremembers were questioned about how having been a victim of a crime might affect their views on the death penalty during individual voir dire, Defendant only questioned one veniremember about having been a crime victim during general voir dire. (T. 4671-72) Instead, Defendant left it to the trial court to ask a general panel question about victimization. (T. 4413-15) He did not even ask questions after Cynthia Morgan, another juror, revealed that she had been the victim of a crime she had not disclosed on her questionnaire. (T. 4586-87) Under these circumstances, it cannot be said that Defendant exercised diligence in discovering this information. *State v. McGough*, 536 So. 2d 1187 (Fla. 2d DCA 1989); *Birch v. Albert*, 761 So. 2d 355 (Fla. 3d DCA 2000); *Blaylock v. State*, 537 So. 2d 1103 (Fla. 3d DCA 1988). The claim was properly denied.

Defendant finally asserts that even if the lower court was correct in finding that the claim was procedurally barred, it erred by failing to treat the claim as one of ineffective assistance of counsel and in finding that counsel did not have a

duty to investigate the jurors' backgrounds. However, in making these assertions, Defendant ignores that it was he who suggested that counsel had no duty to investigate and failed to plead sufficiently a claim of ineffective assistance of counsel. In fact, Defendant's entire assertions on the issue of ineffective assistance were:

> Trial counsel is not required to conduct an investigation of the background of the venire during trial; such a requirement would pose too onerous a burden on the parties and their trial attorneys, who are busy with scheduling, evidentiary matters, and other legal issues. *See Roberts v. Tejeda*, 814 So. 2d 334, 344-45 (Fla. 2002). However, should the Supreme Court recede from its dicta in *Buenoano* which recognizes that claims based on juror nondisclosure may be first raised in an initial 3.850/3.851 motion, then [Defendant] asserts that his trial counsel was ineffective for failing to investigate the jurors' backgrounds in time to raise the issue as part of [Defendant's] motion for new trial.

(PCR. 584-85) Since Defendant was the one who asserted that counsel had no duty to investigate, he should not now be heard to complain that the lower court accepted his assertion and found that counsel could not have been deficient for failing to do something that he had no duty to do. *See Blumberg v. USAA Casualty Ins.*, 790 So. 2d 1061, 1066 (Fla. 2001); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984)(To prove deficiency, defendant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.").

Further, given the conclusory nature of these assertions, the lower court also properly determined that they did not lift the bar. This Court has repeatedly held that conclusory assertions of ineffective assistance of counsel are insufficient to overcome a procedural bar. *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990). Moreover, the insufficiency of the pleading of the ineffectiveness claim is all the more clear in light of *Carratelli v. State*, 32 Fla. L. Weekly S390 (Fla. Jul. 5, 2007), which requires that a defendant show that a bias juror served before he is entitled to relief based on a claim of ineffective assistance regarding a juror challenge issue. Thus, the lower court properly determined that this insufficiently plead allegation of ineffective assistance of counsel was insufficient. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). The denial of the claim should be affirmed.

III. THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO A COMMENT IN CLOSING WAS PROPERLY SUMMARILY DENIED.

Defendant next asserts the lower court erred in rejecting his claim that his counsel was ineffective for failing to object to a comment in closing. Specifically, Defendant asserts that his counsel was ineffective for failing to object to a comment

in closing that this Court determined on direct appeal violated the Golden Rule but was harmless. However, the lower court properly summarily denied this claim, as it is procedurally barred and without merit.

Initially, the State would note that this claim was properly denied as procedurally barred. This Court has repeatedly held that where a claim was raised and decided on direct appeal, it cannot be relitigated in a post conviction proceeding under the guise of ineffective assistance of counsel. *Preston v. State*, 32 Fla. L. Weekly S296, S300 (Fla. May 31, 2007); *Franqui v. State*, 32 Fla. L. Weekly S210, S213 (Fla. May 3, 2007); *Miller v. State*, 926 So. 2d 1243 (Fla. 2006); *Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000). In fact, in *Robinson v. State*, 707 So. 2d 688, 697-99 (Fla. 1998), this Court directly held that claims regarding the propriety of comments in closing and the effective assistance of counsel for failing to object to comments in closing to be procedurally barred "[a]s a matter of law."

Here, Defendant raised the issue of the propriety of the State's comment on direct appeal. Initial Brief of Appellant, FSC Case No. SC93,994, at 75-80. This Court rejected the argument:

> [Defendant] asserts that several statements made by the State during its closing argument in the guilt

phase constitute fundamental error and warrant relief in the form of a new trial. [FN60] Though we are concerned with one set of remarks in particular, we nevertheless conclude that relief based on fundamental error is not warranted in this case.

The prosecutor's statements which cause us concern are those related to an asserted "Golden Rule" argument. During her closing argument, the prosecutor addressed the jury as follows:

> Imagine with tape over your mouth and a hood over your head, imagine it on Krisztina. Not on yourselves, on Krisztina and what Krisztina is going through.

An error is fundamental in nature when it "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *McDonald*, 743 So. 2d at 505. An improper "Golden Rule" argument typically occurs when counsel asks jurors to place themselves in the circumstances of the victim. It extends beyond the evidence and "unduly create[s], arouse[s] and inflame[s] the sympathy, prejudice and passions of [the] jury to the detriment of the accused." *Urbin v. State*, 714 So. 2d 411, 421 (Fla. 1998)(quoting *Barnes v. State*, 58 So. 2d 157, 159 (Fla. 1951)). The prosecutor unmistakably asked the jurors to place themselves in Furton's position, which clearly is error. We reject the State's assertion that the prosecutor's remarks were merely permissible comments on the evidence. A seasoned prosecutor involved in a capital case knows better than to make an improper "Golden Rule" argument. However, because this incident was isolated, and an overwhelming amount of unrebutted evidence exists against [Defendant], we determine that the error is, on this record, harmless in nature and therefore deny relief.

* * * *

n60 [Defendant] concedes that fundamental error is the only basis for relief because he did not object to any of the remarks at issue.

Lugo, 845 So. 2d at 106-07. As the issue regarding the comment

was raised and rejected on direct appeal, the lower court properly determined that the claim was barred and that raising the claim in the guise of ineffective assistance of counsel did not lift the bar. It should be affirmed.

While Defendant suggests that *Chandler v. State*, 848 So. 2d 1031 (Fla. 2003), shows the lower court erred in rejecting this claim, the opposite is true. There, the defendant had asserted that his counsel had been ineffective for failing to object to comments in closing after this Court had considered on direct appeal whether the comments constituted fundamental error. *Id.* at 1043-46. This Court determined that the rejection of the assertion of fundamental error on direct appeal foreclosed any finding that counsel's alleged deficiency in failing to object to the comment was prejudicial:

> Because Chandler could not show the comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the *Strickland* test. *See Strickland*, 466 U.S. at 694.
>
> The instant case is similar to *Thompson v. State*, 759 So. 2d 650, 664 (Fla. 2000), in which the defendant claimed defense counsel was ineffective for failing to object to several improper remarks by the prosecutor. This Court stated that "because none of these prosecutorial comments would have constituted reversible error had they been objected to at trial, we affirm the trial court ruling summarily denying this claim." *Id.* at 664. Similarly, because we have previously held that the prosecutor's comments in this case did not constitute fundamental error, even though

> some of the prosecutor's comments in this case were ill-advised, they were not so prejudicial as to vitiate the entire trial. Thus, Chandler is not entitled to relief on this claim.

Id. at 1046. Thus, *Chandler* actually shows that the lower court properly summarily denied the claim. The denial should be affirmed.

Further, while Defendant asserts that the logic of *Chandler* is flawed because the level of prejudice that he needed to show logically has to be lower than the standard for reversal on direct appeal, it is Defendant's logic that is flawed. As this Court has recognized, once a conviction becomes final, the interest in finality of the judgment attaches and is only overcome by a showing that the proceeding through which the conviction was obtained was unfair. *Witt v. State*, 387 So. 2d 922, 924-25 (Fla. 1980). Thus, as this Court has stated:

> Postconviction relief procedures, such as those authorized by our Rule 3.850, offer an avenue to challenge a once final judgment and sentence in limited instances, and for limited reasons. The United States Supreme Court recently noted:
>
> > It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice. *
> > * Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures . . . . Moreover, [the] increased

> volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice. Because there is no limit on the time when a collateral attack may be made, evidentiary hearings are often inconclusive and retrials may be impossible if the attack is successful. . . .
>
> *United States v. Addonizio*, 442 U.S. 178, 184 & n.11, 99 S. Ct. 2235, 2240 & n.11, 60 L. Ed. 2d 805 (1979) (footnote omitted). *See also Linkletter v. Walker*, 381 U.S. 618, 637-38, 85 S. Ct. 1731, 1741-42, 14 L. Ed. 2d 601 (1965).

Witt, 387 So. 2d at 925. Given this interest in finality, it is entirely logical that the burden on a defendant to show that he was deprived of a fair trial is not lower than the standard to obtain a reversal on direct appeal but higher than that standard. Defendant's suggestion to the contrary should be rejected, and the lower court affirmed.

IV. THE VIENNA CONVENTION CLAIM WAS PROPERLY SUMMARILY DENIED.

Defendant next asserts that the lower court erred in summarily denying his claim that he was entitled to dismissal of the indictment or suppression of evidence based on an alleged violation of the Vienna Convention on Consular Relations. He asserts that had he been advised of his right to contact the consulate under the Convention, he would have contacted the consulate and asked the consulate to provide legal assistance, and that this contact with the consulate would have rendered it

likely that he would have been provided with an extradition hearing. However, the lower court properly summarily denied the claim, as Defendant lacked standing to raise it, the claim was procedurally barred, prejudice was not adequately alleged and the remedies Defendant sought are not available.

In *Maharaj v. State*, 778 So. 2d 944, 959 (Fla. 2000), this Court rejected a Vienna Convention claim, expressly stating that the defendant had "failed to establish that he has standing, as treaties are between countries, not citizens. *See Matta-Ballesteros*, 896 F.2d 255 (7th Cir. 1990)." *See also Gordon v. State*, 863 So. 2d 1215, 1221 (Fla. 2003). Here, the failure to establish standing is particularly acute. The record reflects that the Bahamian authorities arrested Defendant at request of Special Agent Jerry Forrester, who was working in the legal attaché office to the Bahamas. (T. 10605-08) Agent Forrester requested the arrest at the request of the Miami-Dade Police. (T. 10604-08, 10649-51) Thus, the essence of Defendant's claim is that when he was arrested by the Bahamian authorities at the request of the American authorities, the Bahamian authorities did not inform him of his right to contact the American authorities.[10] However, given that the American authorities were

[10] In fact, because of a bilateral agreement between the countries, the Bahamian authorities were actually required to

the driving force behind the Bahamian authorities' arrest of Defendant, it is highly unlikely that they were unaware that the Bahamian authorities had done as they had asked or that the American authorities would seek any diplomatic remedy based on the alleged violation of the Convention, which as the United States Supreme Court noted in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2682 (2006), is the "primary means of enforcing the Convention." Thus, the lower court properly found that Defendant had no standing to assert this claim under *Maharaj*, and should be affirmed.

Even if Defendant did have standing, Defendant would still be entitled to no relief because the claim is procedurally barred. This Court has held that claims based on alleged violations of the Vienna Convention are procedurally barred in post conviction proceeding. *Gordon v. State*, 863 So. 2d at 1221; *Maharaj*, 778 So. 2d at 959. In *Sanchez-Llamas*, 126 S. Ct. at 2687, the Court held that it was perfectly permissible for state courts to bar Vienna Convention claims in the manner that this Court has. Thus, the lower court also properly rejected this claim as procedurally barred. It should be affirmed.

Even if Defendant did have standing and the claim was not barred, Defendant would still be entitled to no relief because

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contact the consulate and then inform Defendant they had done so. Consular Convention, 3 U.S.T. 3426, Art. 16, ¶2.

he did not adequately plead prejudice. This Court has held that for a defendant to plead prejudice from an alleged Vienna Convention violation adequately, the defendant must show that the alleged "violation had an effect on the trial." *Darling v. State*, 808 So. 2d 145, 166 (Fla. 2002)(quoting *Breard v. Greene*, 523 U.S. 371, 372 (1998)); *see also Gordon*, 863 So. 2d at 1221. Here, Defendant has never alleged that the alleged violation of the Vienna Convention would have had an affect on the outcome of the trial. Instead, he has only asserted that he would have sought an extradition hearing had the Convention not been violated. However, he does not assert that the holding of an extradition hearing would have in any way affected the outcome of the trial. This is particularly true as the extradition treaty in effect at the time of Defendant's arrest between the United States and the Bahamas specifically permits the extradition of a defendant exposed to the death penalty for the crime of murder and allows trial for offenses not included in the initial extradition request with the consent of the other government. Extradition Treaty, Mar. 9, 1990, U.S.-Bah., Art. 7 & 14, S. Treaty Doc No. 102-17.[11] Thus, it does not appear that any challenge to Defendant's extradition would have been successful and would have affected the outcome of trial. Under

[11] The version of the extradition treaty cited in Defendant's brief has been superseded by the extradition treaty cited above.

these circumstances, the lower court properly determined that Defendant had not sufficiently alleged prejudice. *Darling v. State*, 808 So. 2d at 166; *see also Gordon*, 863 So. 2d at 1221.

Further, even Defendant's speculative assertion of prejudice appears to be based on a mistake of law. Defendant's assertion that he would have learned of his right to contest extradition is based on his assertion that he would have asked the consulate "to provide him with legal advice." Initial Brief, FSC Case No. SC06-1532, at 39-40. In the lower court, Defendant characterized the provision of such legal advice as "the required information that he would have been given by the consulate." However, as the United States Supreme Court stated in *Sanchez-Llamas*, the Convention "does not guarantee defendants *any* assistance at all. The provision secures only a right of foreign nationals to have their consulate *informed* of their arrest or detention-not to have their consulate intervene." *Sanchez-Llamas*, 126 S. Ct. at 2681. Thus, there is no required information, and while Defendant may have asked for legal advice from the consulate, there is no indication that the consulate would have provided any.[12] Thus, even Defendant's assertion that

[12] It should be noted that Defendant had business cards for several lawyers both in Florida and the Bahamas and payment information for the Florida lawyers who represented him in this matter at the time of his arrest with him at the time of his arrest. (T. 10626-27, 10629, 10651-53) Moreover, the record

contact with the consulate would have enable him to fight extradition is based on Defendant's incorrect assumption that the consulate would have been required to provide him with assistance. Under these circumstances, the lower court properly denied the claim because Defendant did not adequately allege prejudice. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). It should be affirmed.

Contrary to Defendant's suggestion *United States v. Antonakeas*, 255 F.3d 714 (9th Cir. 2001), does not hold that a claim of an inability to seek relief under an extradition treaty establishes prejudice from a Vienna Convention claim. Instead, the Court simply found the claim was procedurally barred because it had not been preserved in the trial court and refused to address the claim on the merits. *Id.* at 720-21. The mere fact that a court rejected a claim as unpreserved does not show that the claim had any merit. Defendant's suggestion to the contrary should be rejected.

Even if Defendant had standing, the claim was not procedurally barred and Defendant had adequately alleged prejudice, the claim would still have been properly summarily denied. The remedies that Defendant sought were not available.

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reflects that Defendant was asked if he wished to return to Florida voluntarily and agreed to do so without contesting extradition. (T. 10609, 10638-39)

In *Conde v. State*, 860 So. 2d 930, 953 (Fla. 2003), this Court held that suppression was not an available remedy for an alleged violation of the Vienna Convention. In *Sanchez-Llamas*, 126 S. Ct. at 2678-82, the United States Supreme Court agreed that suppression was not an available remedy for an alleged Vienna Convention violation. Moreover, the Court noted that the authority to create a judicial remedy has to come from the Convention itself. *Id.* at 2679. It stated that to do otherwise would allow the judiciary to expand the government's treaty obligations, which was beyond the power of the judiciary. *Id.* This principal of judicial restrain would apply with all the more force to this Court as the power to engage in foreign affairs rests with the federal government and actions by the states that interfere with that authority are unconstitutional. *See American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 413-14 (2003). As such, the claim was properly denied to the extent that it sought suppression of evidence as a remedy because that remedy is unavailable.

The other remedy that Defendant sought was dismissal of the indictment. However, this remedy is even more inappropriate than the request for suppression. As noted above, the Court required that the source of any available remedy under the Convention must come from the Convention. Nothing in the Convention would

make dismissal of charges a valid remedy. In fact, the only discussion in the Convention regarding the exercise of the rights afforded under the Convention is:

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(2), 21 U.S.T. 77. In rejecting the assertion that this provision entitled a defendant to suppression of evidence, the Court noted that the purpose of the Convention did not even extend to requiring that an arrestee be given any assistance and that the remedy of suppression was limited to situations where it was necessary to deter constitutional violations because of its costly toll on the truth finding and law enforcement objectives of the criminal justice system. *Sanchez-Llamas*, 126 S. Ct. at 2680-81.

The United States Supreme Court has held that avoidance of prosecution is not an appropriate remedy, even when there has been a constitutional violation that might otherwise render evidence suppressible. See *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975). Under Florida law, dismissal is considered a drastic remedy to

be imposed under extreme circumstances. *See Ham v. Dunmire*, 891 So. 2d 492 (Fla. 2004); *Lindsay v. King*, 894 So. 2d 1058 (Fla. 1st DCA 2005); *State v. Gillis*, 876 So. 2d 703 (Fla. 3d DCA 2004); *State v. Ottrock*, 573 So. 2d 169 (Fla. 5th DCA 1991); *State v. Evans*, 418 So. 2d 459 (Fla. 4th DCA 1982); *State v. Hamilton*, 387 So. 2d 555 (Fla. 2d DCA 1980). Moreover, in *Ham*, this Court noted that a litigant's involvement in the conduct warranting the dismissal was an important factor to be considered. *Ham*, 891 So. 2d at 497-98. Because of this reasoning, the courts that have considered whether dismissal of charges is an appropriate sanction for a Vienna Convention violation have found that it is not. *United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir. 2002); *United States v. De la Pava*, 268 F.3d 157, 163-66 (2d Cir. 2001); *United States v. Page*, 232 F.3d 536, 539-41 (6th Cir. 2000); *United States v. Li*, 206 F.3d 56, 66 (1st Cir. 2000); *Villegas v. State*, 546 S.E.2d 504, 507 (Ga. 2001).

Given this authority, dismissal is not an appropriate remedy for an alleged violation of the Vienna Convention. This is particularly true in this case, since the alleged misconduct was not even committed by the State but by the Bahamian authorities.

Because neither of the remedies that Defendant sought are

available for an alleged Vienna Convention violation, the claim would still have been properly denied even if Defendant had standing to raise the issue, the issue was not procedurally barred and the claim had been presented adequately. The denial of the claim should be affirmed.

V. THE *BRADY* AND *GIGLIO* CLAIMS WERE PROPERLY DENIED AS PROCEDURALLY BARRED AND WITHOUT MERIT.

Defendant next asserts that the lower court erred in summarily denying his claim that *Giglio v. United States*, 405 U.S. 150 (1972), and *Brady v. Maryland*, 373 U.S. 83 (1963), were violated by the alleged failure to disclose that Schiller was under investigation for Medicare fraud by federal authorities and by the presentation of Schiller's denial that he had committed Medicare fraud. However, this claim was properly summarily denied as it is procedurally barred and without merit.

Claims that could have been, should have been or were raised on direct appeal are procedurally barred in post conviction proceedings. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). Here, Defendant asserted that the State allegedly failed to disclose the investigation into Schiller's involvement in Medicare fraud and that the State "sat idly by, while their key witness knowingly committed perjury" by denying his involvement in Medicare fraud in his supplemental motion for new trial. (R. 5516-21) At the

hearing on that motion, Defendant argued both that the State had suppressed information about Schiller's involvement in Medicare fraud and that it had knowingly presented false testimony when Schiller denied such involvement. (T. 13338-48) The State responded that Delgado had told it that Schiller was involved in Medicare fraud, that it had discussed Delgado's assertions with the federal government and that the federal government had asked for documentation about Schiller. (T. 13365-67) After considering these arguments, the trial court found that the State had not suppressed any information and that the allegedly suppressed information was not material. (T. 13370-71)

On direct appeal, Defendant asserted that the State had violated *Brady* by failing to disclosure information concerning the investigation of Schiller's involvement in Medicare fraud. Initial Brief of Appellant, FSC Case No. SC93,994, at 69-75. In a footnote to this argument, Defendant asserted that Schiller's denial of involvement was "arguably perjury" and cited to cases concerning *Giglio* violations. *Id.* at 73 n.10. This Court rejected Defendant's assertion that the State had violated *Brady*, finding that Defendant had failed to establish either that the State suppressed any information or that any allegedly suppressed information was material even if Defendant could establish that the allegedly suppressed information was

favorable. *Lugo*, 845 So. 2d at 104-05.

Thus, the alleged *Brady* violation was presented on direct appeal. Moreover, since the alleged *Giglio* violation was raised in the trial court in connection with the motion for new trial, it could and should have been raised on direct appeal. Under these circumstances, the lower court properly determined that this claim was procedurally barred. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). It should be affirmed.

In an attempt to overcome the bar, Defendant asserts that his claim is based on new evidence in the form of an e-mail between the prosecutors. Defendant asserts that the e-mail shows that the federal prosecutor called Defendant's prosecutor "and told her of Mr. Schiller's role in the Medicare fraud investigation." Initial Brief of Appellant, FSC Case No. SC06-1543. Not surprisingly, Defendant does not quote the e-mail because it does not reflect any such thing. Instead, the e-mail states:

> Alicia Valle AUSA called and told me the[y] got the Flip in NJ. They do NOT need Delgado to make the case. BUT, Jack Denaro came to her office and asked her for a plea and she is thinking about making it CONCURRENT. Just what I don't want. Last Week when I spoke to Ms. Rundle about the Natale matter, she told me to make sure the Feds did not mess me up. That they can just wait because our case was so much more important. She told me whatever help I needed she would do. I thought that if we gave the Feds more info so they didn't need

> Delgado that they would give him Consecutive time. I really think that we need to stand firm on this even if you or Ms. Rundle have to call the powers that be over there. They just seem like they will plead anyone out---But Schiller. That's the only person they care about even though Delgado is in this for over a million. By the way the deal will also save his entire family. He is looking worse and worse for me. Do the words Sal and Willie mean anything to them?? I rather he be pending charges when I try the case then this cush deal.

(PCR. 468) As the above shows, the e-mail does not reflect any discussion of Schiller's involvement in Medicare fraud. Instead, it reflects a discussion about the nature of the pending prosecution of Delgado for Medicare fraud and the State's assumption that Schiller would be prosecuted: They just seem like they will plead anyone out---But Schiller.

As properly read, the e-mail is fully consistent with the position that the State had taken throughout this case. Beginning at an October 1997 hearing regarding the scope of discovery regarding Medicare fraud and continuing through new trial proceedings, the State consistently took the position that it was aware that there was an investigation into Medicare fraud concerning Delgado, that Schiller was being implicated in that investigation and that all of the defendants were aware of this information. (T. 1964-65, 1969, 1970, 1981, 1989, R. 5628) In fact, the State asserted that it "was made aware by counsel to Delgado **and Federal Authorities** that Delgado was indeed a target

of the same Medicare fraud scheme and was speaking to Federal authorities." (R. 5628)(emphasis added). At the hearing on the motion, the State acknowledged that it "shared with the Federal Government" information provided by Delgado that he committed Medicare fraud with Schiller and gave the federal authorities access to Schiller's records. (R. 13365, 13366) Since the e-mail is consistent with the position the State always espoused, it does not provide a basis to lift the bar. The claims were properly denied.

Even if the claims were not barred, they were still properly summarily denied. This Court has held that to show a *Brady* violation, a defendant must establish that the allegedly suppressed material was favorable to him in that it exculpates the defendant, mitigates his sentence or constitutes impeachment evidence of a State witness at trial; that the State suppressed the information; and that the allegedly suppressed information was material. *Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003); *Maharaj v. State*, 778 So. 2d 944, 953 (Fla. 2000); *Way v. State*, 760 So. 2d 903, 910 (Fla. 2000). To show materiality, a defendant must show that there is a reasonable probability that the result of the proceeding would have been different had the information been disclosed. *Allen*, 854 So. 2d at 1260; *Way*, 760 So. 2d at 913. This Court had held that a *Brady* violation

cannot be maintained when the record establishes that the defendant was aware of the allegedly suppressed material. *Riechmann v. State*, 32 Fla. L. Weekly S135, S137 (Fla. Apr. 12, 2007); *Davis v. State*, 928 So. 2d 1089, 1116 (Fla. 2005); *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000)("Although the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.")(quoting *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000)). Moreover, both this Court and the United States Supreme Court have recognized that a *Brady* claim is not meritorious when the allegedly suppressed information would not have been admissible at trial. *Wood v. Bartholomew*, 516 U.S. 1 (1995); *Breedlove v. State*, 580 So. 2d 605 (Fla. 1991).

To assert a *Giglio* claim properly, a defendant must assert that: "(1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material." *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991). To demonstrate perjury, a defendant must show more than mere inconsistencies. *United States v. Lochmondy*, 890 F.2d 817, 822

(6th Cir. 1989); *see also United States v. Bailey*, 123 F.3d 1381, 1395-96 (11th Cir. 1997)(proof of perjury requires more than showing of mere memory lapse, unintentional error or oversight); *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994)(conflicts in testimony are insufficient to show perjury). Moreover, it has been held that a *Giglio* claim also cannot be sustained when the defendant was aware of the alleged falsity of the information when it was presented. *Routly v. Singletary*, 33 F.3d 1279, 1286 (11th Cir. 1994).

Here, the record reflects that Defendant was aware that there was an investigation concerning Medicare fraud being conducted by the federal government and that Schiller was being implicated well before trial. (T. 1964-89) In fact, Delgado testified before the jury that he was involved in Medicare fraud with Schiller, that the decision to kidnap Schiller arose from a belief that Schiller had cheated Defendant and Delgado and that the reason a lawsuit was not filed was because the money owed was part of the Medicare fraud. (T. 10968, 10976-79) Since the record reflects that Defendant did know of the Medicare fraud, his *Brady* and *Giglio* claims were meritless. *Riechmann*, 32 Fla. L. Weekly at S137; *Davis*, 928 So. 2d at 1116; *Maharaj*, 778 So. 2d at 954; *Occhicone*, 768 So. 2d at 1042; *see also Routly*, 33 F.3d at 1286. The summary denial of the claims should be

affirmed.

Moreover, while Defendant asserts that the information would have been favorable to him because he could have used the information to impeach Schiller, he does not explain how this is true. Under Florida law, a witness generally may not be questioned about a specific act of misconduct. §§90.404, 90.609, 90.610, Fla. Stat. While there is a limited exception for State witnesses under pending investigation or charges, that exception is based on the expectation of a benefit to the witness from the State. *Breedlove*, 580 So. 2d at 607-09. Moreover, extrinsic evidence is not admissible for impeachment on a collateral issue. *Dupont v. State*, 556 So. 2d 457, 458 (Fla. 4th DCA 1990). An issue is collateral unless "the proposed testimony can be admitted into evidence for any purpose independent of the contradictions." *Id.*

Here, Defendant had present nothing indicating such a benefit or expectation of a benefit and instead relies on information that the State was acting to the detriment of Delgado and Schiller. Moreover, any evidence about Schiller's involvement in Medicare fraud would not have been relevant to the facts of the crimes and would therefore have been collateral. *Dupont*, 556 So. 2d at 458. Under these circumstances, any attempt to admit any additional evidence

about Schiller's involvement in Medicare fraud would have been inadmissible. Since the allegedly suppressed information would not have been admissible, it would not support a *Brady* claim. *Wood v. Bartholomew*, 516 U.S. 1 (1995); *Breedlove v. State*, 580 So. 2d 605 (Fla. 1991).

Moreover, while Defendant has boldly asserted that the State knowingly presented false testimony, he has never explained how the State could have done so. The allegedly false testimony was Schiller's statements he did not knowingly engage in a fraudulent medical supply business or engage in illegal business with Delgado while acknowledging that he had medical supply companies that billed Medicare. (T. 6874-76, 6849-51) Defendant does not explain how the State could know that Schiller was guilty of a crime before he was even charged with the crime, as the State is not the arbiter of defendants' guilt. Since Defendant had to show that the State knew the testimony was actually false to be guilty of a *Giglio* violation, this claim was properly summarily denied.

Even if Defendant had shown that the information had been suppressed and was admissible or that the State could know that Schiller's denial of criminal conduct was actually false, the claims should still be denied, as the allegedly suppressed information was not material under the materiality standard for

either *Brady* or *Giglio*. While Defendant appears to assert that the State's case relied heavily on the credibility of Schiller's identification of Defendant as one of his attackers, the record belies this assertion. Defendant's involvement in all of the crimes of which he was convicted was shown through the testimony of Delgado and confirmed by the physical evidence including that seized from his apartment and Doorbal's apartment. Defendant's involvement in the crimes against Schiller was also shown through the testimony of Pierre, Sanchez and Weekes. Moreover, evidence was presented that Schiller's property and assets were transferred into the name of Defendant's ex-wife Lillian Torres, placed into accounts under Defendant's control, found in Defendant and Doorbal's apartments and used to pay restitution so that Defendant could obtain an early termination of federal probation. Evidence was presented regarding Defendant involvement in attempting to enter into an agreement with Schiller regarding the return of Schiller's property in exchange for the crimes not being reported. Petrescu, Bartusz and Gray provided additional evidence regarding Defendant's involvement in the crimes against Griga and Furton. Given all of this evidence identifying Defendant as one of Schiller's assailants, it cannot be said that any inability to show that Schiller committed Medicare fraud affected the outcome of this case in

any manner.

The lack of materiality of this information is confirmed by the fact that Doorbal was convicted at the same trial despite Schiller's inability to provide any identifying information about him and the fact that he was not even mentioned in the attempted agreement with Schiller. Moreover, it should be remembered that the jury heard Delgado's testimony that Schiller was in fact involved in Medicare fraud. In closing, the State did not assert that Schiller was a legitimate business but that the issue of whether Schiller committed Medicare fraud was irrelevant:

> Marc Schiller, to this day, I don't know if he's committing Medicare fraud. And, frankly, I don't care. Because you know what? Even if he was the lowest of drug dealer, if he's the lowest of the low, you cannot take the law into your own hands and treat somebody like this and kill them or try and kill them because they either owe you money or you think they got their money illegally. That's what courts are for. And if you think he's doing something wrong, report him. And if you've been in business with him and you're owed money by him, that's your loss. You don't get to kill him for that.
>
> In fact, in voir dire when we all spoke, you all said you can't kill somebody because you don't like their business or their business isn't legal. That's not a legal excuse to the crime. Human lives have value. And it doesn't matter who you are.
>
> And you don't have to like March Schiller. And, frankly, this case is -- isn't about Medicare fraud, and it's not about Marc Schiller. It's about Frank and Krisztina, and how this defendant got away with doing what he did to Marc Schiller and then decided to do it to Frank and Krisztina.
>
> * * * *

> In fact, I'll be quite honesty with you. The cross examination of George Delgado was relatively short, for as long as he testified on direct. And I'll submit to you why. They don't want him to tell the facts again. They don't want him to repeat it again because it's never gonna change. The truth doesn't change. So they ask him little pieces of information that basically has nothing to do with the crimes. Like you're being investigated for Medicare fraud. Who cares? That's a federal government problem. You can be on that jury, if you want. This case is not about Medicare fraud. It is not about Marc Schiller's Medicare fraud or George Delgado's Medicare fraud. Don't let somebody make that the issue.

(T. 12461-62, 12535) Thus, the lower court properly determined that the information that was allegedly suppressed did not satisfy either the *Brady* or *Giglio* materiality standards. It should be affirmed.

IV. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING LEAVE TO AMEND.

Defendant finally asserts that the lower court erred in denying his motion for leave to amend his motion for post conviction relief. However, the lower court did not abuse its discretion[13] in denying leave to amend, as Defendant did not show good cause for the failure to have asserted the claims previously. Moreover, the claims that Defendant sought to add would not entitle him to relief as they are procedurally barred and without merit.

[13] Denials of motions for leave to amend are reviewed for an abuse of discretion. *Moore v. State*, 820 So. 2d 199, 205-06 (Fla. 2002); Fla. R. Crim. P. 3.851(f)(4).

Florida Rule of Criminal Procedure 3.851(f)(4) provides:

> A motion filed under this rule may be amended up to 30 days prior to the evidentiary hearing upon motion and good cause shown. The trial court may in its discretion grant a motion to amend provided that the motion sets forth the reason the claim was not raised earlier and attaches a copy of the claim sought to be added. Granting motion under this subdivision shall not be a basis for granting a continuance of the evidentiary hearing unless a manifest injustice would occur if a continuance was not granted. If amendment is allowed, the state shall file an amended answer within 20 days after the amended motion is filed.

In *Vining v. State*, 827 So. 2d 201, 211-13 (Fla. 2002), this Court addressed the requirements for a showing of good cause for leave to amend a motion for post conviction relief under Florida law. This Court stressed that motions for post conviction relief should be fully pled when filed and that later attempts to amend such motions were improper unless the defendant satisfied the requirement for filing a successive motion. To meet the requirements for filing a successive motion, a defendant is required to show that the claim is based on newly discovered evidence or a fundamental change of constitutional law that applies retroactively. Fla. R. Crim. P. 3.851 (d)(2).

Moreover, in *Moore v. State*, 820 So. 2d 199, 205-06 (Fla. 2002), this Court held that a lower court did not abuse its discretion in refusing to accept an amended motion, where the amendment was not based on information that had recently been provided to the defendant. This Court has also rejected a claim

that an allegation that counsel was ineffective in failing to assert a claim earlier is grounds for leave to amend a pleading. *Brown v. State*, 894 So. 2d 137, 153-54 (Fla. 2004).

Here, as Defendant admits, his only allegation of good cause was that his counsel had failed to recognize the viability of the argument earlier. However, such allegations of ineffective assistance of post conviction counsel do not constitute good cause for leave to amend under *Brown*. Thus, the lower court did not abuse its discretion in denying leave to amend. It should be affirmed.

Moreover, nothing about the claims that Defendant sought to add through the amendment satisfies the requirement for filing a successive motion, as this Court held was necessary to be granted leave to amend after a *Huff* hearing in *Vining*. For a defendant to meet the requirements for filing a successive motion for post conviction relief, a defendant must show that the claim is based on newly discovered evidence or a fundamental change in law that applies retroactively. Fla. R. Crim. P. 3.851(d)(2). To be considered newly discovered evidence, the evidence must not have been known to the trial court, counsel or the defendant and must not have been discoverable through an exercise of due diligence. *Diaz v. State*, 945 So. 2d 1136, 1145 (Fla. 2006). Here, Defendant did not meet these requirements

with regard to any of the claim that he sought to add through his amendment.

The first claim that Defendant sought to add was a claim that his arrest warrant was invalid because it was based on the presentation of false information in the form of Schiller's statement that he recognized Defendant's voice based on it distinct lisp-like quality and based on the omission of information that the police had not originally believed Schiller when he first reported the crimes against him. (PCR. 977-81) The fact that this affidavit was not newly discovered is amply shown by the record, which reflects that Defendant attached it to a second supplemental brief that he unsuccessfully attempted to file in this Court during the course of the direct appeal. Second Supplemental Brief of Appellant, FSC Case No. SC93,944. In fact, the issue that Defendant sought to raise in that brief was that his arrest warrant was invalid, *inter alia*, because it was based on the omission of the fact that the police did not believe Schiller when he first reported the crimes against him. *Id.* Thus, this claim was clearly not based on newly discovered evidence. Moreover, the legal basis of this claim was *Franks v. Delaware*, 438 U.S. 154 (1978). As *Franks* was decided two decades before Defendant's trial, it cannot be considered a change in law.

The second claim that Defendant sought to add was a claim that his trial counsel was ineffective for failing to raise the issues discussed in the first claim he sought to add through a motion to suppress. (PCR. 981-82) However, as this Court has noted, a claim of ineffective assistance of counsel is the antithesis of a claim of newly discovered evidence. *Sireci v. State*, 773 So. 2d 34, 40 n.11 (Fla. 2000)("[i]t logically inconsistent for a defendant to argue, as Sireci does, that evidence is newly discovered because counsel was ineffective."). Moreover, there has been no change in law regarding ineffective assistance of counsel.

The fourth claim[14] that Defendant sought to add was a claim that Defendant was entitled to the suppression of evidence or dismissal of the indictment because he was allegedly improperly

[14] Defendant also sought to add a claim that his counsel was ineffective for failing to raise a claim based on the alleged violation of the Vienna Convention. (PCR. 983-87) Defendant does not complain about the denial of leave to amend to add this claim on appeal. As such, any issue regarding the denial of leave to amend concerning this claim is waived. *Duest v. State*, 555 So. 2d 849, 852 (Fla. 1990). Moreover, the claim was not based on newly discovered evidence or a fundamental change of constitutional law, and leave to amend to add this claim was properly denied under *Vining*. Even if the claim should have been allowed, it would still provide no basis for relief. As argued in Issue IV, *supra*, the claim regarding the violation of the Vienna Convention was without merit. Thus, counsel cannot be deemed ineffective for failing to present it. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

extradited in that his consent to return to Florida was not in writing.[15] However, the fact that Defendant did not sign a written consent to return to Florida is something that Defendant knew. Moreover, Defendant did not cite to any change of law in support of this claim.

Since none of the claims were based on newly discovered evidence or a fundamental change of constitutional law, the lower court did not abuse its discretion in refusing to grant Defendant leave to amend to add these claims. *Vining*, 827 So. 2d at 211-13. It should be affirmed.

Even if the lower court had abused its discretion in denying leave to amend, Defendant would still be entitled to no relief. Issues regarding the suppression of evidence are issues that could and should have been raised on direct appeal. *Patton v. State*, 784 So. 2d 380, 386 & nn. 3-4 (Fla. 2000). Issues that could have and should have been raised on direct appeal are procedurally barred in post conviction proceeding. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). The first and fourth claim that Defendant sought to add are issues regarding the suppression of evidence. As such, they are procedurally barred.

[15]The record reflects that Defendant was asked if he wished to return to Florida voluntarily and agreed to do so without contesting extradition. (T. 10609, 10638-39)

Moreover, the United States Supreme Court has held that an alleged violation of an extradition treaty does not deprive a court of jurisdiction. *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886). The only exception the Court has recognized is when the extradition was pursuant to the treaty and the treaty deprived the receiving court of jurisdiction. *United States v. Rauscher*, 119 U.S. 407 (1886). Here, the record reflects that Defendant returned to Florida voluntarily without invoking the extradition treaty. The record reflects that Defendant was asked if he wished to return to Florida voluntarily and agreed to do so without contesting extradition. (T. 10609, 10638-39) Moreover, nothing in the extradition treaty would deprive the court of jurisdiction. Extradition Treaty, Mar. 9, 1990, U.S.-Bah., Art. 7 & 14, S. Treaty Doc No. 102-17. As such, any claim that the indictment should have been dismissed because Defendant's consent to return to Florida was not in writing is without merit.

The second claim was that trial counsel was ineffective for failing to litigate a motion to suppress based on the assertion that Schiller's statement that Defendant's voice had a lisp-like quality was false. Defendant suggested that counsel should have presented evidence from a speech pathologist or other witnesses familiar with Defendant's voice to testify that he does not have

a lisp or had Defendant demonstrate his voice to show that he does not have a lisp. (PCR. 982) However, the allegations that Defendant asserts that counsel should have made in seeking suppression were not even sufficient to warrant a suppression hearing. In *Franks v. Delaware*, 438 U.S. 154, 171 (1978), the Court held:

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.

Here, Defendant's allegations do not show that Off. Garafalo, the arrest warrant affiant, knowingly, intentionally or with reckless disregard for their truth made any false statement in the affidavit.[16] In fact, they do not even show that Schiller knowingly, intentionally or with reckless disregard for their truth made any false statements. At best,

[16] As Defendant acknowledged below, the affidavit merely states that Schiller "recognized a familiar voice" and "positively identified this voice as Daniel Lugo." (PCR. 978-79) The comments about the lisp are from Schiller's deposition and trial testimony. (PCR. 979)

the allegations might show that Schiller was mistaken in describing the quality in Defendant's voice that he recognized. Under these circumstances, Defendant's allegations do not even show that his counsel could have obtained a suppression hearing, much less the suppression of evidence. However, counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue.[17] *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107, 111 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992).

Because the claims that Defendant sought to add in the amendment are without merit or procedurally barred, Defendant would not have been entitled to any relief had he been permitted to amend and add the claims. Thus, the lower court's denial of post conviction relief should be affirmed.

[17] Further, Defendant does not explain what evidence he even believes was seized as the result of his allegedly unlawful arrest and provides no allegation regarding how the alleged suppression of this evidence would create a reasonable probability of a different result at trial. As such, he has not sufficiently alleged a claim of ineffective assistance of counsel. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

CONCLUSION

For the foregoing reasons, the order denying post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Roy Wasson, 5901 SW 74th Street, Miami, Florida 33143, this 22nd day of August 2007.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

SANDRA S. JAGGARD
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