Supreme Court of Florida

CASE NO. SC06-1532

DANIEL LUGO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON DIRECT APPEAL FROM THE DENIAL OF POST-CONVICTION RELIEF BY THE CIRCUIT COURT OF THE ELEVENTH CIRCUIT

APPELLANT=S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This is an appeal from an order entered by the Circuit Court of the Eleventh Circuit denying post-conviction relief in a capital murder case. R.VIII-1124. In 1998, the Defendant Daniel Lugo was tried and convicted on numerous counts including two counts of First Degree Murder. *Lugo v. State*, 845 So. 2d 74, 91 & n. 30 (Fla. 2003) (A*Lugo I*@). The facts of the underlying case appear in *Lugo I.*

Mr. Lugo was represented at trial by a single retained attorney, Ronald Guralnick. R.X-1512. Mr. Guralnick called no witnesses and introduced no evidence during the guilt phase of Mr. Lugo=s trial. *Lugo I* at 91. During the penalty phase, Mr. Guralnick called as witnesses only Mr. Lugo=s mother and Santiago Gervacio, a long-time friend. *Id.* Mr. Lugo was sentenced to death, upon the recommendation of the jury by a vote of eleven to one. *Id.*

Special Assistant Public Defender J. Rafael Rodriguez was appointed to handle the direct appeal to this Court. *See id.* at 83. This Court affirmed the convictions and sentences on February 20, 2003.. *Id.* at 119. Rehearing was denied. The U.S. Supreme Court denied certiorari on October 6, 2003.

The Office of Capital Collateral Regional CounselCSouthern Region was appointed to handle these post-conviction proceedings. R. II-343. The CCRC almost immediately removed to withdraw based upon a conflict of interest. R. II-351. That motion was denied. R. II-358. Eventually, CCRC was relieved of its responsibility in this case and

the undersigned was appointed as Mr. Lugo=s counsel.

The undersigned filed Defendant=s Initial Motion for Post-conviction Relief and for Competency Evaluation seeking appointment of mental health experts to evaluate Mr. Lugo=s competency. R. III-360. Mental health experts were appointed, and examinations were conducted of the Defendant. Those experts agreed that the Defendant was indeed competent.

Mr. Lugo sought to discharge the undersigned by filing a Motion for Recusal of Roy D. Wasson as Counsel. R. III-522. Mr. Lugo thereafter[1] withdrew that motion. R. III-520.

The Defendant filed his Amended Motion for Post-conviction Relief raising seven claims. R. IV-564. Claim I was that AMr. Lugo was denied a fair trial because of a juror=s non-disclosure during voir dire regarding being a victim of violent crime.@ R. IV-577. Claim II was that AMr. Lugo=s trial counsel rendered ineffective assistance by failing to object to improper >Golden Rule= arguments made by the prosecutor.@ R. IV-585. Claim III was that Atrial counsel rendered ineffective assistance by failing to adequately investigate and present evidence of several non-statutory mitigators.@ R. IV-588. Claim

[1] The motion for recusal was not filed until the same day as Mr. Lugo=s withdrawal of that motion, December 21, 2004. However, the motion for recusal had been served in early November, 2004. R. III-525.

IV was that ADefendant was denied his right to consular relations under Article 36 of the Vienna Convention . . . .@ R. IV-600. Claim V was that AMr. Lugo was denied effective assistance of a capable mental health expert.@ R. IV-606. Claim VI was that AMr. Lugo is entitled to post-conviction relief because the prosecution withheld potentially useful information from him which impeached victim/witness Marc Schiller.@ R. IV-608. Claim VII was that ADefendant is entitled to post-conviction relief because he was tried and sentenced under an unconstitutional scheme in contravention of *Apprendi* and *Blakely*.@ R. IV-615.

A *Huff*[2] hearing was held on September 7, 2005. SR.I-3. The undersigned appeared and argued that the Defendant should be afforded an evidentiary hearing on Claim I (SR.I-4), Claim II (SR.I-15-16), Claim III (SR.I-18-19), Claim IV (SR.I-28, Claim V (SR.I-32), and Claim VI. SR.I-36. Defendant withdrew Claim VII (SR.I-39). The claim based upon the prosecution=s withholding of evidence was supported by an email message dated October 31, 1996 from prosecutor Gail Levine to her then-superior, Michael Band reflecting Ms. Levine=s knowledge that star witness Schiller was guilty of Medicare fraud (which he had denied at trial) and was known to have been a target of a federal investigation. SR.I-38; R.III-468. The trial court summarily denied all claims except Claim III. SR.I-40-41.

[2]*See Huff v. State*, 622 So. 2d 982 (Fla. 1993).

Before the evidentiary hearing on Claim III, the Defendant filed his Motion to Amend Motion for Post-Conviction Relief. R.VII-929. Mr. Lugo also filed his proposed Amendment to Motion for Post-Conviction Relief. R.VII-933. In that proposed amendment, Mr. Lugo sought to raise four additional claims. The first of those was that Mr. Lugo=s conviction was obtained in violation of the Fourth Amendment because the arrest warrant was based upon false statements and material omissions of fact. R.VII-934. The second new claim was that trial counsel was ineffective for failing to seek suppression of evidence obtained in violation of Mr. Lugo=s Fourth Amendment rights. R.VII-938. Third, Mr. Lugo sought to add a claim that his trial counsel rendered ineffective assistance by failing to argue that Mr. Lugo=s arrest in the Bahamas violated his rights under Article 36 of the Vienna Convention on Consular Relations. R.VII-940. The fourth new claim that Defendant sought to assert was that Mr. Lugo was denied his rights under the self-executing extradition treaty with the Bahamas. R.VII-945.

A hearing was held on Defendant=s motion to amend his motion for post-conviction relief. R.IX-1463. The trial court denied that motion. R.IX-1467.

An evidentiary hearing was conducted on Claim III dealing with trial counsel=s ineffectiveness in failing to investigate mitigation witnesses. Defendant at that evidentiary hearing called seven witnesses, including Mr. Lugo, and introduced as exhibits his school records from Xavier High School and Fordham University. Those school records showed that Mr. Lugo earned AFirst Honors@ and ASecond Honors@ in high school (SR.VII.-1096,

1098; SR. X-1475) and earned at least 110 credits toward his bachelor=s degree in college. R.VIII-1095-1101.

Defendant called Judge Robert Holdman, a sitting judge in the New York Supreme Court who presides over criminal trials. R.X-1476. Judge Holdman before becoming a judge had served for fourteen years as a chief trial counsel in the Bronx District Attorney=s Office, where he prosecuted many murder cases. R.X-1476.

Judge Holdman knew Danny Lugo from his days at Fordham University, where the two played on the varsity football team together. R.X-1476. Those two competed for the same positions on the team=s defensive line along with other players. R.X-1477. All of those defensive line players Agot along very well.@ R.X-1477. When asked what kind of person Danny Lugo was, Judge Holdman said: ADanny was a good teammate. Hard worker and a good guy. Good teammate.@ R.X-1477.

Mr. Lugo was a year ahead of Judge Holdman in college. When asked if Mr. Lugo was a fair competitor, Judge Holdman said:

> Yes. Danny was very good to me as a freshman, you know. As a freshman you=re new to the situation and easily taken advantage of, I guess you could say, and he never treated me poorly. In fact, just the opposite. He looked out for me.

RX-1478. Judge Holdman agreed that football players living in close proximity to one another must rely on each other, and he testified that Mr. Lugo was honest and trustworthy. R.X-1478.

Judge Holdman never knew of Mr. Lugo ever committing a violent act. R.X-1479. He had no reason to believe that Mr. Lugo ever committed a crime, before hearing about this case. R.X-1479. The judge had never heard of, or had any reason to believe that Mr. Lugo engaged in any dishonest behavior, selfish behavior, or immoral behavior. *Id.* The witness never knew the Defendant to have used drugs or alcohol. *Id.*

Judge Holdman came to Miami voluntarily to testify after being contacted by the undersigned=s investigator, David Wasser. R.X-1480. Judge Holdman was never contacted by anyone on behalf of Mr. Lugo=s trial counsel, Ronald Guralnick. *Id.*. Had he been contacted by Mr. Guralnick, Judge Holdman would have been willing to come to court during the sentencing phase of the trial and would have provided the same testimony as he gave at the post-conviction hearing. R.X-1481.

Defendant called as a witness Mr. O=Neal Tutein, who served as associate athletic director and head football coach at Fordham University from 1981 to 1985. R. X-1494. Mr. Tutein recalled that Danny Lugo played football for him for two years, after the coach recruited him from Xavier High School. R. X-1494. When asked what kind of person Danny Lugo was when Coach Tutein knew him at the football program at Fordham, the coach testified as follows:

> He was an outstanding youngster. Very quiet. A very hard worker. Lived in the weight room. Took good care of himself and the kids liked him. You know, and as I say, it was hard to get close to him but ***he was a person of character*** and I certainly got that impression during the years he played for us because he worked very hard. He was very committed to the

program and the players liked him.

R. X-1495 (emphasis added).

Danny Awas not a troublemaker at all.@ R. X-1496. He had a good, friendly relationship with the other team members; he was a hard working football player; Danny was a fair competitor on the field; and Coach Tutein knew him to be honest and trustworthy. R.X-1497. The Coach never knew Danny to engage in any dishonest behavior, never saw him engage in any selfish behavior (Aexcept that he wanted to play@); did not engage in any immoral behavior to the Coach=s knowledge; and never abused drugs or alcohol. R. X-1497-98.

Coach Tutein first learned about this case when contacted by the undersigned=s investigator, David Wasser. R. X-1498. Mr. Lugo=s trial attorney, Ron Guralnick, did not contact Coach Tutein back in 1998 when this case was tried. R. X-1499. Had Mr. Guralnick or someone on his behalf attempted to locate Coach Tutein, he would have been approximately equally accessible. *Id*. Had he been contacted by someone representing Mr. Lugo and asked to come to court to testify, he Aabsolutely would have@ done so. R. X-1499-1500.

Defendant called as a witness Charles Spinelli, the businessman from New Jersey who was a practicing attorney for thirteen years. R. X-1503. Mr. Spinelli played football with Danny Lugo at Fordham University. R. X-1504. Mr. Spinelli knew Danny to be a Ahardworking, dedicated teammate,@ who was a fair competitor, honest and trustworthy,

and a friend to the witness and other teammates. R. X-1504.

Other than the acts which are the subject of this case, Mr. Spinelli never heard of Danny Lugo committing any sort of violent acts, never heard of him being accused of committing any crime, and never heard that he was engaging in any sort of dishonest behavior. When asked if Danny behaved selfishly, Mr. Spinelli responded: ANo, in fact, it would be the opposite. He was a good teammate, hard working, dedicated teammate@ and was a generous person. R. X.1505. Mr. Spinelli never knew Danny to engage in immoral behavior or to use drugs or alcohol. *Id*.

Mr. Spinelli was not contacted by Mr. Lugo=s prior counsel, Ron Guralnick, about the trial of this case. R. X-1506. Had he been contacted by Mr. Guralnick, Mr. Spinelli would Aabsolutely@ have been willing to come into court and testify. *Id*. On cross examination by the prosecution, Mr. Spinelli testified that he was shocked to hear the specifics about the crimes of which Danny Lugo was convicted. R. X-1510. When asked if he was shocked A[b]ecause they=re shocking, those acts,@ the witness disagreed and stated: ANo, because I did not believe that he would be the type of person to commit them.@ R. X-1510.

Defendant called Ron Guralnick, Mr. Lugo=s trial counsel. R. X-1512. Mr. Guralnick testified that Mr. Lugo Adidn=t want to call anybody@ initially as mitigation witnesses. R. X-1513. Mr. Guralnick testified that, had he known of potential non-family members such as Coach Tutein who had positive things to say about Danny Lugo,

Mr. Guralnick would have regarded them as good mitigation witnesses that he would have called to testify about Danny=s character, honesty, and integrity. Those questions and answers were as follows:

> Q. Let=s focus on non-family members. Did you look for any non-family member witnesses from the New York area?
>
> A. I had no information about non-family witnesses from Mr. Lugo so I had no reason to.
>
> Q. Did you ask Mr. Lugo where he went to high-school and college.
>
> A. I didn=t know where he went to high-school. It was in New York some place but he went to Fordham University as I recall.
>
> Q. Did you request copies of his high school records from Fordham?
>
> A. No, I did not.
>
> Q. Did you speak to any faculty members or coaches at Fordham?
>
> A. No, I did not because I spoke to Mr. Lugo at length about anything that he advised me of such as college, et cetera. The only thing I got out of him was that he was a fairly decent student and he played football for Fordham University.
>
> Q. And, if you had contacted the Fordham football program and found out about the coach from the program, Oneal [sic] Tutein, who thought he was like an outstanding young man with a lot of promise that would have been a good mitigation witness to call, wouldn=t it?
>
> A. It would of been a fair mitigation witness considering the facts of what actually happened.
>
> Q. You had no reason strategically to call him, would you?
>
> A. If Danny told me that that person that you are referring to could have something that would be helpful to Danny, I would of.
>
> * * *
>
> Q. And if you had called him and he had testified that he thought that Danny, when he knew him, was honest and reliable and a good sport, and didn=t abuse alcohol and drugs and had a lot of good things going for

him, you think that would of made a difference I the mitigation penalty phase of the trial?

A. It depends what he would of told me. There=s strategical decisions you need and I can=t then question because I never spoke to the man.

Q. Uh-huh.

A. Because I didn=t know about him.

Q. But assuming that a person like a State prosecutor was going to say good things about Danny=s character and abilities and honesty, integrity, all this, that would of been a good mitigation witness that would influence the jury?

A. I would think so.

R. X-1514-16.

When asked specifically whether A a person like a state prosecutor was going to say good things about Danny=s character and abilities and honesty, integrity, all this, that would have been a good mitigation witness that would influence the jury,@ Mr. Guralnick responded: AI would think so.@ R. X-1516. When asked whether Mr. Guralnick Awould argue it in front of the jury in the penalty phase,@ he responded: AI would, if I knew about that witness.@ R. X-1517. Mr. Guralnick=s explanation for not investigating any of the mitigation witnesses called at the 3.851 hearing was that he did not know about them because Danny had not told him. *Id*. When asked if he contacted anyone at Fordham University, Mr. Guralnick responded: AI didn=t investigate the entire State of New York for possible people that knew him. If he would have told me that, I would, of course, speak to that gentleman.@ R. X-1517.

Mr. Guralnick did not attempt to obtain Danny Lugo=s academic records from

Fordham. *Id*. Although Mr. Guralnick testified that it was his recollection that Danny Lugo=s mother Atestified about him being a good student when he was in college.@ Mr. Guralnick also agreed that the credibility of A[a] family member testifying that somebody is a good student@ is different Ain credibility from a transcript from the university.@ R. X-1518.

When asked whether he would have considered calling Judge Holdman as a character witness, he responded: Abased upon the other information you gave me ***that would be a person I would speak to***, not necessarily because of the items that you just mentioned, because if he is a good boy at 32 years ago and then murdered people, I don=t think that would cut anything with jury ***but a judge who was a former prosecutor who had some decent things to say about him. If I had known about him,*** I didn=t even know he had gone to school with him but, ***if I had known about that I would definitely want to speak to that man***.@ *Id*. at 1518-19 (emphasis added).

Judge Young at the evidentiary hearing on this Rule 3.851 motion sustained the prosecution=s objection to the undersigned=s question to Mr. Guralnick concerning his knowledge of the requirement that he Ago to the schools and the neighborhood where the Defendant used to live and to his family members and ask them@ about prospective mitigation witnesses. R. X-1525. When the undersigned expressed surprise that Judge Young would sustain such an objection, the Court demonstrated confusion about the

nature of these proceedings, stating: AThis is not a 3.850 hearing. You=re making this into a 3.850 hearing, and I am giving you some leeway, but you really need to just stay on the issue of why we=re here today.@ R. X-1525.

When asked whether the only witnesses that Mr. Guralnick looked for were Anames that he [Danny Lugo] gave [him],@ Mr. Guralnick responded: AThis is not a guessing game.@ R. X-1528. Mr. Guralnick concluded his direct testimony by reiterating that, had he known of witnesses such as Judge Holdman, he might well have called them as character witnesses during the sentencing proceedings. After testifying again that Danny Lugo Anever told me some of those things,@ Mr. Guralnick concluded: AAnd, if he did, I might have thought, you know, that=s why, this former prosecutor as an example, ***that=s a guy I would call***, but I didn=t know about him.@ R. X-1529.

On cross examination, Mr. Guralnick testified that his failure to call mitigation witnesses did not result from honoring Mr. Lugo=s wishes to refrain from calling such witnesses. When asked if it was Mr. Guralnick=s Achoice to call the Defendant=s mother,@ he responded that Mr. Lugo Adidn=t want me to call her.@ R. X-1535-36. When asked if he called the mother Adespite what he [Danny Lugo] wanted at the time,@ Mr. Guralnick responded: AI didn=t care what he wanted.@ R. X-1536.

Cindy Velez testified that she was Mr. Lugo=s girlfriend when she was a teenager. R. X-1546. She visited his family and got to know his parents and siblings. R. X-1546. At the time, Danny was a college student at Fordham. R. X-1547. Danny lived in a

normal, average middle class home, did not use alcohol or drugs, and adhered to a curfew at home. R.X-1547. Ms. Velez has continued to visit Danny in prison since his conviction. She testified that A[h]e=s a wonderful person. Has a great heart. He=s very outgoing. Very good with people.@ R. X-1548.

Since the time Ms. Velez first knew Danny, he lived a healthy lifestyle, was a weightlifter, did not take steroids or smoke pot. And, other than the crimes involved in this case, never committed a violent act. R. X-1549. Ms. Velez was not contacted by Mr. Guralnick back before this case was tried in 1998. R. X-1552. If she had been contacted, she would have made herself available to come into court to testify about Mr. Lugo=s character, as she had done at the post-conviction hearing. R. X-1552-53.

The undersigned=s private investigator, David Wasser, testified concerning his investigation which led to the discovery of the witnesses who were called at the 3.851 hearing. R. X-1563. Mr. Wasser located witnesses Tutein, Holdman, Velez, and Spinelli using Abasic investigative techniques.@ R. X-1564. Mr. Lugo did not give Mr. Wasser the names of the coaches and fellow football players from Fordham University. Instead, Mr. Wasser in checking Mr. Lugo=s background, Anoticed one of the schools he went to was Fordham University,@ so Mr. Wasser Acalled the athletic department . . . [,] got a list of the roster of his football team where he played . . . [and] was able to just put information in the database of some of the people in the roster and found them very quickly.@ R. X-1565. Mr. Wasser traveled to the New York area to meet with these witnesses, and was

successful in approaching them and interviewing them. R. X-1566. AThey were very cooperative.@ *Id*.

When asked whether Mr. Wasser was Aonly looking for people who had good things to say about Danny@ or was Alooking for anybody who had any information about Danny=s background,@ he responded: AI didn=t know what I was going to find out so I found out what I found out and they were all telling me pretty much the same thing[:] he was a good person.@ R. X-1566. Mr. Wasser did not locate any witnesses who had any negative comments to say about Danny=s character. *Id.*

On cross examination, Mr. Wasser was asked whether Mr. Lugo had become more cooperative as he was nearing the latter stages of his death penalty case, the question insinuating that Mr. Lugo was then more likely to provide names of potential witnesses than he was when Mr. Guralnick was conducting his investigation. R. X-1570. Mr. Wasser made it clear that Mr. Lugo did not provide the names of the witnesses: AI didn=t know what these people were really going to tell me. Before I got there I found out that he was going to Fordham University and then ***I didn=t have actual names of players that Danny gave me. I found them.***@ R. X-1570 (emphasis added). Mr. Lugo did provide Mr. Wasser with Cindy Velez=s name. R. X-1572.

Defense counsel called Danny Lugo. He testified that he never told Ron Guralnick that he did not want Mr. Guralnick to call non-family members as mitigation witnesses. R. X-1578. Mr. Guralnick never asked him for the names of anyone that Mr. Lugo went

to college with. R. X-1578. Mr. Lugo could not remember Mr. Guralnick asking him about Cindy Velez or Aanybody in the category of a girlfriend from New York would could testify@ on his behalf. *Id.*

After the evidentiary hearing was over, Judge Young clarified his comments made previously that this was not a 3.850 motion. He said: AI want to clarify that by saying that I felt that Mr. Wasson was getting into the adjudicatory stage of this trial and going a little bit upstream when we weren=t simply dealing with whether or not there was a competent issue of counsel at sentencing. I want[ed] to curtail that part of the questioning. Post-conviction is in fact that he didn=t do what he was supposed to have done. I understand that. We=ll get that clear for the record. @ R. X-1593.

The trial court entered its Order Denying Defendant=s Amended Motion for Post-Conviction Relief on March 29, 2006. R.VIII-1124. That order elaborated on Judge Young=s summary denial of Claim I based on juror Schlehuber=s non-disclosure that he had been a victim of a violent crime. R.VIII-1133. Judge Young based his ruling on the determination that A[c]laims of juror misconduct are procedurally barred as a basis for post-conviction relief as they could have and should have been raised on direct appeal.@ R.VIII-1133. His Honor also ruled that, A[e]ven if this claim was not procedurally barred, it is facially insufficient as it makes conclusory allegations that juror Schlehuber would have been rendered disqualified if he had disclosed the fact that he was the victim a battery.@ *Id*. Judge Young wrote that Claim I Ais also facially insufficient because

Defendant must also show the juror=s status as a victim rendered him biased, which he has not done.@ R.VIII-1134.

Judge Young in his order denying post-conviction relief set forth his grounds for summary denial of Claim I. R.VIII-1134. That was the claim based on trial counsel Guralnick=s ineffectiveness for failing to investigate juror Schlehuber=s background in time to raise the issue as part of his motion for new trial. The trial court explained that the basis for his ruling was that Acounsel is not required to do a background check, [so] counsel cannot be deemed ineffective for failing to conduct [t]he check.@ R.VIII-1134.

Judge Young in his written order denying post-conviction relief explained that the basis for his summary denial of Claim IIC based on trial counsel=s ineffective failure to object to Golden Rule argumentsCwas procedurally barred by having previously been raised on direct appeal. R.VIII-1135. That order also found that, A[e]ven if this claim were not procedurally barred, it is facially insufficient and sets forth mere conclusory allegations.@ *Id*.

Judge Young=s order denied post-conviction relief on Claim III in a lengthy discussion that focused more on the claim as set forth in Defendant=s amended motion for post-conviction relief than the claim as it was fleshed-out in the testimony in the evidentiary hearing. In addressing the claim that Mr. Guralnick should have called the witnesses who testified, Judge Young=s order concluded that ADefendant has not shown that there was reasonable probability that the [sic] would not have received the death

penalty,@ even had those witnesses been called. R.VIII-1138.

The trial court=s order denied Claim IV on the grounds that a defendant has no privately-enforceable right to enforce a violation of the Vienna Convention; that the claim is procedurally barred by not having been raised on direct appeal; and that, insofar as Defendant sought suppression of the evidence which was the fruit of the violation of the Vienna Convention, the claim was Afacially insufficient@ for failing to state specifically what evidence should have been suppressed. R.VIII-1141-42.

The trial court=s order explained Judge Young=s summary denial of relief under Claim VI based on *Brady* and *Giglio* violations. Judge Young found that the *Brady* claim was raised on direct appeal and was procedurally barred. *Id*. Judge Young held that the newly discovered email discussing witness Schiller=s involvement in a Medicare fraud scheme was insufficient to constitute an enforceable *Brady* violation because Defendant Ais unable to show that he suffered prejudice@ from the violation. R.VIII-1144. Judge Young denied the motion based on the *Giglio* violation on the ground that Defendant Afails to set for[th] sufficient facts to support the claim and is merely conclusory .@ R.VIII-1145.

The order overlooked the fact that the Defendant at the *Huff* hearing had withdrawn Claim VII; Judge Young denied Claim VII on the ground that the Florida Supreme Court Ahas declined to hold that Florida=s death penalty scheme is unconstitutional on the basis of *Ring*.@ R.VIII-1145.

Defense counsel did not receive the trial court=s order denying Defendant=s amended motion for post-conviction relief in a timely fashion. When the order was received, the undersigned hastily filed a motion for rehearing and moved for additional time to amend and supplement that motion. R.VIII-1215. Defendant then amended his motion for rehearing. R.VIII-1247. That motion was denied. R.VIII-1317.

SUMMARY OF THE ARGUMENT

The trial court erred in denying post-conviction relief on Claim III because the Defendant demonstrated that his trial counsel, Ron Guralnick, was ineffective in failing to investigate and present witnesses to testify about Mr. Lugo=s good character as a young man, ability as a student athlete, and his healthy lifestyle avoiding alcohol and drugs. Mr. Guralnick did not refrain from calling those witnesses as a matter of strategy, but simply because he failed to conduct the investigation necessary to identify and locate those witnesses. The mitigation testimony from those witnesses could reasonably have been expected to alter the recommendations of the jury on the death penalty.

The trial court erred in denying an evidentiary hearing on Mr. Lugo=s Claim I seeking an evidentiary hearing concerning Juror Schlehuber=s nondisclosure of his status as a victim of a violent crime. The issue was not barred by not having been raised on direct appeal. There is no need to show that a juror would have been stricken for cause had he correctly disclosed material information. There was no lack of due diligence in seeking correct information from the juror. Either such nondisclosures may be remedied

by being raised for the first time in post-conviction proceedings, or trial counsel Guralnick was ineffective to research Juror Schlehuber=s criminal victim status and present it on his motion for new trial.

Trial counsel Guralnick rendered ineffective assistance by failing to object to improper Golden Rule arguments made by the prosecutor. This Court in *Lugo I* found that the argument in question Aclearly is error.@ While this Court found that the Golden Rule argument was not fundamental error, trial counsel=s failure to timely object rendered his assistance ineffective.

Mr. Lugo was denied his right to consular relations under Article 36 of the Vienna Convention. The indictment should have been dismissed or the evidence obtained as a result of his statement to police following his investigation should have been suppressed.

The trial court erroneously denied evidentiary hearing on the *Giglio* issue as defendant presented newly-discovered evidence establishing that the prosecution knowingly withheld material information about the credibility of its star witness, Marcelo Schiller. Gail Levine knew that Mr. Schiller was guilty of Medicare fraud and that he was the target of a federal indictment, but failed to disclose that information and allowed him to testify as if he were an honest businessman.

The trial court erroneously denied Defendant=s timely motion to amend his motion for post-conviction relief. Mr. Lugo complied with the requirements of Rule 3.851(f)(4) by making a timely motion and demonstrating good cause why he should be permitted to

raise due grounds. Had those grounds been raised, they would support post-conviction relief.

I.

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE AND PRESENT EVIDENCE IN MITIGATION FROM NON-FAMILY MEMBERS ABOUT DANNY LUGO=S GOOD CHARACTER AND HEALTHY LIFESTYLE

Defendant is entitled to new sentencing proceedings because his trial counsel, Ron Guralnick, was ineffective in failing to investigate and present evidence of nonstatutory mitigating circumstances. Those include the fact that Mr. Lugo was highly regarded as a young man of good character by his teachers, coaches and teammates when he participated in high school and collegiate athletics, and that he never drank alcohol or used drugs. The failure of defense counsel to investigate a capital defendant=s personal background and good character constitutes ineffective assistance of counsel. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

The legal standard applicable to ineffective assistance claims is as follows:

> In order to be entitled to relief on a claim of ineffective assistance of counsel, [a defendant] must establish deficient performance and prejudice, as set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). See *Rutherford v. State*, 727 So. 2d 216, 218 (Fla. 1998). As to the first

> prong, deficient performance, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards. See *Strickland*, 466 U.S. at 688. Second, as to the prejudice prong, the deficient performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. See *id*. at 694; *Rutherford*, 727 So. 2d at 220. Gore v. State, 846 So. 2d 461, 467 (Fla. 2003).

Peterka v. State, 890 So. 2d 219 (Fla. 2004).

Specifically, when evaluating claims that counsel was ineffective for failing to present mitigating evidence, the defendant has the burden of showing that counsel's ineffectiveness "deprived the defendant of a reliable penalty phase proceeding." *Asay v. State*, 769 So. 2d 974, 985 (Fla. 2000). In determining whether a defendant has met that burden, this Court has recognized that "the obligation to investigate and prepare for the penalty portion of a capital case ***cannot be overstated.***" *State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002)(emphasis added). AAn attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence.@ *Ragsdale v. State*, 798 So. 2d 713, 716 (Fla. 2001) (quoting State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000)).

The United States Supreme Court not long ago reaffirmed the importance of a thorough investigation by defense counsel into mitigating factors. In *Wiggins*

v. Smith, 539 U.S. 510, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (2003). The Court in *Wiggins* noted that efforts should be made to discover available mitigating evidence and evidence to rebut any aggravating evidence from such sources as "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influence." *Id.* at 223 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, at 133 (1989)). Trial counsel for Mr. Lugo failed in that burden, so this court should grant post-conviction relief.

A defendant=s interest in athletics in high school and college constitutes a non-statutory mitigator because such participation is evidence of Aearly potential.@ *Atwater v. State*, 788 So. 2d 223, 232 (Fla. 2001). Mr. Guralnick was ineffective and Mr. Lugo=s defense counsel during the penalty phase by failing to investigate his client=s background and participation in school athletics.

Unlike the typical case in which a capital murder defendant has a history of drug or alcohol abuse which is offered (or which should have been offered) in mitigation to show the ill effects that it had on his life, this is a case in which the evidence is clear that Mr. Lugo demonstrated his appreciation of the values of life and good health by his abstinence from drugs or alcohol. Several witnesses

testified at the evidentiary hearing that Danny Lugo never took drugs or drank alcohol. Although he was a body builder, he did not use steroids. Instead, Mr. Lugo took good care of himself and demonstrated his appreciation for life and good health by living a healthy lifestyle. He was highly regarded by all who knew him. Mr. Guralnick should have done the investigation into this aspect of Mr. Lugo=s character in order to make an informed determination whether to introduce such evidence in the penalty phase. His failure to do so constituted ineffective assistance of counsel.

These omissions from the standard which would have been followed by a reasonably effective defense attorney in a capital case Adeprived the Defendant of a reliable penalty phase proceeding.@ *See Asay v. State*, 769 So. 2d 974, 985 (Fla. 2000). As stated by this Court in *Ragsdale v. State*, 798 So. 2d 713, 716 (Fla. 2001), AAn attorney has a strict duty to conduct a reasonable investigation of a defendant=s background for possible mitigating evidence.@ That duty was breached here.

II.

THE TRIAL COURT ERRONEOUSLY DENIED AN EVIDENTIARY HEARING ON DEFENDANT=S CLAIM THAT HE WAS DENIED A FAIR TRIAL BECAUSE OF A JUROR=S NONDISCLOSURE DURING VOIR DIRE REGARDING BEING A VICTIM OF VIOLENT CRIME

A. Introduction:

At the *Huff* hearing held below, Defendant argued that Mr. Lugo was entitled to an evidentiary hearing, including a juror interview, based on a juror=s nondisclosure of material information on a jury questionnaire and during voir dire. During the jury selection phase, juror Willard Schlehuber was asked whether he, or any close friend or relatives, had been the victim of any kind of crime, and he disclosed only a theft which did not involve violence. In truth, Mr. Schlehuber was the unhappy victim of a battery which he did not disclose. That nondisclosure was material because the truth of Mr. Schlehuber=s status as an empathetic victim of a crime of violence would either have supported a challenge to him for cause or have resulted in the exercise of a peremptory strike by defense counsel upon him.

AUnder Florida Rule of Criminal Procedure 3.600(b)(4), a juror's breach of duty to disclose information relating to service in a particular case constitutes misconduct entitling the defendant to a new trial when prejudice is established.@ *Tripp v. State of Florida*, 874 So. 2d 732, 733 (Fla. 4th DCA 2004). *Accord, Marshall v. State*, 664 So. 2d 302, 404 (Fla. 3d DCA 1995).

B. Factual Basis of Claim:

Mr. Willard Schlehuber was a member of Mr. Lugo=s twelve member jury during both the guilt and penalty phase of the above mentioned trial. Mr. Schlehuber filled out the juror questionnaire form which was provided to counsel for purposes of voir dire

questioning. R.III-455. Mr. Schlehuber answered question number 21 on the juror questionnaire in the affirmative. R.III-459. Question number 21 asks, AHave you or any close friends or relatives been the victim of any kind of crime, whether it was reported to law authorities or not?@ *Id*. Mr. Schlehuber explained that the only crime of which he was a victim was a Atheft.@ *Id*.

After investigation, the undersigned collateral counsel found that Mr. Schlehuber had been a victim of a crime of violence which would have rendered him, at the very least, an undesirable juror for the defense in a criminal case such as this one. A Miami-Dade Police Department report, agency report no. 540819R, filed on October 25, 1995 evidences that Mr. Schlehuber was a victim of a battery[3].

Briefly, that police report states that Mr. Schlehuber was at work when an argument started with the named suspect at a construction site where Schlehuber was an employee. The suspect, a person delivering a load of rock to the construction site, began

[3] The police report in question does not appear in the record. Instead, another police report (R.III-451) is contained in the record reflecting the Aburglary@ which Mr. Schlehuber disclosed in his jury questionnaire. The contents of the police report no. 540819R reflecting the battery complaint are accurately summarized in the following paragraph, taken from Defendant Lugo=s verified amended motion for post-conviction relief. R.IV-578-79.

arguing with Mr. Schlehuber regarding where the delivery was to be made. An argument ensued and the suspect then pushed Mr. Schlehuber to the ground; when Schlehuber stood up, the suspect struck him in the face with a closed fist, cutting his upper and lower lips, and then punched him several times in the chest. Victim=s rights were given to Mr. Schlehuber by the police officer and he was advised to go to the State Attorney=s Office to file charges.

Mr. Schlehuber did not disclose the fact that he was the victim of the crime of battery on the juror questionnaire which he filled out and signed, under penalty of perjury, declaring that the answers were true and correct to the best of his knowledge and belief. That nondisclosure**C**even if unintentional**C**requires a jury interview and a new trial if the police report is true.

C. Lugo Satisfies the Three-Prong Test for a New Trial:

Mr. Lugo was denied a fair trial based on the non-disclosure of a juror of this juror being a victim of a crime of violence. There is a three part test which is used in finding that a juror=s concealment of information during voir dire warrants a new trial. This three part test is (1) the information is relevant and material, (2) the juror concealed the information during questioning, and (3) the juror=s failure to disclose the information was not attributable to lack of due diligence on the part of the complaining party. *E.g.*, *Birch v Albert*, 761 So. 2d 355 (Fla. 3d DCA 2000). This three part test is often referred to as the *De La Rosa* test because it was established by the Florida Supreme Court in *De La*

Rosa v. Zequeira. 659 So. 2d 239 (Fla. 1995).

The fact that Mr. Schlehuber did not disclose to counsel the information regarding being the victim of the crime of battery is relevant and material to Mr. Lugo=s case. Mr. Schlehuber was the victim of a crime of violence. He was involved in an altercation with a man on the construction site where he worked. Schlehuber was pushed to the ground and punched in the face many times causing bleeding and injuries. The circumstances surrounding this altercation make this non-disclosure material. In *Birch, supra*, the court explained that the materiality of undisclosed information by juror during voir dire must be analyzed on a case-by-case basis for purposes of determining whether new trial is warranted for juror misconduct.

The case against Mr. Lugo contained accusations of the battering and injuring Marcello Schiller, a person with whom Mr. Lugo and the other defendants had a working relationship, as well as killing the other victims. The commonalities between the battery against Mr. Schlehuber and the crimes against the victims in Mr. Lugo=s case make this non-disclosure by Mr. Schlehuber highly material. A juror=s status as a victim of a crime like that with which the defendant is charged**C**and the naturally-ensuing empathy for the victim in the trial where the juror serves**C** is so highly material that it can constitute a

ground for a challenge to that juror for cause. *E.g., Chester v. State*, 737 So. 2d 557 (Fla. 3d DCA 1999).

At the very least, the juror=s status as an unhappy victim would have resulted in Lugo=s use of a peremptory strike to remove him from the venire. An evidentiary hearing should be ordered at which the juror is summoned to testify, in order to elicit the factual bases for either a challenge for cause or a peremptory strike of Mr. Schlehuber. *See Tripp v. State*, 874 So. 2d 732, 734 (Fla. 4th DCA 2004); *Forbes v. State,* 753 So. 2d 709, 710 (Fla. 1st DCA 2000)(denial of new trial without evidentiary hearing and juror interview is reversible error)

The second part of the De La Rosa test which must be met is the juror must have concealed the information during questioning. In the present case, Mr. Schlehuber was asked to fully and completely, under the penalty of perjury, to complete a juror questionnaire. This questionnaire asked each juror if they or any close friend or relative had been the victim of a crime. Mr. Schlehuber answered this question in the affirmative. He stated that he had been the victim of a theft in which no one was ever caught or charged. Thus, he understood the question.

Mr. Schlehuber never on this questionnaire or in the presence of the judge and counsel stated that he had been the victim of the crime of battery (or any other act of violence). This question on the questionnaire specifically states that the information is

needed regardless of whether this case was reported to authorities or not, clearly giving the juror the responsibility to detail ALL crimes, regardless of the outcome.

There is no need for Lugo to allege or prove any intentional misstatement or omission by the juror in order to be entitled to a new trial. A juror's false response during voir dire, albeit unintentional, which results in the nondisclosure of material information relevant to jury service in that case justifies a new trial as a matter of law.@ *Chester v. State*, 737 So. 2d 557, 558 (Fla. 3d DCA 1999).

The juror clearly was asked to disclose ALL crimes to which he had been a victim. Mr. Schlehuber did not disclose this information on the questionnaire or otherwise. The second part of the *De La Rosa* test has been met.

The third and last part of the *De La Rosa* test states that the juror=s failure to disclose the information must not be attributable to lack of due diligence on the part of the complaining party. In this case, the explanations provided regarding the kinds of responses that were sought would reasonably have been understood by the juror to encompass the undisclosed information. *See Roberts ex rel. Estate of Roberts v. Tejada,* 814 So.2d 334 (Fla.2002).

The question on the questionnaire was clear and concise as to the information the court was looking for. There were no ambiguous or legal terms by which a juror could be confused as to what the question was asking. While the

juror in this case clearly knew that the battery was a crime (if for no other reason than the police told him to consult the State Attorney to press charges), such a questionnaire is sufficient to elicit an affirmative response from a victim, even if that victim/juror claims subjective unawareness that the act perpetrated against him or her was a Acrime@ within the meaning of the questionnaire. In *Chester*, *supra*, the court noted: AJuror Masi=s subjective understanding that her unfortunate childhood experience was not a crime does nothing to obviate the objective reality that it was.@ 737 So. 2d at 558.

D. Issue Not Procedurally Barred:

This Court should hold, once and for all, that the issue of juror nondisclosure may be raised for the first time in a defendant=s first post-conviction motion. In *Buenoano v. State,* 708 So. 2d 941 (Fla. 1998) the Court affirmed denial of relief based upon a juror nondisclosure, in a case where the issue was first raised by way of a ***third*** Rule 3.850 motion. The Court in *dicta* made it clear that, had the issue been raised in the defendant=s first post-conviction motion, it would have been timely:

> In denying Buenoano relief, the trial court concluded that the claim was procedurally barred because Buenoano failed to establish that the facts underlying the claim could not have been known by her or her counsel by the use of due diligence. Fla. R. Crim. Pro. 3.850(b)(1). The court reasoned that Buenoano has had over a

> decade to research and discover any alleged irregularities in the jurors= backgrounds and the fact that juror Battle had been convicted of a crime easily ***could have been discovered within the time limits of rule 3.850*** through the exercise of due diligence. We agree.
>
> Juror Battle responded affirmatively to the following question on his juror questionnaire: "HAVE YOU OR ANY MEMBER OF YOUR FAMILY EVER BEEN ACCUSED, COMPLAINANT, OR WITNESS IN A CRIMINAL CASE?" Relief was properly denied because the juror questionnaires were available to collateral counsel and, ***through the exercise of due diligence, the facts underlying this claim could have been discovered within the time limitations of rule 3.850.***

Id. at 952 (emphasis added).

Judge Young=s order is internally inconsistent in that it holds that the claim regarding juror Schlehuber=s misconduct was procedurally barred, in that it should have been raised on direct appeal; yet Judge Young holds that Atrial counsel is not required to conduct an investigation of the background of the venire during trial.@ It does not make sense to hold that an important issue such as the composition of the jury based on juror non-disclosure must be raised on direct appeal, while holding that the lawyer who failed to do the investigation had no duty to do so and is not ineffective. Both propositions cannot be true.

There is no authority for the proposition that a juror=s material nondisclosure of his or her background experiences must be raised on direct appeal. Unlike claims based upon juror misconduct occurring during trial that can be determined from the trial record, this

Court has recognized that claims of juror nondisclosure may be timely raised by a way of a motion under Rule 3.850.

The trial court=s order denying post-conviction relief cites as authority an inapplicable case cited by the State in its memoranda filed herein called *Elledge v. State*, 911 So. 2d 57 (Fla. 2005). The *Elledge* case has nothing to do with a jury panel member=s nondisclosure of material background information during *voir dire*. Instead, *Elledge* involved the question whether a challenge to the rule governing jury interviews to determine whether there was juror misconduct ***during trial*** had to be raised on direct appeal. The claim addressed by the Florida Supreme Court in the *Elledge* case was whether Athe rules prohibiting *Elledge=s* post-conviction counsel from interviewing jurors to determine ***if constitutional error was present during the penalty phase*** violated *Elledge=s* constitutional rights.@ 911 So. 2d at 62 & n.6 (emphasis added). Only those issues that are based on information contained in the original record of the case must be raised on direct appeal in order to be preserved. *See, e.g., Lambrix v. State,* 559 So. 2d 1137 (Fla. 1990) (Athis claim of juror misconduct is based on information which was contained in the original record of the case and, consequently, must be raised on direct appeal@).

On the other hand, claims of juror nondisclosure of material facts about their backgrounds need not be raised on direct appeal to be preserved for post-

conviction relief. In *Buenoano v. State,* 708 So. 2d 941 (Fla. 1998) the Court affirmed denial of relief based upon a juror nondisclosure, in a case where the issue was first raised by way of a ***third*** Rule 3.850 motion. The Court made it clear that, had the issue been raised in the defendant=s first post-conviction motion, it would have been timely:

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Id. at 952 (emphasis added).

Similarly**,** in *Johnson v. State,* 804 So. 2d 1218 (Fla. 2001), this Court, in affirming the summary denial of an untimely motion filed under Rule 3.850, cited the *Buenoano* case as authority for the proposition that the defendant should have raised his claim of need for public records to investigate Airregularities in the juror=s backgrounds@ in

his post-conviction motion: AHere, Johnson has not asserted any reason why he could not have requested these juror background records before he filed his first 3.850 motion, nor has he asserted any specific juror misconduct that has been disclosed since his first 3.850 motion was denied.@ *Johnson v. State*, 804 So. 2d 1218, 1224 (Fla. 2001). Claim I was not procedurally barred and this Court should reverse based upon the juror=s nondisclosure of his status of a victim of violent crime.

E. If Claim is Barred, It Was Due To Ineffective Assistance of Counsel:

Should the Court not follow its language *Buenoano* which recognizes that claims based on juror nondisclosure may be first raised in an initial 3.850/3.851 motion, then Lugo asserts that his trial counsel was ineffective for failing to investigate the jurors= backgrounds in time to raise the issue as part of Lugo=s motion for new trial. 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). The fact that trial counsel has no duty to investigate the background of jurors during trial is not dispositive of the question whether trial counsel is ineffective for failing to investigate jurors immediately ***after*** trial.

This Court in *Tejeda* recognized that trial counsel can perform the investigation immediately after trial in time to raise the issue by way of a motion for new trial. The lack of a duty to make the investigation during trial is not the same as a holding that there is no duty to perform the investigation soon enough after trial to raise the issue in a post-trial motion. Therefore, if it is required that juror non-disclosure be raised on direct appeal, it was seriously ineffective

assistance on the part of Mr. Guralnick to fail to conduct that investigation in time to raise the argument on direct appeal.

Mr. Lugo is warranted a new trial on this basis or, at the very least, an evidentiary hearing on the issue.

III.

MR. LUGO=S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO IMPROPER AGOLDEN RULE@ ARGUMENTS MADE BY THE PROSECUTOR

Mr. Lugo=s trial attorney rendered ineffective assistance by failing to object to the prosecutor=s improper AGolden Rule@ arguments made during at trial. Mr. Lugo was deprived of his rights to due process of law and assistance of counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and under the correlative provisions of the Florida Constitution.

Mr. Lugo met the standards of demonstrating ineffective assistance because this Court already has recognized that the arguments made by the prosecution in this case were highly improper; every law student (much less every experienced trial attorney) knows that AGolden Rule@ arguments are unfairly prejudicial and objectionable.

This Court has recognized that the failure of trial counsel to object to improper arguments by a prosecutor may constitute ineffective assistance sufficient to warrant post-conviction relief. *See Chandler v. State*, 848 So. 2d

1031, 1045 (Fla. 2003)(AWe agree that the decision not to object to improper comments is fraught with danger and may not be wise strategy because it might cause an otherwise appealable issue to be considered procedurally barred@).

Such deficient performance by defense counsel in failing to preserve objections to improper prosecutorial argument has resulted in grants of post-conviction relief by Florida appellate courts. *See Eure v. State*, 764 So. 2d 798, 801 (Fla. 2d DCA); *Gordon v. State*, 469 So. 2d 795, 796-98 (Fla. 4th DCA 1985)(both reversing convictions where defense counsel failed to object to prosecutor=s improper closing arguments). Here the Court already has found that the AGolden Rule@ argument in this case was highly improper:

> 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:
>
> AImagine 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 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 creates, arouses and inflames 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.

Lugo I, at 107(emphasis added).

While this Court in *Lugo I* held that the clearly erroneous argument did not reach the onerous level of harmfulness under the Afundamental error@ standard**C**error which A>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=@**C** the Defendant need not meet such a standard to obtain post-conviction relief based upon ineffectiveness of counsel.[4] Judge Young in his order denying post-conviction relief noted that the Court in *Lugo I* had concluded that the Golden Rule argument in this case was harmless error due to the fact that it Awas isolated, and an overwhelming amount of unrebutted evidence exists against Lugo.@ R.VIII-1135. However, the context in which that conclusion was reached this Court in *Lugo I* was in determining whether the argument constituted fundamental error. In this proceeding, on the other hand,

[4]Aside from the differences in the formulations of harmful error in the Ineffective assistance context from that for demonstrating fundamental error, logic dictates that the standard for demonstrating harm is lesser when the inquiry is ineffectiveness of counsel. If the mere failure of erroneous argument to reach the level of fundamental error, *ipso facto*, constituted a failure to reach the level of prejudice under Ineffective assistance analysis, then the failure to timely object to improper argument ***never*** could constitute ineffective assistance sufficient to warrant post-conviction relief. All cases in which Ineffective assistance claims are made concerning failing to object to improper argument ***by definition*** involve unpreserved error which did not result in reversal on direct appeal under fundamental error analysis. The simple fact that the appellate courts ***sometimes*** grant post-conviction relief in such cases, means that the error can be prejudicially harmful under Ineffective assistance standards, even though it is not under fundamental

the standard is much different. Had Mr. Guralnick objected to the Golden Rule argument, the objection would have necessarily been sustained. Had the objection been erroneously overruled, that ruling would have constituted reversible error. Therefore, Mr. Guralnick rendered ineffective assistance of counsel, even though the matter did not constitute reversible fundamental error. Mr. Lugo=s conviction and sentence should be set aside.

IV.

DEFENDANT WAS DENIED HIS RIGHT 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

A. Introduction:

Mr. Lugo is entitled to dismissal of the indictment against him or suppression of the evidence which was the fruit of his arrest because he was denied the rights afforded under Article 36 of the Vienna Convention on Consular Relations of 1963. Mr. Lugo in this case verified in his motion, (1) that he did not know of his right to consular assistance when arrested in the Bahamas; (2) that he would have taken advantage of that right and requested the consul to provide him with legal advice, all of which would have rendered it likely that he would have learned of his right to require extradition and enforce that right.

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error analysis.

C. Facts of Mr. Lugo=s Arrest in the Bahamas and Resulting Prejudice:

In a pre-dawn raid on June 8, 1995, the Bahamian police barged into Mr. Lugo=s hotel room with guns drawn. Those police handcuffed Mr. Lugo and transported him to the local police station. Thereafter, Mr. Lugo was transferred to the custody of a detective Fernandez, who accompanied him by air from the Nassau airport to Miami.

At no time during his arrest by Bahamian authorities was Mr. Lugo advised of his rights under Article 36 of the Vienna Convention. If he had been so advised, he would have requested access to the consulate and to legal counsel and would have learned of the extradition treaty between the Bahamas and the United States. The failure of authorities to advise Mr. Lugo of that extradition treaty constituted prejudice sufficient to warrant the requested relief. *See United States v. Antonakeas*, 255 F.3d 714, 720-21 (9th Cir. 2001).

In *Antonakeas*, the defendant contended on appeal Athat his detention violated the Vienna Convention because he was not informed of his right to contact the Greek consulate in Germany and because the Greek consulate was not contacted about his detention.@ *Id*. He argued Athat this failure prejudiced him with regards to challenging extradition.@ The court of appeals declined to address the merits of that issue because it had not been raised in the trial court. That basis for the decision indicates that a defendant who is not informed of his extradition rights as a result of Article 36 has demonstrated prejudice.

The United States and the Commonwealth of The Bahamas have had an extradition treaty in effect since 1931, renewed in 1978 between the two governments. 30 U.S.T. 187 (Aug. 17, 1978). Had Article 36 not been violated, Mr. Lugo would have been aware of this treaty and would have sought enforcement of its provisions, which would have prevented him from being taken on an airplane by American police to the United States without judicial proceedings.

It must be assumed that, had he sought to enforce the provisions of that extradition treaty, Mr. Lugo=s efforts would have been recognized and he would have been afforded due process thereunder. This is not a case involving a violation of an extradition treaty itself, because the mechanisms under that treaty never were put into effect. It must be presumed that the treaty would not have been violated, so the cases which deal with the lack of a remedy based upon failure by violation of governments to honor such an extradition treaty are not on point. Mr. Lugo has demonstrated prejudice of the Vienna Convention, so the Court should order dismissal of the indictment or vacation of his conviction following retroactive suppression of the evidence which flowed from that violation.

V.

THE TRIAL COURT ERRONEOUSLY DENIED AN EVIDENTIARY HEARING ON THE *GIGLIO* ISSUE: THE STATE IMPROPERLY WITHHELD MAJOR IMPEACHMENT EVIDENCE ON ITS STAR WITNESS, MARCELLO SCHILLER

Mr. Lugo should have been afforded an evidentiary hearing on the claim that the prosecution improperly withheld pertinent information from the defense. The prosecution relied heavily on the testimony of the only surviving victim, Marcelo Schiller, who identified Mr. Lugo as a participant in the kidnaping and extortion scheme against him. Although Mr. Schiller never saw Mr. Lugo during his kidnaping (his eyes were covered the whole time), he claimed to recognize Mr. Lugo=s voice by way of a distinctive lisp. Thus, Mr. Schiller=s credibility was a key part of the prosecution=s case against Mr. Lugo.

When he testified at trial in July of 1998, Mr. Schiller was presented by the prosecution as a legitimate businessman who had withdrawn from doing business with the Defendants because he disagreed with their unsavory tactics. Mr. Schiller specifically denied being involved in Medicare fraud or any other sort of wrongdoing. However, at the time of his testimony, the State of Florida was well aware that Mr. Schiller was the primary target of a Federal Medicare fraud investigation, and the State knew that Mr. Schiller was lying to the jury when he testified that he never had engaged in any such wrongdoing.

When the question arose at a hearing related to Defendant=s motion for new trial, Assistant State Attorney Levine offered as an excuse for her failure to disclose Mr. Schiller=s indictment that she was Aprohibited by Federal law to talk about a sealed indictment.@ R.XXVII-5532-5533. Ms. Levine failed to disclose to the court that the

indictment was unsealed the day after Mr. Schiller was arrested upon departing the court house following his testimony in this case. She could have and should have disclosed what she knew about Schiller=s status as a federal criminal before the trial had concluded.

In *Lugo I*, the Defendant Acontend[ed] that a *Brady* violation occurred due to the State=s failure to disclose its knowledge of the federal investigation of Mark Schiller for Medicare fraud.@ In rejecting that ground for direct appeal, this Court noted the significance of the lack of any evidence of the State=s knowledge of Mr. Schiller=s status as a federal target: AThat Schiller was subsequently indicted on federal Medicare fraud charges is of little import in the wake of Lugo=s ***failure to establish that the State knew*** of Schiller=s pending indictment or had any involvement with it whatsoever.@ *Id*. at 105. This Court Adecline[d] to decide under the facts of this case whether a *Brady* violation would have occurred if the State actually had had knowledge of Lugo=s [sic] pending federal indictment.@ *Id*. at n. 58.

Only after the direct appeal was concluded and these post-conviction proceedings commenced did the Defendant uncover evidence of the State=s knowledge that Mr. Schiller was a federal target who was guilty of significant Medicare fraud. In the public records disclosure provided to the undersigned is an email memorandum dated October 31, 1996 from the prosecutor who tried this case, Assistant State Attorney Gail Levine, to her then-superior, Assistant State Attorney Michael Band. R.III-468.

That memorandum stated that the Assistant United States Attorney had called Ms.

Levine and told her of Mr. Schiller=s role in the Medicare fraud investigation. Mr. Schiller=s role was so important that the federal authorities, according to Ms. Levine, Aseem like they will plead out anyone but Schiller.@ The significance of Mr. Schiller=s role in the Medicare fraud scheme was revealed by Ms. Levine=s comment that the federal authorities Ado not need Delgado to make the case@ and that Mr. Schiller was Athe only person they care about even though Delgado is in this for over a million [dollars].@

The prosecution=s failure to disclose its knowledge of Schiller=s involvement in the Medicare fraud scheme constituted a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Mr. Schiller=s involvement in that scheme would have been significant impeachment evidence. AImpeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule.@ *United States v. Bagley*, 473 So. 2d 667, 676 (1985). Further, there is no need for the Defendant to demonstrate bad faith on the part of the prosecution in order to obtain relief under this claim. AWhen the >reliability of a given witness may well be determinative of guilt or innocence= non-disclosure of evidence affecting credibility falls within this general rule.@ *Giglio v. United States*, 405 U.S. 150, 154 (1972). Mr. Schiller=s testimony identifying Mr. Lugo was critical evidence tying the Defendant to many of the charges involved in this case. Therefore, the trial court should have granted an evidentiary hearing to enable the undersigned counsel for Mr. Lugo to take depositions of the prosecutors involved in the case and find out just how much they knew about Mr. Schiller=s involvement and lack of credibility.

The State possessed evidence favorable to the accused which was impeaching to the prosecution=s witness, Mr. Schiller, which evidence was suppressed causing Mr. Lugo prejudice. The suppression of that evidence constituted a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *See Mordenti v. State*, 894 So. 2d 161 (Fla. 2004). By calling Mr. Schiller and allowing him to testify falsely about his role in the Medicare fraud scheme, the prosecution violated *Giglio v. United States*, 405 U.S. 150 (1972). In light of those violations, the Defendant Mr. Lugo is entitled to post-conviction relief.

VI.

THE TRIAL COURT ERRONEOUSLY DENIED DEFENDANT=S TIMELY MOTION TO AMEND HIS MOTION FOR POST-CONVICTION RELIEF

The trial court erroneously denied Mr. Lugo=s motion to amend his motion for post-conviction relief timely filed on December 27, 2005, thirty days prior to the evidentiary hearing in this case. *See* R.VII-929. That was Mr. Lugo=s first request to amend his motion for post-conviction relief pursuant to Fla. R. Crim. 3.851(f)(4). His earlier AAmended Motion for Post-conviction Relief@ was filed as a matter of course pursuant to Rule 3.851(g)(11), following a determination that Mr. Lugo was mentally competent.

Rule 3.851(f)(4) provides that A[a] motion filed under this rule may be amended up to 30 days prior to the evidentiary hearing upon motion and good cause shown.@ Defendant Lugo timely filed the motion and for good cause, stated as follows:

> The reason that the new claims based upon the unlawfulness of the arrest warrant under which the Defendant was arrested and the violation of the extradition treaty with the Bahamas were not raised previously is that the undersigned counsel for Defendant failed to timely identify those claims as factually supported and legally viable. Although Mr. Lugo had himself mentioned to the undersigned counsel his belief in the factual and legal basis for those claims, due to the voluminousness of the record in this case and the predecessor judge=s refusal to appoint second-chair post-conviction counsel at state expense, the undersigned could not humanly locate the factual support and legal authorities permitting assertion of those claims.

R.VII at 930.

Mr. Lugo complied with the requirement under Rule 3.851(f)(4) of Aattach[ing] a copy of the claim sought to be added.@ Those claims included the claim that Mr. Lugo=s conviction was obtained in violation of the Fourth Amendment because the arrest warrant was based upon false statements and material omissions of fact warranting relief under *Debord v. State*, 422 So. 2d 881 (Fla. 2d DCA 1982). *See also, e.g., Franks v. Delaware*, 438 U.S. 154 (1978).

A claim that the Defendant=s conviction was obtained in violation of the Fourth Amendment is properly the subject of a motion for post-conviction relief. *E.g., Taylor v. Germany*, 740 So. 2d 529 (Fla. 1999) (unpublished opinion stating: ATo the extent that the petition claims that Petitioner=s conviction was obtained in violation of the Fourth Amendment, it is transferred to the circuit court . . . as a motion filed pursuant to Florida Rule of criminal procedure 3.851@).

Also cognizable under rule 3.851 was Mr. Lugo=s second claim he sought to include by way of amendment: that trial counsel was ineffective for failing to seek suppression of the evidence obtained in violation of Mr. Lugo=s Fourth Amendment rights. *See generally, Oliver v. State* 453 So. 2d 866 (Fla. 1st DCA 1984) (recognizing potential viability of ineffective assistance of counsel claim in rule 3.850 proceeding, but affirming denial of post-conviction relief on ground Athat appellant=s counsel fully and adequately presented and argued the Fourth Amendment (and its Florida constitutional counterpart) in urging appellant=s confession was obtained as a result as an unlawful arrest and seizure@).

Mr. Lugo also should have been granted leave to amend his motion for post-conviction relief to assert ineffectiveness of his trial counsel for failing to argue that Mr. Lugo=s arrest in the Bahamas violated his individual rights under Article 36 of the Vienna Convention on consular relations. *See* R.VII-940. *But See Gordon v. State*, 863 So. 2d 1215, 1221 (Fla. 2003) (stating that individual does not have standing to raise claim under the Vienna Convention). The United States Supreme Court has subsequently held that suppression of evidence is not a remedy compelled by federal law for violation of Article 36. *See Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006). However, the state may impose its own standard for suppression of evidence where prejudice can be shown from a violation of rights such as those imposed by Article 36. Therefore the United States Supreme Court having not yet decided that an individual lacks standing to bring an Article

36 claim, and there being the possibility that suppression would be required under Florida law based upon such a violation, leave to amend to plead this claim should have been granted.

Finally, leave to amend should have been granted to allow Mr. Lugo to allege violation of his rights under the self-executing extradition treaty with the Bahamas. *See* R.VII-945.

CONCLUSION

WHEREFORE, the trial judge having erroneously rejected relief under Claim III after evidentiary hearing, having erroneously denied an evidentiary hearing on other valid claims, and having erroneously denied leave to amend Mr. Lugo=s motion under Rule 3.851, the order under review should be reversed with instructions to grant a new trial on all issues. In the alternative, the trial court should grant another evidentiary hearing on the previously-rejected claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies hereof were served via U.S. Mail upon the following: Sandra S. Jaggard, Assistant Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131-2407 and Gail Levine, Assistant State Attorney, 1350 NW 12th Ave Miami Florida 33136-2102; Hon. David H.Young, 11th Circuit Court Judge, 1351 NW 12th Street, Suite 410, Miami, Florida 33125; and Daniel Lugo, Inmate No. M16321 Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026-4000 on this the 19th day of May, 2007.

By: s/Roy D. Wasson
ROY D. WASSON
Florida Bar No. 332070

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been computer generated in 14 point Times New Roman font and complies with the requirements of Rule 9.210(a)(2).

By: s/Roy D. Wasson
ROY D. WASSON

Fla. Bar No. 0332070