

**IN THE CIRCUIT COURT OF THE 10TH
JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR POLK COUNTY**

**CRIMINAL DIVISION
CASE NO. CF01-3262**

THE STATE OF FLORIDA,

Plaintiff,

v.

NELSON SERRANO,

Defendant/Petitioner.

_____ /

**SECOND AMENDMENT TO
MOTION FOR POST-CONVICTION RELIEF**

The Defendant, NELSON SERRANO, respectfully files this Second Amendment to his Motion for Post-Conviction Relief filed herein pursuant to Rule 3.851 of the Florida Rules of Criminal Procedure and states as follows:

The State withheld from the defense that the sole eyewitness, John Purvis, informed law enforcement that the individual seen standing outside of Erie

Manufacturing—the purported perpetrator—was likely Asian. During an interview on October 11, 1999 prior to his hypnosis, Mr. Purvis stated that:

*He looks like he could've been Asian, or maybe, he wasn't Caucasian, he might have been like Hispanic or something.*¹

*He looked like he was either Hispanic or Asian or something.*²

*[He had] thin black hair like a Mexican or Oriental.*³

Additionally, while under hypnosis, Mr. Purvis again reiterated that the individual was likely Asian stating, “[h]e looks like slanted eye folks do.”⁴

I. THE STATE’S SUPPRESSION OF EVIDENCE THAT MR. PURVIS INFORMED LAW ENFORCEMENT THAT THE PURPORTED PERPETRATOR WAS LIKELY ASIAN VIOLATED MR. SERRANO’S FEDERAL AND STATE DUE PROCESS RIGHTS UNDER *BRADY V. MARYLAND*

In order to establish a *Brady* violation, a defendant must demonstrate that the State willfully or inadvertently withheld evidence that is favorable to the accused because it is exculpatory or impeaching and that prejudice ensued. *Brady v. Maryland*, 373 U.S. 83 (1963); *Floyd v. State*, 902 So. 2d 775, 779 (Fla. 2005).⁵

Evidence that the man seen outside of Erie manufacturing—the presumed perpetrator—was likely Asian is plainly favorable to Mr. Serrano. The State

¹ Audio Cassette: Hypnotic Interview of John Purvis of Crime Scene Sketch, Tape 1 Side A 8:52 (Oct. 11, 1999) (emphasis added).

² *Id.* at 21:19 (emphasis added).

³ *Id.* at 21:40 (emphasis added).

⁴ *Id.* at 21:01 (emphasis added).

⁵ For an in-depth discussion of *Brady v. Maryland*, see Mr. Serrano’s initial Amendment to Motion for Post-Conviction Relief, 19-21.

asserted that the man seen outside of Erie Manufacturing was the perpetrator of the crime. Because Mr. Serrano is not Asian, any evidence that the likely perpetrator was Asian is plainly exculpatory.

Furthermore, Mr. Serrano could have used this evidence that the presumed perpetrator was Asian for impeachment. During the trial, Mr. Purvis testified that the man outside of Erie Manufacturing was Hispanic or Mediterranean of olive complexion.⁶ In addition, the composite sketch of the likely perpetrator that was admitted at the trial through Mr. Purvis was of a man with a dark complexion who was not Asian. If the State had not withheld evidence that Mr. Purvis previously informed investigators that the man outside of Erie Manufacturing might be Asian, Mr. Serrano would have impeached Mr. Purvis with this prior statement.

Thus, the State's suppression of evidence that the presumed perpetrator was possibly Asian prevented Mr. Serrano from presenting both highly exculpatory and impeaching evidence.

⁶ T. 3339 (“Q: [The man had] the type of complexion that led you to believe he was Hispanic? A: I knew he wasn’t Caucasian. Q: Any type of Mediterranean, olive complected (sic)? A: That’s correct.”)

II. THE STATE KNOWINGLY PERMITTED THE ADMISSION OF PERJURED TESTIMONY AND AN INACCURATE COMPOSITE SKETCH INDICATING THAT THE PURPORTED PERPETRATOR WAS HISPANIC IN VIOLATION OF MR. SERRANO'S STATE AND FEDERAL DUE PROCESS RIGHTS UNDER GIGLIO V. UNITED STATES

The State failed to inform Mr. Serrano and the Court that Mr. Purvis perjured himself when testifying that the individual he saw outside of Erie Manufacturing was Hispanic or Mediterranean. A *Giglio* violation occurs where (1) the testimony given was false, (2) the prosecutor knew the testimony was false, and (3) the statement was material. *Giglio v. United States*, 405 U.S. 150 (1972); *Guzman v. State*, 868 So. 2d 498, 505 (Fla. 2003). The State bears the burden of establishing that the false testimony was not material. *Id.* at 506 (“The State as the beneficiary of the *Giglio* violation, bears the burden to prove that the presentation of false testimony was harmless beyond a reasonable doubt.”).

As previously explained, Mr. Purvis testified that the man outside of Erie was “Hispanic,” “Mediterranean,” and “olive complected.” (T.3339). He also testified that the composite sketch of a man who does not look Asian but looks Hispanic or Mediterranean was accurate. (T.3384). Mr. Purvis, however, did not testify that the man was possibly Asian, as he had previously informed the State. Thus, this testimony falsely conveyed that the man Mr. Purvis saw was Hispanic or Mediterranean. The State knew Mr. Purvis’ testimony was false because Mr. Purvis previously told law enforcement that the individual might have been Asian.

Furthermore, this false testimony was plainly material. Mr. Purvis is the only witness who saw the man standing outside of Erie Manufacturing. Thus, by failing to correct Mr. Purvis's testimony, the State enabled the sole eyewitness to mislead the jury regarding whom he saw outside of the Erie Manufacturing at the time of the crime.

III. EVIDENCE THAT THE PURPORTED PERPETRATOR WAS ASIAN AUGMENTS MR. SERRANO'S ARGUMENT THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO DEPOSE THE SOLE EYEWITNESS, MR. PURVIS

Mr. Serrano's State and Federal due process rights were also violated by trial counsel's failure to depose the sole eyewitness. A defendant is entitled to relief in a post-conviction claim of ineffective assistance of counsel where (1) counsel's performance was deficient because the performance was outside the range of competent performance under prevailing professional standards, and (2) the defendant suffered prejudice because of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 693 (1984).

Mr. Serrano's trial counsel was ineffective because prevailing professional standards indicate that counsel should depose the sole eyewitness to the crime in question. Furthermore, this deficient performance clearly prejudiced Mr. Serrano. If Mr. Serrano's trial counsel had deposed the sole eyewitness, Mr. Purvis, Mr. Serrano would have discovered that Mr. Purvis identified the man standing outside

of Erie Manufacturing as likely Asian. Because Mr. Serrano is not Asian, he suffered prejudice due to trial counsel failure's to discover this enormously favorable evidence.

CONCLUSION

The State failing to disclose and enabling perjured testimony led to a compromised trial that excluded compelling evidence of Mr. Serrano's innocence. Mr. Serrano's trial counsel's failure to depose Mr. Purvis exacerbated this harm and the prejudice Mr. Serrano suffered.

For the foregoing reasons, Mr. Serrano respectfully requests that this Court vacate his convictions and sentence of death and order a new trial.⁷ Additionally, Mr. Serrano requests an evidentiary hearing on the matters set forth in this Second Amendment.

⁷ Mr. Serrano also reserves the right to supplement this Second Amendment in light of the fact that the State still has not provided a complete copy of the audio recording and any copy of the video recording of Mr. Purvis' interview on October 11, 1999.

OATH

Under penalties of perjury, I declare that I have read the foregoing Amendment/Supplement to my Motion for Post-Conviction Relief and that the facts stated in it are true.

NELSON SERRANO

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John Agüero, Assistant State Attorney, 255 N. Broadway Avenue, Bartow, FL 33830 and to the Office of the Attorney General, Attn: Stephen D. Ake, Esq., Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33706-7013 on the ____ day of July 2013.

BY: _____
MARCIA J. SILVERS, ESQ.