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 REPLY BRIEF

ROY D. WASSON
WASSON & ASSOCIATES, CHARTERED
Suite 205
5901 Southwest 74th Street
Miami, Florida 33143
(305) 666-5053 Telephone
(305) 666-0010 Facsimile
roy@wassonandassociates.com

Court-Appointed Registry Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGE

OTHER AUTHORITIES PAGE

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

A. Failure To Investigate Not Strategic Decision:

The State argues that trial counsel Guralnick made a strategic decision not to look for witnesses like those who testified at the post-conviction hearing about Mr. Lugo=s good character, healthy lifestyle, and behavior as a college student and football player at Fordham University. The State contends that Mr. Guralnick saw a risk in presenting proof that the Defendant**C**who earned a football scholarship to a fine university and had the respect and trust of friends and coaches**C**had every opportunity to succeed as an honest member of society.[1] Inconsistently, however, the State argues that Mr. Guralnick=s failure to find the former teammates and coaches was harmless because Mr. Guralnick elicited the substantial equivalent of that testimony through the testimony of Mr.

[1] The State notes that Mr. Guralnick testified Athat he did not believe that presenting evidence that Defendant had played football and [of] Defendant=s character years before the crime would have been helpful,@ and Mr. Guralnick testified that Ahe did not believe that presenting evidence that showed Defendant had every opportunity in life but became a criminal anyway would not [sic] have been helpful.@ (Answer Brief at 45).

Lugo=s mother and friend, Santiago Gervacio.[2]

The State cannot have it both ways; Mr. Guralnick cannot have made a strategic decision not to present proof on these subject because it would have been harmful, while himself presenting proof on the subject. The very fact that trial counsel presented some proof about Mr. Lugo=s college football career and good character in the eyes of his friends negates the argument that counsel consciously chose to avoid proof in those areas as potentially harmful.

Further, Mr. Guralnick on direct examination testified that witnesses like those called at the post-conviction hearing would have been good mitigation witnesses, and that he ***would have*** called some of them if he had known about them.

> 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

[2] The State explains that Mr. Guralnick indeed presented proof in these areas, stating that trial Acounsel had Defendant=s mother testify that Defendant played football, did well in school and won a football scholarship to college,@ and Ahad Defendant=s mother and his friend . . . , Santiago Gervacio, testify that Defendant was not violent or a liar and that Defendant was a good and generous friend, son, father and husband.@

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.***

R. X-1416 (emphasis added).

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 (emphasis added).

Mr. Guralnick=s explanation for not investigating any of the mitigation witnesses called at the 3.851 hearing was not any strategic decision to simply call Mr. Lugo=s mother and a single friend because those witnesses would be sufficient. Mr. Guralnick did not look for more mitigation evidence simply because Mr. Lugo did not give him the

names and addresses of potential witnesses on a silver platter. *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 (emphasis added). That was a violation of counsel=s duty to conduct his own investigation.

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*** . . . [,] ***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). There was no strategic decision to limit counsel=s investigation, only and ineffective effort.

B. Defendant=s Mother=s Testimony Was Not Equivalent:

The State in its Answer Brief tries to minimize the nature of the mitigation evidence in question as merely being evidence that Danny Lugo Ahad played football,@ and argues that that fact was established by his mother=s testimony. The State cites to Mr. Guralnick=s testimony that such evidence would not have been helpful. (Answer Brief at 45). Mr. Guralnick testified (R.X-1518) that evidence of Mr. Lugo Abeing a good football player . . . would not of [sic] done

him any good at all whatsoever.@ The issue was not whether there should have been additional testimony that the Defendant had been a football player in college, nor whether there should have been testimony that he was a Agood@ football player. The issue was what the other players and coachesBincluding a sitting judge and former prosecutorBthought about a teammate=s ***character*** who played along side of them and shared their locker rooms.

Judge Holdman, Mr. Spinelli and Mr. Tutien knew Mr. Lugo to be honest, morally straight, a hard worker and unselfish. He never used drugs or abused alcohol. Those traits have little to do with playing football, or even how well one plays football, but a lot to do with a man=s character and the issue whether his life should have been spared in the sentencing process. Mr. Lugo=s mother=s testimony that her son had played football was qualitatively different from the testimony presented by several disinterested witnesses about traits that the jury could have found lived-on in the Defendant. Although time had passed since Mr. Lugo=s college athletic days, even trial counsel Guralnick acknowledged the wisdom of interviewing and calling those witnesses. Even if that evidence would have been too remote in another case, death is different.

C. Strength of Aggravating Factors Not Dispositive:

The State argues that the mitigation evidence in question was so far

outweighed by the aggravating factors in this case that trial counsel=s ineffectiveness would not have changed the outcome of the sentencing proceedings. That argument was made by the prosecution and rejected by the court in *People v. Orange*, 659 N.E.2d 138 (Ill. 1995). This Court should limit the circumstances in which the good character evidence will not overcome the aggravating effect of multiple murder convictions to cases in which the defendant had an extensive criminal history unrelated to the crimes in question, as did the court in *Orange* as follows:

> The State argues that this court has frequently refused to find prejudice due to ineffective assistance of counsel in cases involving violent crimes because there is no reasonable probability that mitigation testimony would overcome the aggravating factor of the nature of the conviction. . . . However, in the cases the State relies upon the defendants= extensive past and subsequent criminal history was so great that it was highly improbable that proposed mitigation evidence would outweigh the aggravating evidence. . . . The State also relies upon *People v. Caballero* (1992), 152 Ill. 2d 347, 178 Ill. Dec. 390, 604 N.E.2d 913, for the proposition that sentencing for a violent multiple-murder conviction will not be influenced by mitigation evidence of a defendant's good character. However, we note that the case the State cites . . . was that defendant's second appeal from dismissal of his post-conviction petition. In the original appeal of the post-conviction petition *(People v. Caballero* (1989), 126 Ill. 2d 248, 128 Ill. Dec. 1, 533 N.E.2d 1089)), this court remanded for an evidentiary hearing on the issue of whether defense counsel was ineffective for failure to present mitigating evidence. In the earlier case the court held it was reasonable to believe that despite defendant's multiple-murder convictions, evidence in the affidavits defendant supplied with his post-conviction petition might provide

> mitigating character evidence sufficient to alter the sentence which warranted an evidentiary hearing. *Caballero,* 126 Ill. 2d at 280-81.

Id. at 950-51.

Defense counsel=s failure to investigate and present proof 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 abused alcohol or used drugs Adeprived the defendant of a reliable penalty phase proceeding.@ *Asay v. State*, 769 So. 2d 974, 985 (Fla. 2000). Trial counsel was ineffective and the death sentences should be reversed.

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. The Issue Is Not Procedurally Barred:

None of the cases cited in the State=s Answer Brief support the argument that a juror=s non-disclosure of material information always must be raised on direct appeal or it is procedurally barred. Nor do those cases support the proposition that trial counsel=s failure to timely investigate circumstances of juror non-disclosure are not cognizable under Rule 3.851.

The State cites this Court=s decision in *Elledge v. State*, 911 So. 2d 57, 77 n.27

(Fla. 2005)(as holding Athat claims of juror misconduct are procedurally barred in post-conviction litigation because they could have and should have been raised on direct appeal.@ (Answer Brief at 56). The *Elledge* case involved the issue of possible jury misconduct that was known to defense counsel and the trial court at the time of trial. The appellant=s initial brief in that case reflects that the involved jurors were questioned about the circumstances of the alleged misconduct, and that the defense attorney moved to strike the entire *venire* and later moved for a mistrial. (*Elledge* Initial Brief at 90-92). Thus, the matters that the defendant in *Elledge* sought to raise in post-conviction proceedings were fully developed of record during the initial trial proceedings and could have been timely raised in the direct appeal. Further, it should be noted that the *Elledge* case involves actual jury misconduct during trial, rather than non-disclosure of extrinsic information pertinent to jury selection, as is involved here.

Another issue raised in the *Elledge* case involved the issue of the constitutionality of the rule regarding juror interviews where the appellant sought to determine whether the jury was influenced by the presence of armed courtroom security personnel. The defendant knew about the presence of the armed security officer during the trial, and moved for a mistrial on that issue without seeking to interview jurors concerning whether they saw the weapon worn by security personnel. Thus, the effect of the courtroom security on the jury was known to counsel during trial and that issue could properly have been raised on direct appeal.

Contrary to the State=s representation, this Court in *Happ v. Moore*, 784 So. 2d 1091, 1094 & n.3 (Fla. 2001) did not hold that claims of juror misconduct are procedurally barred in post-conviction litigation where they were not raised on direct appeal. That version of the *Happ* case was this Court=s decision on the defendant=s petition for writ of habeas corpus alleging ineffective assistance of appellate counsel. No issue of juror misconduct was raised in that version of the *Happ* case. The only mention of juror misconduct is a reference in the cited footnote to Ajuror misconduct@ as having been one of the thirty-two grounds for the defendant=s Rule 3.850 motion.

That Rule 3.850 motion was addressed in a different version of the case: *Happ v. State*, 770 So. 2d 158 (Fla. 2000). There this Court dismissed the defendant=s appeal from the denial of most of his post-conviction claims, but nothing about that opinion indicates that this Court held that the claim of juror misconduct was procedurally barred as having not been raised on direct appeal. Instead, this Court=s dismissal was based on the fact Athat counsel for appellant has set forth positions and arguments that have not previously been properly pleaded or presented with particularity to the trial court in the pleadings filed in the trial court.@ No. SC93-121 (unpublished opinion Sept. 13, 2000). The *Happ* line of cases simply does not support the State=s position that the juror non-disclosure claim is procedurally barred.

Nor was a juror=s non-disclosure of material information pertaining to the juror=s qualifications involved in the case cited by the State of *Brown v. State*, 755 So. 2d 616

(Fla. 2000). Instead, that case involved a jury=s exposure during trial to a newspaper article about the case. Defense counsel learned of the article and made a proper request for an inquiry as to whether the jurors had read the article. *Id*. at 637. Thus, the issue concerning the effect of the article could have and should have been raised on direct appeal, unlike the situation in present case where the juror=s non-disclosure of material information was unknown to trial counsel.

This Court=s decision in *Gaskin v. State*, 737 So. 2d 509 (Fla. 1999) is distinguishable from the present case involving juror non-disclosure of background information pertinent to jury service. In *Gaskin*, the claim of juror misconduct that was held to be procedurally barred because the issue could have been raised on direct appeal involved juror claims, notwithstanding extensive adverse pre-trial publicity, that the jurors were honest and could be impartial. (*See* State=s Answer Brief in *Gaskin* at 56 (AThe trial court denied the claim as procedurally barred since the grounds were based solely on the trial record and Gaskin could have raised the claim on direct appeal.@)). In the present case, there is nothing in the trial court record pertaining to juror Schlehuber=s status as a victim of a crime of violence. The issue could not have been raised on direct appeal, and is not procedurally barred.

In *Gaskin* the defendant claimed in post-conviction proceedings that A[a]ll but one of Mr. Gaskin=s jurors were familiar with the inflammatory media reporting surrounding his trial.@ (*Gaskin* Initial Brief at 54). In *Gaskin* the information leading to the claim of

juror misconduct was known to the parties during *voir dire* and could have been raised on direct appeal. In contrast, the information about juror Schlehuber=s undisclosed status as a victim of violent crime was not disclosed during the trial or in time to be raised on direct appeal. Instead, it required the work of a private investigator engaged by the undersigned in post-conviction proceedings to uncover juror Schlehuber=s non-disclosure.

This Court has rejected the proposition that a challenge to a juror=s untruthful or incomplete responses to questioning during *voir dire* must be raised during the trial proceedings. *See Roberts v. Tejeda*, 814 So. 2d 334 (Fla. 2002). As noted by this Court in *Kelly v. Community Hosp.*, 818 So. 2d 469 (Fla. 2002), a rule that requires counsel to raise a juror=s non-disclosures during the trial proceedings Afails to adequately address the complex circumstances in which jurors= intentional or unintentional omissions may arise during the *voir dire* process. Where, as here, significant matters concealed in *voir dire* may not be revealed or resolved solely by reference to the clerk=s index in a single courthouse, the [Third District=s] *Tejeda* limitation is contrary to any sense of justice.@ *Id*. at 475. Therefore, the issue was not procedurally barred by having not been raised on direct appeal.

B. Necessity of Evidentiary Hearing:

The Appellant disagrees that he needed to demonstrate such bias on the part of

juror Schlehuber as would render him subject to a challenge for cause. This is not a case like those cited by the State for the proposition that a juror is properly allowed to sit in the absence of some showing of bias or prejudice sufficient to render the juror unfair. *Cf. Brown v. State*, 818 So. 2d 652 (Fla. 3d DCA 2002); *Brown v. State*, 755 So. 2d 737 (Fla. 4th DCA 2000). Nor does the Appellant suggest that *Chester v. State*, 737 So. 2d 557 (Fla. 3d DCA 1999) Ahold[s] a veniremember is excusable for cause merely because he was a crime victim,@ as the State characterizes Appellant=s argument. (*See* Answer Brief at 60 & n.8). Instead, the Appellant simply submits the proposition that a prospective juror=s status a crime victim mayCwhen further developedCrender the panel member subject to a challenge for cause, and may render that prospective juror a candidate for the exercise of a peremptory strike, even if not subject to a cause challenge.

The State presents no authority for its implicit suggestion that juror non-disclosures are not cognizable in a post-conviction proceeding, in the absence of a showing that the non-disclosure rendered the prospective juror so biased or prejudiced as to be subject to a challenge for cause. Thus, the standards adopted by this Court in *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995) are applicable to this case, like any other case. The issue under *De La Rosa* is not whether the undisclosed information would warrant a juror being stricken for cause, but whether Athe information is relevant and material to jury service in the case.@ 659 So. 2d at 241.

Although the definition of Amaterial@ in this context Acould include facts

demonstrating a prospective juror=s actual bias or prejudice,@ that is not necessarily the standard for materiality under the *De La Rosa* test. *See Companioni v. City of Tampa*, 958 So. 2d 404, 415 (Fla. 2d DCA 2007). The definition of Amaterial@ in this context Acould also include facts about the prospective juror=s employment, opinions, experiences, associations, or other factors ***not demonstrating actual bias or prejudice but that bear on an attorney=s ability to make an informed judgment about exercising a peremptory challenge*** against the prospective juror.@ *Id*. (emphasis added). ANon-disclosure is considered material if it is substantial and important so that if the facts were known, ***the defense may have been influenced to peremptorily challenge the juror*** from the jury.@ *Murphy v. Hurst*, 881 So. 2d 1157, 1162 (Fla. 5th DCA 2004).

The State devotes considerable argument to the proposition that the undisclosed crime of battery against juror Schlehuber was not substantially similar to the crimes charged against Mr. Lugo in the present case. This Court has made it clear, however, that there need be no substantial similarity between the undisclosed litigation involving a prospective juror and the case on which the juror is sitting as the trier-of-fact. ATo be material, a prospective juror=s litigation history need not necessarily involve an action similar to the one in which he or she may be required to serve.@ *Kelly v. Community Hosp.*, 818 So. 2d 469, 474-75 (Fla. 2002). The same should be true of prior crimes against jurors.

It is impossible to say for sure whether juror Schlehuber=s non-disclosure in this case was Amaterial@ because the trial court denied an evidentiary hearing at which that issue could be explored. It would be premature for this Court to conclude, as a matter of law, that juror Schlehuber=s status as the victim of a crime of violence that resulted in injury could not have provided grounds to strike him peremptorily, or challenge him for cause. Even if it were the law that the standard in a post-conviction proceeding requires a defendant to demonstrate that a prospective juror who failed to disclose information would have been subject to a cause challenge, Mr. Lugo cannot demonstrate that without being afforded the opportunity to summon Mr. Schlehuber before the court to give testimony about the circumstances of the undisclosed crime against him.

This Court should not accept the State=s argument that Mr. Lugo=s trial counsel=s failure to inquire of other jurors about their experiences as crime victims demonstrates that Mr. Lugo=s trial counsel would likely not have asked Mr. Schlehuber about his experience as a victim. None of those other jurors indicated that he or she had suffered physical violence at the hands of the perpetrators in those cases. Juror Ferrara=s relative had a car stolen. Juror Morgan experienced the theft of her wallet and her sister was a rape victim. Mr. Lepow was the victim of a house burglary and a Achain snatching.@ Juror Dacal (mistakenly identified as ADucal@) characterized the crime against her as a Ahome robbery,@ without indicating that she had been assaulted or injured in any way. Juror Cynthia Fort (mistakenly identified as AFont@), another robbery victim, did not

indicate that she had been physically injured in the course of that crime. Thus, only juror Schlehuber was the victim of crimes of violence upon his person, so he was more likely to be sympathetic to the plight of the victims in this case and would have been a better candidate for follow-up questioning by defense counsel, had he accurately answered the questions and the jury questionnaire. Therefore, the summary denial of this claim in Mr. Lugo=s Rule 3.851 motion should be reversed.

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. This Court should recognize that there are three different levels of prejudice an appellant must demonstrateCdepending upon the procedural posture of the case when it reaches the appellate courtCto warrant reversal based upon improper prosecutorial arguments. At the highest extreme, applicable to claims of fundamental error, is error that Areaches down into validity of the trial itself to the extent that verdict of guilty could not have been obtained without the assistance of the alleged error.=@ *See Lugo v. State*, 845 So. 2d 74, 107 (Fla. 2003)(quoting *McDonald v. State*, 743 So. 2d 501 (Fla. 1999)).

At the other extreme is an error which is preserved at trial and which, on appeal, cannot be found by the appellate court beyond a reasonable doubt not to have affected or

contributed to the verdict. *E.g., Knowles v. State*, 848 So. 2d 1055 (Fla. 2003). Such preserved errors raised on direct appeal need not even have Asubstantially influence[d] the jury=s verdict@ in order to warrant reversal. *Id*. at 264.

Between these two standards is the standard that this Court should find applies to claims of ineffective assistance of counsel. Where defense counsel without strategic purpose fails to object to improper argument which was clear error, this Court should conclude that counsel has been ineffective within the meaning of that term under *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny. That standard should apply here and warrant reversal, because this Court already in *Lugo I* found that the prosecutor=s argument in question Aclearly is error.@ *Id*. at 107.

This Court could find that three levels of prejudice exist in these three situations without overruling its decision in *Chandler v. State*, 848 So. 2d 1031 (Fla. 2003), because *Chandler* is distinguishable under its facts. Although this Court=s *Chandler* decision seemed to indicate that the appellant could not demonstrate sufficient prejudice under *Strickland* A[b]ecause Chandler could not show the comments were fundamental error on direct appeal,@ the showing of prejudice actually made in the *Chandler* case was not even sufficient to have warranted relief, had the objection been made at trial.

As noted in the quoted portion of the *Chandler* decision cited by the State on pages 68-69 of the Answer Brief, *Chandler* was Asimilar to *Thompson v State*, 759 So. 2d 650, 664 (Fla. 2000), in which . . . [t]his Court stated that >because none of these prosecutorial

comments would have constituted reversible error had they been objected to at trial.=@ Those errors did not establish prejudice sufficient to meet the *Strickland* test because they would not have warranted reversal if preserved and raised on direct appeal.

Thus, this Court=s comment in *Chandler* indicating that the standard for demonstrating prejudice in *Strickland* is equal to or greater than the standard for demonstrating fundamental error was not necessary to a decision in *Chandler*. That case was like *Thompson*, in which the error would not have been reversible, even had it been preserved at the trial court level for direct appeal. This Court did not need to address the circumstances present here, where the error in question would have been clearly reversible, had it been preserved.

This case is the perfect opportunity for this Court to recognize a three-level standard and to hold that the standard for demonstrating prejudice has been met, notwithstanding the absence of fundamental error in connection with the improper prosecutorial argument. 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

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. This Court should reject the State=s argument that the trial court correctly summarily denied the Defendant=s Vienna Convention claim on the ground that he Adid not adequately plead prejudice.@ (*See* Answer Brief at 72-73). Mr. Lugo properly pleaded and presented sufficient argument on prejudice that the trial court understood his position below. That position is that the Aviolation had an effect on the trial@ within the meaning of this Court under *Darling v. State*, 808 So. 2d 145, 166 (Fla. 2002). That effect was the result of Mr. Lugo=s involuntary return to Florida, and the fruit of that return in the form of the evidence marshaled against him as the result of his own statement to police following his return. Mr. Lugo could not have been extradited, had the Vienna Convention violation not occurred, because The Bahamas and the United States have no extradition treaty between them. Further, Mr. Lugo would not have made the inculpatory statements that led the police to much of the evidence used against him at trial. Mr. Lugo certainly does assert that the violation of rights under the Vienna Convention affected the outcome of the trial, and that was clear to the trial court below.

Should this Court agree with the State that the facts and circumstances of that adverse effect on the outcome of the trial were not sufficiently pleaded in Mr. Lugo=s

amended 3.851 motion, as further amended by his motion to amend filed on December 27, 2005, Mr. Lugo requests that this Court remand with instructions to provide him with a further opportunity to amend to plead those facts more specifically.

The Appellant disagrees with the State=s other arguments on this issue, such as the argument that Defendant lacks standing, the argument that his claim is procedurally barred, and the argument that there are no enforceable remedies for violations of the Vienna Convention.

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. This Court in *Lugo I* did not foreclose the possibility of relief under *Giglio* because the Court Adecline[d] to decide under the facts of this case [as they were then known] whether a *Brady* violation would have occurred if the State actual had knowledge of Mr. Schiller=s pending federal indictment.@ *See* 845 So. 2d at 105 n.58. The correspondence between the prosecutor who tried this case, Gail Levine, and her superior, Assistant State Attorney Michael Band provides sufficient evidence of the State=s knowledge of that impending federal indictment to permit an evidentiary hearing into exactly how much knowledge was

available to the State.

If the federal authorities had indicated to the State prosecutors that Athey will plead anyone outCbut Schiller,@ that is sufficient evidence that the federal authorities intended to indict Schiller, and conveyed that information to the State. How could the U.S. Attorney refuse to offer a plea agreement to someone who had not been indicted? The federal authorities= unwillingness to offer a plea agreement to Schiller necessarily conveys their communicated intent that Schiller would be indicted.

The State here knowingly presented false testimony from Schiller improperly bolstering his credibility as if he were an honest businessman, when the State knew that he was defrauding the citizens of this nation of millions of dollars, and lying about it. Mr. Schiller=s testimony was the most direct evidence implicating Mr. Lugo in the crimes involving Mr. Lugo=s alleged presence in the warehouse where Schiller was being held. Even though there was other evidence on other counts against Mr. Lugo, the verdicts were likely would have been different or at least some of the charges had Schiller=s true status as a federal criminal been disclosed to defense counsel, as should have been done. This Court should reverse Mr. Lugo=s convictions and sentences, or should remand for an evidentiary hearing on the *Brady* and *Giglio* claims.

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. The State too broadly reads this Court=s holding in *Moore v. State*, 820 So. 2d 199 (Fla. 2002) as holding that an amendment to a post-conviction motion should not be granted Awhere the amendment was not based on information that had recently been provided to the defendant.@ (*See* Answer Brief at 91). This Court did not hold that newly discovered information is the only ground for permitting an amendment to a post-conviction motion. Instead, the Court held that Aa second or successive motion for post-conviction relief can be denied on the ground that it is an abuse of process if there is ***no reason for failing to raise the issues in the previous motion***.@ *Id*. at 205 (emphasis added). Here, Mr. Lugo=s undersigned counsel provided a reason having failed to include the issues in question in the prior motion for post-conviction relief. Therefore, the *Moore* case does not support the trial court=s ruling denying leave to amend.

Nor is this Court=s decision in *Brown v. State*, 894 So. 2d 137 (Fla. 2004) on point. In *Brown* this Court affirmed the denial of the defendant=s request to present supplemental argument on his post-conviction motion, when that request had not been made until after the evidentiary hearing conducted in that case. In the present case, Mr. Lugo=s undersigned counsel recognized his failure to raise potentially-meritorious issues in

time to comply with the provision of Fla R. Crim. 3.851(f)(4) providing 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.@ The time deadlines for proceedings in this case have not been strictly followed throughout the course of the action below. The motion to amend was timely and there was no reason to deny the requested amendment, so the trial court=s ruling was arbitrary and capricious and constituted an abuse of discretion. That ruling should be reversed for further proceedings.

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,

ROY D. WASSON
WASSON & ASSOCIATES, CHARTERED
Counsel for Appellant
5901 Southwest 74th Street
Suite 205
Miami, FL 33143
(305) 666-5053 Telephone
(305) 666-0010 Facsimile

By:_____
ROY D. WASSON
Florida Bar No. 332070

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 Daniel Lugo, Inmate No. M16321 Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026-4000 on this the 22nd day of October, 2007.

By: _____
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: _____
ROY D. WASSON
Fla. Bar No. 0332070