IN THE SUPREME COURT OF FLORIDA
CASE NO. SC06-148

VIRGINIA GAIL LARZELERE,

Petitioner,

v.

JAMES MCDONOUGH,

Secretary,
Florida Department of Corrections,
Respondent,

and

CHARLIE CRIST,

Attorney General,
Additional Respondent.

REPLY PETITION FOR WRIT OF HABEAS CORPUS

DAVID D. HENDRY
ASSISTANT CCC
FLORIDA BAR NO. 0160016
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
3801 CORPOREX PARK DR., STE. 210
TAMPA, FL 33619-1136
(813) 740-3544

COUNSEL FOR PETITIONER

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REPLY TO STATE'S RESPONSE

GROUND I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MS. LARZELERE'S CONVICTION

In response to Ms. Larzelere's constructive amendment claim, the State cites to Raulerson v. State, 358 So. 2d 826 (Fla. 1978). Raulerson is far afield from the issues found in the case at bar. The Raulerson case simply involves a variance in the first name of an alleged victim. The appellant argued in Raulerson that because the name "Mike" is different from "Michael," there was reasonable doubt as to the identity of the victim, and the conviction could not stand due to the variance between the first name of the victim listed in the indictment and the proof offered at trial. In the case at bar, the jury was essentially instructed that they could find Ms. Larzelere guilty of murder if they found that she conspired with some known and unknown individuals not listed in the indictment. The jury was instructed as follows:

> The elements involved in a conspiracy that must be shown by independent evidence are, one, that the intent of Virginia Gail Larzelere was that the offense that was the object of the conspiracy would be committed. And two, that in order to carry out that intent, Virginia Gail Larzelere agreed, conspired, combined, or confederated with Jason Eric Larzelere to cause said offense to be committed, either by them or one of them, *or by some other person.* (emphasis added) [Dir. ROA pg. 5895, ROA Vol. 18, pg. 2922]
>
> *It is not necessary that Virginia Gail Larzelere do any act in the furtherance of the conspiracy*. It is a defense to a charge of criminal conspiracy that a defendant, *after conspiring with*

> *one or more persons to commit the offense* that was the object of the alleged conspiracy, *persuaded the alleged co-conspirators* not to do so...
>
> *If two or more persons help each other commit a crime and the defendant is one of them*, the defendant must be treated as if she had done all the things *the other person or persons did...*
>
> If a defendant paid or promised to pay *another person or persons to commit a crime* the defendant must be treated as if she had done all the things the person who received or was promised the payment did if []the crime was committed by a co-conspirator...(emphasis added) [Dir. ROA pg. 5896, ROA Vol. 18, pg. 2923]
>
> ...the defendant and the co-conspirator agreed, conspired, combined, or confederated to cause said offense to be committed, *either by them or one of them, or by some other co-conspirator*. (emphasis added) [Dir. ROA pg.5897, ROA Vol. 18, pg. 2924]
>
> ...a defendant, *after conspiring with one or more persons* to committ [sic] the offense that was the object of the alleged conspiracy, *persuaded the alleged co-conspirators* not to do so... (emphasis added) [Dir. ROA pg. 5898, ROA Vol. 18, pg. 2925]

Ms. Larzelere was not indicted for conspiracy, yet the jury was instructed on conspiracy. Jason Larzelere was the only person listed in the indictment for murder with Virginia Larzelere, yet the jury was instructed that Ms. Larzelere could be found guilty if she conspired with other individuals, even if she committed no act towards the alleged conspiracy. The jury instructions amended the terms of the indictment. The indictment itself was so vague and indistinct that Ms. Larzelere was not on notice of the nature of the charges against her. When trial counsel learned that the State intended to constructively

amend the indictment and introduce others into the conspiracy, the defense attorneys objected and noted the following:

> The Court: Fine. Now, over at the principal instruction, I have done some research on this, and I'm concerned that we're using the term co-conspirator in that instruction, and yet but for the instruction that was earlier given, included the definition of conspiracy, there is no definition as it relates to this instruction of the elements of conspiracy.
>
> It occurs to me that it would be appropriate to define the elements of conspiracy, either by referring to the previously given definition in the [sic] these instructions, or a new definition that plugs into this instruction.
>
> I don't know authority for that as far as case law, but I'd like to at least have argument briefly here, to see if you agree. And, of course, you folkes [sic] object to that instruction, but my request of you is, aside from that objection, if it's going to be given, do you agree or disagree that to be complete, it would need to have either reference to or definition separately of the conspiracy definition?
>
> Mr. Wilkins [for the defense]: Judge, I think you can cure it by substitution [of] Jason Larzelere for the word conspirator.
>
> Ms. Sedgewick [for the state]: I object to that. It's not required that we prove that the killer was Jason Larzelere. We only have to prove that the killer was a co-conspirator of Virginia Larzelere.
>
> Mr. Howes [for the defense]: Judge, on their theory of the case, and theory of the facts, the only person it can be is Jason Larzelere. There are no other co-conspirators.
>
> Ms. Sedgewick: There are two other co-conspirators, Kristen Palmieri and Steven Heidle, based upon the evidence presented in the case.

> The Court: What says the State as to the Court's point on the need for definition of conspirator or conspiracy.
>
> Ms. Sedgwick: I agree.
>
> Mr. Howes: We object, Your Honor, We think it's sufficient as is, or it be replaced with the name of Jason Larzelere, because under the State's theory of the case, that's the only person it could be. Otherwise, if it could be someone other than Jason Larzelere, we have a due process problem, because we're finding now, immediately preceding closing arguments, that Steven Heidle and Kristin Palmieri were co-conspirators in the murder.
>
> The Court: I'm going to work in definition for instructions for conspiracy elements that won't be any different than the general instructions on the conspiracy. But it will start out with some language that ties the definition with the principal instruction that we're speaking of. And it will fall on the same page as this instruction.
>
> Mr. Howes: Your Honor, we further object to any instruction other than the standard with respect to this matter.
>
> Ms. Sedgewick: The state wishes to make clear that the Court's instructions that the Court intends to give is not limiting the co-conspirator pursuant to this definition to be Jason Larzelere.
>
> The Court: No. I am going to give a general definition of elements of conspiracy...

[Dir. ROA, pp. 5771-5773, ROA Vol. 18, pp. 2919-2921]

And again, the defense objected:

> THE COURT: ...So do you at least understand my reasoning for why I believe there needs to be a limited definition of conspiracy in the principal for hire instruction?
> MR. HOWES: Yes, sir.

THE COURT: Having said that, number one, do you want the Court to leave in–first of all, do you want me to leave in the conspiracy instruction that relates to the admissibility of coconspirators statements?
MR. HOWES: Yes, sir.
THE COURT: Secondly, do you, preserving your right which you have to object to the principal for hire instruction, do you want the Court to give a definition of conspiracy added to the principal for hire instruction?
MR. HOWES: No, sir. As we stated off the record, we think that paragraph 3 in the first part should read: The crime was committed by Jason Eric Larzelere.
THE COURT: Alright, I understand. What says the State to their request that it be Jason Larzelere?
MS. SEDGWICK: **There's no legal requirement that the murder be committed by any particular person. The jury can consider whatever evidence has been presented in the case, and determine whether or not the shooter was a co-conspirator of Virginia Larzelere.**
THE COURT: Now, have you argued in your argument any evidence that anybody was the shooter other than Jason himself?
MS. SEDGWICK: No, I haven't.
THE COURT: All right. Then what evidence is there, if you didn't argue it, what evidence is there of somebody being the shooter other than Jason Larzelere?
MS. SEDGWICK: Defense has argued that it was robbery, and that Kristen and Steven Heidle had motive because they were at loss of funds because of Jason moving home, and that it was not Jason.
THE COURT: That it was not Kristen or Steven, but also not Jason, but some other person?
MS. SEDGWICK: Right.
THE COURT: Did you argue that?
MS. SEDGWICK: No. But I don't believe that I have to. It's not a question of my arguments, but what the evidence shows.
THE COURT: **I'm going to rule that in fact the State has the right to have that instruction, even if they didn't argue it, if there in fact is evidence from which the jury could infer the commission of the offense by someone**

> **other than Jason. And I'm going to deny the defense's request that the name Jason Larzelere be plugged in there. And I'm going to let the language, by a co-conspirator, be in there, in paragraph 3 of the principal for hire instruction...**
> MR. HOWES: ...**We object to the addition or inclusion, of putting the entire conspiracy language if [sic] there, yes, sir....**

[**Emphasis added**, Dir. ROA pp. 5876-5878]

The above objections were preserved but not raised on direct appeal. This constituted ineffective assistance of appellate counsel. On page seven of their response, the State argues that because trial counsel actually requested a conspiracy instruction, Ms. Larzelere cannot complain of the error. In light of the clear objections on record and most certain requests to limit the conspiracy instructions to Virginia and Jason Larzelere as listed in the indictment, the issues were preserved and appellate counsel was ineffective for raising the issues on direct appeal. The State's reliance on Martin v. State, 218 So. 2d 195 (Fla. 3rd DCA 1969) is misplaced. Aiding and abetting was not instructed in the case at bar.

The lower court cited to and the State now cites to Roby v. State, 246 So. 2d 566 (Fla. 1971) in support of the denial of this claim. Roby is distinguishable from the case at bar. In Roby, the defendant was actually on notice of the charges against him because three men were jointly charged with murder, and all three men were specifically listed in the indictment: "The respondent, Arthur Lee Roby, and two other defendants, William Henry Johnson, Jr., and Ernest Williams, were jointly charged with the substantive crime

of 1st degree murder of one Frank Cutler, deceased, the indictment alleging in the usual language that the three defendants unlawfully effected the death of the victim by shooting him with a pistol." Roby at 567. In the case at bar, only Virginia and Jason Larzelere were jointly charged, and they are the only two people listed in the indictment. Yet, the jury was instructed that others may be involved. The jury in Roby was not instructed that others may have been involved in the murder, and Roby was therefore not placed in jeopardy of being convicted of a crime not charged in the indictment.

The State is wrong to suggest that there is no valid claim of ineffective assistance of appellate counsel. In the case of Hodges v. State, 878 So. 2d 401 (Fla. 4th DCA 2004), the Fourth District Court of Appeal held that appellate counsel was ineffective for failing to raise a fundamental error claim concerning the jury instructions. In Hodges, defense counsel failed to object to a jury instruction on a kidnaping charge that authorized a conviction if the defendant had one of two different types of statutory intent, when the information specifically only listed one type of statutory intent. Even though this error was not preserved at the trial level or appellate level, the Court granted relief because the error was fundamental. In the case at bar, fundamental error occurred when the jury was broadly instructed that Virginia could have conspired with individuals other than Jason Larzelere, individuals not listed in the indictment. Therefore, according to Hodges, even if the State's argument is accepted that defense counsel committed the error by requesting

a conspiracy instruction[1], that fact would not be fatal to the claim because the error is fundamental. Furthermore, it is Ms. Larzelere's position that requesting a jury instruction on a crime not charged by the State would constitute ineffective assistance of counsel under United States v. Cronic, 466 U.S. 668 (1984).

> Appellate counsel may be deemed to have rendered ineffective assistance of counsel in failing to raise an unpreserved issue on appeal if the issue is meritorious and rises to the level of a due process violation, constitutional violation, or another matter of fundamental error. Meyer v. Singletary, 610 So. 2d 1329 1331 (Fla. 4th DCA 1992) (citing Hargrave v. State, 427 So. 2d 713 (Fla. 1983)).
>
> We determine that this issue was meritorious and rose to the level of fundamental error; had appellate counsel argued the issue on appeal, this court would have revered and remanded for a new trial on this count. Therefore, we order a new trial on the kidnaping charge.

[Hodges at pp. 402-403] .

See also Eagle v. Linahan, 279 F. 3d 926, 943 (11th Cir. 2001)("to determine whether appellate counsel's deficient performance in failing to raise claim on direct appeal resulted in prejudice to the defendant, so as to deprive him of his Sixth Amendment right to effective assistance of counsel, the Court should review the merits of omitted claim; if the Court concludes that the omitted claim would have reasonable probability of success, then counsel's performance was necessarily 'prejudicial' because it affected outcome of appeal.").

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[1]Ms. Larzelere does not concede that the constructive amendment error was invited at the trial level due to defense counsel's actions.

As to the State's reliance on Raulerson to challenge the merits of Ms. Larzelere's constructive amendment claim, that case is clearly distinguishable from the case at bar. First of all, Ms. Larzelere asserts that the indictment flaws in her case constitute constructive amendments that require *per se* reversal. Raulerson is an example of a simple variance that would require the defendant to show embarrassment in the preparation of defense. On the other hand, prejudice is presumed in the case of a constructive amendment. United States v. Keller, III, 916 F. 2d 628, 636 (11th Cir. 1990). The 11th Circuit in Keller reasoned and held the following in granting relief:

> The court's instructions had the effect of adding the phrase "with other named and unnamed co-conspirators" to Count Three of the indictment. The grand jury could have included a similar phrase in the indictment, but did not. The grand jury understood that it could include similar language, because it did so in Count Seven of the indictment. The jury instructions altered an essential element of the offense and thereby broadened the possible bases for conviction of Keller by allowing the jury to convict him if he conspired with anyone, when the indictment alleged he conspired solely with Smith. (footnote omitted).
>
> We conclude that the trial court's jury instructions constituted a constructive amendment of the indictment and therefore violated Keller's Fifth Amendment right to be charged by grand jury indictment. Such a violation is reversible error *per se*. United States v. Peel, 837 F. 2d 975, 979 (11th Circuit 1988), United States v. Figueroa, 666 F. 2d 1375, 1379 (11th Cir. 1982).

[Keller, III at 636].

Just as in Keller, III, the jury instructions in the Virginia Larzelere case constituted a constructive amendment to the original indictment. No other named or unnamed co-

conspirators were listed in the indictment. The fact that conspiracy was not even alleged in the indictment illustrates just how vague and indistinct the indictment was. The State could have listed "other known or unknown persons" in the indictment, but it did not. The jury instructions in the Larzelere trial broadened the possibilities of an otherwise limited original indictment, and embarrassed Ms. Larzelere in the preparation of her defense, essentially transformed her defense into a nullity, and allowed the State to obtain a conviction on a crime not actually charged in the indictment. This constitutional violation constitutes *per se* reversible error. United States v. Peel, 837 F. 2d 975, 979 (11th Circuit 1988). The lower court's Order denying relief in the case at bar failed to distinguish the Keller case. The lower court failed to distinguish or address any of the cases cited by Larzelere pertaining to her constructive amendment claim. The State has failed to do the same.

The lower court erred in denying relief from this fundamental error on procedural bar grounds. *See* Cabrera v. State, 890 So. 2d 506 (Fla. 2d DCA 2005), Sherrey v. State, 895 So. 2d 1195 (Fla. 2d DCA 2005)(new trial granted due to fundamental error in jury instructions, notwithstanding failure to object). The Cabrera case cites to Chicone v. State, 684 So. 2d 736 (Fla. 1996). "A defendant has the right to have a court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence. (Citation omitted). The use of the conjunction "and/or" erroneously permitted the conviction of each defendant for conspiracy to traffic in heroin on a finding that either of them conspired with

coconspirators in trafficking heroin, twenty eight grams or more." Cabrera at 507. In the case at bar, the jury was incorrectly and unintelligently instructed on the essential and material elements of the crime charged and required to be proved by competent evidence. The error in the jury instructions in the case at bar was fundamental, it was improperly procedurally barred by the lower court, and this error is not subject to a harmless error analysis. Reed v. State, 837 So. 2d 366 (Fla. 2002).

The State claims on page 7 of their response that "[t]he evidence at trial clearly showed that one or more persons in addition to Larzelere were involved in the murder of the victim," and that the trial court has "wide latitude in instructing the jury." This is incorrect according to the cases cited above. Because the State and the court opened the conspiracy to the entire world due to the jury instructions, the indictment was vague, indistinct, and subsequently unconstitutionally constructively amended, and Ms. Larzelere must be afforded a new trial. The failure to raise this meritorious issue on direct appeal constituted ineffective assistance of counsel and this constitutional error should be cured.

CONCLUSION

Based on the foregoing, Ms. Larzelere respectfully requests that this Court grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States mail to all counsel of record on this ___ day of July, 2006.

_____

David D. Hendry
Florida Bar No. 0160016
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544

The Honorable John W. Watson, III
Circuit Court Judge
Volusia County Courthouse
125 East Orange Avenue
Daytona Beach, FL 32114

Kenneth S. Nunnelley
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Boulevard, 5th Floor
Daytona Beach, FL 32118

Christopher Lerner
Assistant State Attorney
Office of the State Attorney
415 North Orange Avenue
Orlando, FL 32802

Virginia Larzelere
DOC# 842556
Lowell Correctional Institution
Women's Unit Annex
11120 N.W. Gainesville Road
Ocala, FL 34482-1479

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

David D. Hendry
Florida Bar No. 0160016
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544
Attorney for Petitioner