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.

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AMENDMENT TO MOTION FOR POST-CONVICTION RELIEF

The Defendant, NELSON SERRANO, respectfully files this 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:

I. THE STATE WITHHELD EXCULPATORY EVIDENCE THAT WOULD HAVE PROHIBITED A DEATH SENTENCE

The State did not disclose the following information prior to Mr. Serrano's trial or sentencing:

On August 23, 2002, the United States government completed its Request for the Extradition of Nelson Ivan Serrano from Ecuador ("Extradition Request"). As part of the Extradition Request, the United States stipulated:

> After due consideration, and pursuant to applicable principles of international law, the Government of the United States assures the government of Ecuador that if Nelson Ivan Serrano is extradited by Ecuador ***the death penalty will not be sought or imposed in this case***.[1]

(emphasis added). The United States Department of State and Department of Justice certified the Extradition Request. Assistant State Attorney Paul Wallace and Florida Department of Law Enforcement ("FDLE") Agent Tommy Ray submitted affidavits in support of the Extradition Request. The Ecuadorian Consulate in Washington D.C. authenticated the document, making it admissible in Ecuadorian courts.

Although a DEA country attaché instructed that there "[wasn't] any value in [Agent] Ray or a prosecuting attorney visiting Ecuador prior to the issuance of a [sic] arrest warrant and the actual arrest of Serrano,"[2] on or about August 25, 2002, Assistant State Attorney Wallace, FDLE Agent Ray, and retired FDLE Agent Caso traveled to Ecuador with the United States government's Extradition Request in

[1] Request for the Extradition of Nelson Ivan Serrano, from Susana Lorenzo-Giguere, Trial Attorney, U.S. Dep't of Justice, to Linda Jacobson, U.S. Dep't of State (Aug. 23, 2002) a copy of which is attached hereto as Exhibit 1.

[2] Memorandum from Special Agent Supervisor, David R. Waller, Fla. Dep't of Law Enforcement, to Reg'l Dir., James D. Sewell, Fla. Dep't of Law Enforcement (May 29, 2002) a copy of which is attached hereto as Exhibit 2.

hand.[3] While in Ecuador, Assistant State Attorney Wallace and FDLE Agent Ray presented an extensive PowerPoint describing the evidence against Mr. Serrano. Unlike the United States Extradition Request, Florida's PowerPoint argued that Mr. Serrano was solely a United States citizen and deceptively omitted the fact that he was also an Ecuadorian citizen.[4] During the afternoon of August 29, 2002, Assistant State Attorney Wallace and other Florida law enforcement officials met with the President of the Ecuadorian Supreme Court to discuss Mr. Serrano's extradition and immediate incarceration.[5]

A few hours after discussing the extradition of Mr. Serrano with the Ecuadorian Supreme Court, Assistant State Attorney Wallace acted to have Mr. Serrano—an Ecuadorian citizen—deported.[6] Despite the United States government's pending Extradition Request, representatives of Florida, including Assistant State Attorney Wallace and other Florida law enforcement officials, collaborated with the Ecuadorian police to arrange Mr. Serrano's arrest and deportation. Assistant State Attorney Wallace relied heavily on a retired Ecuadorian police officer,[7] Maj. Jorge Pastor, to collect evidence of Mr. Serrano's United States citizenship. Assistant State Attorney Wallace reviewed Maj. Pastor's

[3] Trial Tr. vol. 35, 5896 Oct. 6 2006 (FDLE Agent Ray's testimony) a copy of which is attached hereto as Exhibit 3.
[4] See Final Page of Ecuador PowerPoint Presentation (Aug. 2002) a copy of which is attached hereto as Exhibit 4.
[5] FDLE Rep. #1076 (Aug. 29, 2002) a copy of which is attached hereto as Exhibit 5.
[6] *Id.*
[7] DEA Country Attaché Hudson claimed that Maj. Pastor worked with the DEA.

work on a daily basis.[8] Maj. Pastor prepared a document arguing that Mr. Serrano, who, in fact, had dual citizenship in the United States and Ecuador, was not an Ecuadorian citizen and requesting his deportation from Ecuador ("Deportation Request"). [9] Florida law enforcement paid Maj. Pastor[10] $300-600.[11]

This Deportation Request, which was considered by Ecuadorian authorities,[12] differed significantly from the United States' Extradition Request. No representative of the United States government certified this request. The Ecuadorian government did not authenticate it. The Deportation Request repeatedly asserted that Mr. Serrano was a United States citizen and deceptively omitted the fact that he was also a citizen of Ecuador. [13] Furthermore, the

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[8] FDLE Rep. #1074 (Aug. 27, 2002) a copy of which is attached hereto as Exhibit 6; FDLE Rep. #1076 (Aug. 29, 2002) a copy of which is attached hereto as Exhibit 5.

[9] Deportation Request, Maj. Jorge Pastor, (August 2002) (found in State Attorney's file with cover sheet indicating it was prepared by Maj. Jorge Pastor) a copy of which is attached hereto as Exhibit 7.

[10] His full name is Jorge Luis Pastor Peñaherrera. Ecuadorian names include the first name, middle name, father's last name, and mother's last name. Although he is referred to as "Maj. Peñaherrera" in some instances, his legal name in the United States is Jorge Pastor.

[11] R. at 2399-2400, FDLE Agent Ray's testimony (Mar. 15, 2007), from Hearing on Amended and Supplemental Motion to Dismiss the Indictment and Divest the Court of Jurisdiction, a copy of which is attached hereto as Exhibit 8; Letter from Michael R. Ramage, Gen. Counsel, Fla. Dep't of Law Enforcement, to Lt. Col. Acosta Jativa, Ecuador National Police (2007) a copy of which is attached hereto as Exhibit 9. Page 1 of Exhibit 9 is slanted because undersigned counsel has not been able to obtain a better copy of it.

[12] Revised Deportation Request, Maj. Jorge Pastor (Aug. 2002) (attached to the Ecuadorian deportation process) a copy of which is attached hereto as Exhibit 10.

[13] Revised Deportation Request, Maj. Jorge Pastor (Aug. 2002) (attached to the Ecuadorian deportation process) a copy of which is attached hereto as Exhibit 10; *see* R. at 2420, Ombudsman Claudio Mueckay's testimony (Mar. 15, 2007), from Hearing on Amended and Supplemental Motion to Dismiss the Indictment and Divest the Court of Jurisdiction, a copy of which is attached hereto as Exhibit 11 ("Q: In these proceedings does the record reflect that the truth about Mr. Nelson Serrano being an Ecuadorian citizen, were they withheld from this police chief that acted as the hearing officer? A: That's correct…").

Deportation Request did not alert Ecuadorian authorities that Mr. Serrano might face the death penalty although Assistant State Attorney Wallace plainly knew that the crimes for which Mr. Serrano was indicted were punishable by death.

The State Attorney's Office also knew that Mr. Serrano was an Ecuadorian citizen. In February 2002, Assistant State Attorney John Aguero completed provisional arrest request forms, one of the steps for the United States Extradition Request, where he identified Mr. Serrano as a dual Ecuadorian and United States citizen.[14] Prior to seeking Mr. Serrano's deportation, FDLE Agent Ray created a wanted poster for Mr. Serrano where he noted Mr. Serrano's Ecuadorian passport number.[15] Indeed, Assistant State Attorney Aguero solicited FDLE Agent Ray's testimony during the trial that he knew Mr. Serrano had dual citizenship in Ecuador and the United States at the time Agent Ray traveled to Ecuador.[16] The 1998 Ecuadorian Constitution even explicitly states, "Ecuadorians by birth who have been naturalized or naturalize in other countries may retain Ecuadorian citizenship."[17]

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[14] Letter from John Aguero, Assistant State Attorney, Office of State Attorney Tenth Judicial Cir. of Fla., to Mike Heineman, U.S. Dep't of Justice (Feb. 22, 2002) a copy of which is attached hereto as Exhibit 12.

[15] FDLE Wanted Poster, a copy of which is attached hereto as Exhibit 13; FDLE Rep. #1037 (May 16, 2002) a copy of which is attached hereto as Exhibit 14.

[16] Trial Tr, vol. 35, 5895 Oct. 6, 2006 a copy of which is attached hereto as Exhibit 15.

[17] Constitution of 1998 June 5, 1998 title 2, ch. 1, art. 11 (Ecuador) *available at* http://pdba.georgetown.edu/constitutions/Ecuador/ecuador98.html a copy of which is attached hereto as Exhibit 16.

The State Attorney's Office also knew that Mr. Serrano could not lawfully face the death penalty if extradited. The United States government copied Assistant State Attorney Wallace on the Extradition Request from the United States Department of Justice, which explicitly stated, "the death penalty will not be sought or imposed in this case."[18] In May 2002, a United States government attaché informed the State Attorney's Office that Mr. Serrano could be extradited and "[t]he only proviso on extradition is that he can't be extradited for a crime where he might be given the death penalty."[19]

On August 31, 2002, through the joint efforts of Assistant State Attorney Wallace and other Florida law enforcement officials and Ecuadorian police, an impromptu deportation hearing ordered Mr. Serrano's removal from Ecuador and delivery to United States authorities in order to stand trial for the charges against him in this case. At 8 a.m. the next morning, September 1, 2002, Mr. Serrano was delivered to FDLE Agent Ray's custody who transported him back to Florida. Subsequently, the Government of Ecuador and the Inter-American Commission on

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[18] Request for the Extradition of Nelson Ivan Serrano, from Susana Lorenzo-Giguere, Trial Attorney, U.S. Dep't of Justice, to Linda Jacobson, U.S. Dep't of State (Aug. 23, 2002) a copy of which is attached hereto as Exhibit 1. Indeed, the United States *Foreign Affairs Manual* requires that "***[w]hen assurances are provided by state authorities***, OIA and L/LEI carefully examine them and, if they are acceptable to the Departments of Justice and State, L/LEI instructs the post to submit by note the formal assurance of the U.S. Government (not that of state authorities) that the death penalty will not be imposed or, if imposed, will not be carried out." 7 F.A.M. 1646.

[19] Memorandum from Special Agent Supervisor, David R. Waller, Fla. Dep't of Law Enforcement, to Reg'l Dir., James D. Sewell, Fla. Dep't of Law Enforcement (May 29, 2002) a copy of which is attached hereto as Exhibit 2.

Human Rights for the Organization of American States condemned the proceedings.[20]

During the sentencing phase, following Mr. Serrano's conviction in Polk County, the State Attorney's Office received a letter from the Ecuadorian Government protesting the possible imposition of the death penalty. The State Attorney's Office did not disclose this letter to Mr. Serrano.[21]

A. The State of Florida Interfered With the United States Government's Foreign Policy Decision Not to Seek or Impose the Death Penalty

By orchestrating an illegal deportation based on false assertions and deceptive omissions of determinative evidence, such as Mr. Serrano's dual citizenship and the fact that he was subject to a death sentence, Assistant State Attorney Wallace and other Florida law enforcement officials interfered with the federal government's exclusive power over foreign relations. The foreign policy decisions of the United States supersede the interests of individual states. The United States government sought Mr. Serrano's extradition under the condition that he would not face the death penalty. The State of Florida's imposition of the

[20] Nelson Iván Serrano Saenz, Case 12.525, Inter-Am. Comm'n H.R., Report No. 84/09, Art. 51 (Publication) (Aug. 6, 2009) a copy of which is attached hereto as Exhibit 17; Letter from Martha Carera Agreda, Consul of Ecuador, Gen. Consulate of Ecuador Miami Fla., to Jerry Hill, State Attorney for the 10th Jud. Cir. of Fla. (Jan. 25, 2007) a copy of which is attached hereto as Exhibit 18.

[21] Letter from Martha Carera Agreda, Consul of Ecuador, Gen. Consulate of Ecuador Miami Fla., to Jerry Hill, State Attorney for the 10th Jud. Cir. of Fla. (Jan. 25, 2007) a copy of which is attached hereto as Exhibit 18.

death penalty, therefore, conflicts with the foreign policy decision of the United States.

Only the federal government can enter into agreements for the surrender of a fugitive in a foreign country. *Rauscher v. United States*, 119 U.S. 407, 414 (1886) citing *Holmes v. Jennison*, 39 U.S. 540, 570 (1840).

> It can hardly be admitted that, even in the absence of treaties or acts of Congress on the subject, the extradition of a fugitive from justice can become the subject of negotiation between a state of this Union and a foreign government.

Rauscher, 119 U.S. at 414. Individual states cannot participate or interfere in the United States' negotiations for fugitives with other sovereign nations. *See Holmes*, 39 U.S. at 570 ("The exercise of the power in question by the states, is totally contradictory and repugnant to the power granted to the United States."); *cf. United States v. Pink*, 315 U.S. 203, 233 (1942) ("No state can rewrite United States foreign policy to conform to its own domestic policies.").

Any agreement between a state and foreign nation such as that which occurred here violates the federal government's exclusive power over foreign intercourse. *See Rauscher*, 119 U.S. at 412-14 (including examples of individual states entering into extradition agreements with foreign nations which conflicted with the United States' power over foreign relations). Even inaction by the federal government does not enable an individual state to engage in negotiations and agreements with foreign nations. *See Holmes*, 39 U.S. at 576 ("From [foreign

relations'] nature, it can never be dormant in the hands of the general government."); *People ex rel. Barlow v. Curtis*, 50 N.Y. 321, 326 (1872) ("[foreign relations are] necessarily in active exercise by the government when acting or omitting to act.").

To determine if a state and foreign nation entered into an agreement, courts look to the substance of an interaction between the state and foreign nation. *Holmes*, 39 U.S. at 573. In *Holmes*, Vermont attempted to surrender an accused criminal to Canadian authorities. *Id.* Vermont argued that it did not enter into agreement with Canada because the Canadian government did not submit a formal written demand. *Id.* The Court, however, found an implicit agreement between Vermont and Canada because Vermont ordered the delivery of the fugitive to Canadian authorities. *Id.* ("From the nature of the transaction, the act of the delivery necessarily implies mutual agreement."). The Court reasoned:

> Can it be supposed that the constitutionality of the act depends on the mere form of the agreement? We think not. The Constitution looks to the essence and substance of things, and not to mere form. It would be but an evasion of the Constitution to place the questions upon the formality with which the agreement was made.

Id. at 574. Any dialogue that substantively amounts to an agreement between a state and foreign nation invades the federal government's constitutionally[22] protected power over foreign affairs. *Id.*

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[22] The power to enter into negotiations for the surrender of a fugitive "has undoubtedly been conferred on the federal government…[and] is clearly included in the treaty-making power, and

The foreign policy decisions of the United States government supersede the interests of individual states. *Id.* at 575 ("[I]t being conceded on all hands, that the power has been granted to the general government, it follows that it cannot be possessed by the states."); *see Rauscher*, 119 U.S. at 430 (explaining that the federal government's agreements with sovereign nations are "to be observed by all courts, state and national, 'anything in the laws of the states to the contrary notwithstanding"); *cf. Pink*, 315 U.S. at 233 ("state law must yield when it is inconsistent with, or impairs the policy or provisions, of a treaty or of an international compact or agreement"). In *Holmes*, *supra*, the Court noted that because the United States rarely surrendered fugitives, Vermont's agreement to surrender a fugitive to Canada interfered with United States foreign policy. 39 U.S.

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the corresponding power of appointing and receiving ambassadors and other public ministers." *Holmes* 39 U.S. at 569. Additionally, the United States Constitution forbids individual states from entering into agreements with foreign countries. U.S. Const. art 1 § 10 ("No state shall enter into any Treaty, Alliance, or confederation…No state shall, without the consent of Congress…enter into any agreement or compact with another state, or with a foreign power"); *Holmes*, 39 U.S. at 572 ("The word agreement does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, it is an "agreement." And the use of all of these terms "treaty," "agreement," "compact," show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a state and a foreign power: and we shall fail to execute that evident intention, unless we give to the word "agreement" its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.) Furthermore, "where an authority is granted to the Union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant, there the authority to the federal government is necessarily exclusive; and the same power cannot be constitutionally exercised by the states." *Holmes*, 39 U.S. at 574. *Holmes* held that "[t]he exercise of the power in question [,foreign relations,] by the states, is totally contradictory and repugnant to the power granted to the United States." *Id.*

at 574-76 (holding that a state's exercise of foreign relations is "totally contradictory and repugnant to the power granted to the federal government.") On remand, the fugitive was discharged pursuant to the United States federal government's decision to not engage in fugitive surrenders or demands. *Id.*

Here, the United States government decided to extradite Mr. Serrano under assurances that Florida would not seek the death penalty. The United States Department of State and Department of Justice confirmed and certified this Extradition Request. Furthermore, the federal government presented the Extradition Request to the Ecuadorian Consulate in Washington D.C. where it was duly authenticated by the Ecuadorian Consulate, making it admissible in Ecuadorian courts. Assistant State Attorney Wallace submitted his sworn statement to support the Extradition Request and traveled to Ecuador with the Extradition Request in hand.

The State of Florida, through Assistant State Attorney Wallace, then unconstitutionally entered into an agreement with Ecuador that conflicted with the federal government's Extradition Request.[23] On August 29, 2002, only hours after he discussed the United States government's request for Mr. Serrano's extradition

[23] The United States Office of International Affairs, which issued the Extradition Request did not issue the Deportation Request. We know this because (1) although questioned extensively about Mr. Serrano's removal, Agent Ray never testified that the United States government made a formal request for Mr. Serrano's deportation; (2) two previous investigations by Ecuador and the Inter-American Commission on Human Rights for the Organization of American States did not reflect a finding of such a request by the United States government; and (3) the removal did not comport with the deportation request process defined by the United States Department of State *Foreign Affairs Manual*; 7 F.A.M. 1642.

with the President of the Ecuadorian Supreme Court, Assistant State Attorney Wallace acted to have Mr. Serrano deported instead. Maj. Pastor's Deportation Request, created at the behest of Assistant State Attorney Wallace, demonstrates an agreement to deliver Mr. Serrano to authorities in the United States so he would stand trial in Florida. *See Holmes*, 39 U.S. at 572-73 (finding an implicit agreement through an order requiring law enforcement to hand over the fugitive to Canadian authorities). As previously explained, an Assistant State Attorney cannot lawfully request a foreign nation to remove one of its citizens. *See e.g. Rauscher*, 19 U.S. at 414 (holding that a state cannot negotiate the removal of a fugitive with a foreign nation).

The Deportation Request, as previously discussed, failed to notify Ecuadorian authorities that Mr. Serrano would face the death penalty and wrongfully asserted that Mr. Serrano was not an Ecuadorian citizen. In contrast, the United States' Extradition Request informed Ecuador that the charges against Mr. Serrano were punishable by death in the assurance or compromise by the United States not to seek capital punishment and did not deny Mr. Serrano's claim to Ecuadorian citizenship. Thus, Assistant State Attorney Wallace interfered with the United States government's foreign policy by seeking a different remedy based on different claims using deceptive means.

Finally, but for Assistant State Attorney Wallace and other Florida law enforcement officials' unconstitutional interference with the federal government's extradition proceedings, Mr. Serrano would not have faced the death penalty. The valid Ecuadorian passport—known to the State Attorney's Office since early 2002—was not noted in the Deportation Request. The Deportation Request also failed to notify Ecuadorian authorities that Mr. Serrano faced the death penalty. Ecuador will not remove an individual facing the death penalty. Assistant State Attorney Wallace, acting on behalf of the State of Florida, improperly misled Ecuadorian authorities in order to secure Mr. Serrano's deportation. Because the State of Florida's willful interference in the United States government's extradition request caused Mr. Serrano to face the death penalty when he otherwise would not, imposition of the death penalty is impermissible. *Holmes*, 39 U.S. at 575; *cf. Pink*, 315 U.S. at 233 ("state law must yield when it is inconsistent with, or impairs the policy or provisions, of a treaty or of an international compact or agreement").

B. Alternatively, Because Mr. Serrano's "Removal" from Ecuador Was a De Facto Extradition, the Principle of Specialty Prohibits Imposition of the Death Penalty

Assuming *arguendo* that this Court should find that the State did not obstruct the request for Mr. Serrano's extradition, Mr. Serrano's removal from Ecuador constituted a de facto extradition under the condition that the death penalty not be imposed.

International extradition contemplates "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." *Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

Extradition proceedings require a formal request by the federal government. *See Stevenson v. United States*, 381 F.2d 142, 144 (9th Cir. 1967) ("While the formalities of extradition may be waived by the parties to the treaty, a demand in some form by the one country upon the other is required, in order to distinguish extradition from the unilateral act of one country…"); *Trujillo v. United States*, 871 F. Supp. 215, 220 (Del. 1994) (holding that the defendant was not extradited when the United States did not make any express or implicit request for the defendant).

Courts do not determine the validity of an extradition based on technicalities and formalities. *See Grin v. Shine*, 187 U.S. 181, 185 (1902) ("where the proceeding is manifestly taken in good faith, a technical noncompliance with some formality of criminal procedure should not be allowed to stand in the way of a faithful discharge of our obligations"); *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925) ("Form is not to be insisted upon beyond the requirements of safety and

justice."); *Bingham v. Bradley*, 241 U.S. 511, 517 (1916) (explaining that "objections [that] savor of technicality" are unpersuasive in extradition matters).

During the prosecution of an extradited defendant, the court must comply with any assurances made to the surrendering country. This obligation, "specialty," requires that the demanding state "'live up to whatever promises it made in order to obtain extradition' because preservation of the institution of extradition requires the continuing cooperation of the surrendering state." *Saccoccia v. United States*, 58 F.3d 754, 767 (1st Cir. 1995) citing *Najohn v. United States*, 785 F.2d 1420, 1422 (9th Cir. 1986); *see Rauscher*, 119 U.S. at 424 (holding that an extradited defendant can only be tried for the crimes specified in the extradition treaty). Courts must act in accordance with specialty by determining "whether, under the totality of the circumstances, the court in the requesting state reasonably believes that prosecuting the defendant on particular charges contradicts the surrendering state's manifested intentions." *Id.* Specialty "is not a hidebound dogma, but must be applied in a practical, commonsense fashion." *Saccoccia*, 58 F.3d at 767.

The principle of specialty often has been held to prohibit the imposition of the death penalty. *See De Asa Sanchez v. United States*, 323 F. Supp. 2d 403, 404 (E.D.N.Y. 2004) ("when a person is extradited with the limitation imposed by the extraditing state that a conviction will not result in a death sentence, federal courts

will honor the limitations"); *Gordon v. State*, 148 N.H. 710, 718 (2002) ("the doctrine of specialty places limits on the offenses for which a defendant may be prosecuted but not on the sentence imposed, unless it is a sentence of death"); Restatement (Third) of the Foreign Relations Law of the United States, § 477 Comment f. (1987) ("If the requested state surrenders a person on condition that the death sentence not be imposed, the condition is binding on the requesting state.").

Here, the United States completed a formal Extradition Request for Mr. Serrano with all required documents. The Extradition Request was certified by the Department of State; certified by the Department of Justice; authenticated by the Ecuadorian Consulate; and supported by affidavits, the indictment, the arrest warrant, and copies of relevant evidence. Mr. Serrano's Extradition Request included a description of the crime of first-degree murder; a statement of the facts of the homicides; the statutes which described the elements of first-degree murder; the descriptions of the possible punishments; the limitation that the death penalty would not be sought or imposed; the identifying documents; a certified copy of the arrest warrant issued by Judge Karla Foreman Wright; and a description of the evidence against Mr. Serrano. Thus, the United States pursued Mr. Serrano's extradition.

The Extradition Request was submitted to Ecuadorian officials. Officials from the United States government and law enforcement officers from Florida met with Ecuadorian authorities to discuss the extradition. In fact, Assistant State Attorney Wallace and other Florida law enforcement officials discussed Mr. Serrano's extradition and immediate incarceration with members of the Ecuadorian Supreme Court.[24]

Furthermore, Mr. Serrano's removal from Ecuador comported with the requirements of the extradition treaty between the United States and Ecuador. The extradition procedure outlined in the Ecuador-United States Extradition Treaty states:

> When the fugitive is merely charged with a crime, a duly authenticated copy of the warrant for his arrest in the country where the crime has been committed, and of any evidence in writing upon which such warrant may have been issued, must accompany the aforesaid requisition. The President of the United States, or the proper executive authority of Ecuador, may then order the arrest of the fugitive, in order that he may be brought before the judicial authority, which is competent to examine the question of extradition. If, then, according to the evidence and the law, it be decided that extradition is due in conformity with this treaty, the fugitive shall be delivered up, according to the forms prescribed in such cases.

18 Stat. 756, 1873 WL 15435 (U.S./Ecuador Treaty, Article V). Mr. Serrano's removal process followed these instructions. The United States Office of International Affairs completed an extradition request with an authenticated copy of the arrest warrant and supporting affidavits. The Ecuadorian government

[24] FDLE R. # 1076 a copy of which is attached hereto as Exhibit 5.

received the Extradition Request. Furthermore, Agent Ray's presentation to members of the Ecuadorian judiciary and executive branch included an in-depth explanation of the evidence against Mr. Serrano. The proper executive authority of the United States, the Attorney General and Secretary of State, signed the Extradition Request. Then, the State of Florida requested an Ecuadorian authority to order Mr. Serrano's arrest. A police officer, occupying a judicial role, determined that removal was appropriate. Finally, the decision to remove Mr. Serrano was based on the criminal charges pending against him in the United States.

Deeming Mr. Serrano's removal anything but an extradition is a surrender to form over substance. Mr. Serrano was not removed through unilateral deportation. *See Stevenson*, 381 F.2d at 144 ("a demand in some form by the one country upon the other is required, in order to distinguish extradition from the unilateral act of one country, for its own purposes, deporting or otherwise unilaterally removing unwelcome aliens.") The United States specifically requested his removal through a certified Extradition Request. Ecuadorian authorities removed him for the express purpose of handing him over to the custody of law enforcement from the United States in order stand trial for the charges against him. Mr. Serrano was substantively extradited. An appeal to form will not invalidate an extradition.

Fernandez, 268 U.S. at 312 ("Form is not to be insisted upon beyond the requirements of safety and justice.").

Because Mr. Serrano was extradited, the doctrine of specialty prohibits the death penalty. The United States Government explicitly stated that Mr. Serrano would not face the death penalty if extradited. Courts are bound by promises to not impose the death penalty made to sovereign nations. *De Asa Sanchez*, 323 F. Supp. 2d at 404 ("when a person is extradited with the limitation imposed by the extraditing state that a conviction will not result in a death sentence, federal courts will honor the limitations"); Restatement (Third) of the Foreign Relations Law of the United States, § 477 Comment f. (1987) ("If the requested state surrenders a person on condition that the death sentence not be imposed, the condition is binding on the requesting state."). The United States made assurances that Mr. Serrano would not face the death penalty, Ecuador heard these assurances, and Ecuador extradited Mr. Serrano to the United States. These assurances control and, accordingly, the State cannot impose the death penalty in this case.

C. The State's Failure to Disclose the United States Government's Assurance that the Death Penalty Would Not Be Sought Violated Mr. Serrano's Federal and State Due Process Rights under *Brady v. Maryland*

Both the United States Supreme Court and Florida courts have noted that regardless of request, favorable, exculpatory or impeachment evidence is material,

and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defendant, the result of the proceeding would have been different. In *Rogers v. State*, 782 So.2d 373 (Fla. 2001), the Florida Supreme Court went to some lengths to explain the State's constitutional obligation to disclose exculpatory evidence under the U.S. Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963). That explanation is equally pertinent to this Court's analysis in this case:

> In *Brady*, the United States Supreme Court held that the "suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S. Ct. 1194. In *Kyles*, the Court wrote: [*United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985),] held that regardless of request [by defendant], favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. at 681, 105 S.Ct. 3375 (opinion of Blackmun, J.); *id.*, at 685, 105 S.Ct. 3375 (White, J., concurring in part and concurring in judgment). *Kyles*, 514 U.S. at 433-434, 115 S.Ct. 1555 (emphasis added). Recently, in *Young v. State*, 739 So.2d 553 (Fla. 1999), we recognized this emphasis placed on the materiality prong and stated: [Although] defendants have the right to pretrial discovery under our Rules of Criminal Procedure, and thus there is an obligation upon defendant to exercise due diligence pretrial to obtain information ... the focus in post-conviction *Brady-Bagley* analysis is ultimately the nature and weight of undisclosed information. The ultimate test in backward looking post-conviction analysis is whether information which the State possessed and did not reveal to the defendant and which information was thereby unavailable to the defendant for trial, is of such a nature and weight that confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been

disclosed to the defendant, the result of the proceeding would have been different. *Young*, 739 So.2d at 559. One week after our decision in *Young*, the United States Supreme Court decided *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), confirming its analysis in *Kyles*. In *Strickler*, the court stated again the rules which must be applied to this case: In *Brady* this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 87, 83 S.Ct. 1194. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagle*y, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682, 105 S.Ct. 3375; *see also Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." *Id.* at 438, 115 S.Ct. 1155. In order to comply with *Brady*, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles*, 514 U.S. at 437, 115 S.Ct. 1555. These cases, together with earlier cases condemning the knowing use of perjured testimony, illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88,55 S.Ct. 629, 79 L.Ed.2d 1314 (1935).

Rogers, 782 So.2d at 377-78. In *Rogers*, the Florida Supreme Court ultimately determined that there was a *Brady* violation and the defendant was entitled to a new trial because of the violation.

In order to establish a *Brady* violation, a defendant must prove: (1) the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *Floyd v. State*, 902 So.2d 775, 779 (Fla. 2005); Carroll v. State, 815 So.2d 601, 619 (Fla. 2002) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). In applying these three elements, the suppressed evidence must be considered in the context of the entire record. *Floyd*, supra.

While an evidentiary hearing is needed to sift through the complexities and irregularities surrounding Mr. Serrano's removal from Ecuador, it is clear that the State failed to disclose to Mr. Serrano the United States government's assurances that he would not face the death penalty and the State Attorney's extensive, deceptive, hands-on involvement in Mr. Serrano's de facto extradition. This evidence was plainly favorable to Mr. Serrano because it established that the State, in violation of the United States Constitution, interfered with the federal government's extradition request, or that a de facto extradition occurred under

assurances that the death penalty would not be sought. But for this *Brady* violation the death penalty would not have been imposed in this case.

II. THE STATE'S FAILURE TO DISCLOSE THE UNITED STATES' ASSURANCE THAT THE DEATH PENALTY WOULD NOT BE SOUGHT OR IMPOSED AND THE STATE'S EXTENSIVE INVOLVEMENT IN MR. SERRANO'S "REMOVAL" FROM ECUADOR PREVENTED MR. SERRANO FROM PRESENTING PERSUASIVE MITIGATING EVIDENCE, IN VIOLATION OF HIS FEDERAL AND STATE DUE PROCESS RIGHTS

During the penalty phase of the trial, the United States Constitution protects the expansive right to present mitigating evidence during penalty phase proceedings. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Mitigating evidence encompasses any matter that the "sentencer could reasonably find that warrants a sentence less than death." *Tennard v. Dretke*, 542 U.S. 274, 285 (2004); *see Payne v. Tennessee*, 501 U.S. 808, 822 (1991) ("[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances."). Mitigating evidence is not limited to evidence that reduces the moral culpability of the defendant. *Wong v. Belmontes*, 558 U.S. 15, 28 (2009).

"Questionable extradition procedures may also give rise to mitigating circumstances to be considered during sentencing." *Karake v. United States*, 281 F. Supp. 2d 302, 309 (D.D.C. 2004); *see Bin Laden v. United States*, 156 F. Supp. 2d 359, 367 (S.D.N.Y. 2001). In *Bin Laden*, the defendant was summarily removed from South Africa and handed over to United States law enforcement based upon

his involvement in the bombing of the United States Embassy in Tanzania. *Id.* After his removal, the highest court in South Africa ruled that his removal violated South African and international law because South Africa did not receive assurances that the United States would not impose the death penalty. *Id.* Based upon this ruling, the district court permitted the defendant to present mitigating evidence that he should not receive the death penalty because equally culpable defendants would not be punished by death.[25] *Id.*

During the penalty phase, a capital defendant may present evidence that he would not be facing the death penalty if proper extradition procedures had been followed. *Bin Laden*, *supra*, *Karake*, 281 F. Supp. 2d at 309. "In light of the expansive approach taken towards mitigating factors…the government is required to disclose any evidence that the United States represented to any foreign government that defendants would not be subject to the death penalty upon extradition." *Karake*, 281 F. Supp. 2d at 309. In *Karake*, the defendants were permitted to discover evidence of cooperation between the United States and Rwandan governments, assurances made to the Rwandan government, and improprieties in the defendant's removal from Rwanda. *Id.*

Significantly, improper extradition is a persuasive mitigating factor. *Bin Laden*, 156 F. Supp. 2d at 371. During the penalty phase in *Bin Laden*, eleven

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[25] There, all co-defendants were extradited upon assurances that they would not face the death penalty. *Bin Laden*, 156 F. Supp. at 370.

jurors found the mitigating factor that other equally culpable co-defendants who were properly extradited would not receive a death sentence. *Id.* Ultimately, the jury did not reach a unanimous verdict and the defendant was sentenced to life in prison. *Id.*

As previously explained, a defendant will successfully establish a *Brady* violation when (1) the evidence is favorable to the accused, (2) the State willfully or inadvertently suppressed the evidence; (3) the defendant suffered prejudice; and (4) the State cannot satisfy the burden of establishing that the omission was harmless error. *Floyd v. State*, 902 So.2d 775, 779 (Fla. 2005); *Carroll v. State*, 815 So.2d 601, 619 (Fla. 2002) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)).

Here, the following circumstances surrounding Mr. Serrano's removal from Ecuador, which the State willfully did not disclose to Mr. Serrano, are favorable to Mr. Serrano because they provide a basis for a sentence less than death: (1) as part of the Extradition Request, the United States government assured the Ecuadorian government that Mr. Serrano would not face the death penalty, (2) the United States pursued Mr. Serrano's extradition, (3) the State prosecutor, who knew that Mr. Serrano was an Ecuadorian citizen, went to Ecuador and sought Mr. Serrano's deportation while the United States' Extradition Request was pending, (4) the Deportation Request did not advise Ecuadorian authorities that Mr. Serrano would

face the death penalty, and (5) prior to Mr. Serrano being sentenced, Ecuador sent a letter to the State Attorney's Office protesting the imposition of the death penalty. Indeed, Mr. Serrano plainly would not have faced the death penalty if properly extradited.

Mr. Serrano should have been given the opportunity to present evidence at the penalty phase of the United States' promise not to seek the death penalty and Florida authorities' wrongful action designed to usurp that promise. Assistant State Attorney Wallace and other Florida law enforcement officials requested and assisted in illegally removing Mr. Serrano from Ecuador. The Ecuadorian state and the Inter-American Commission on Human Rights for the Organization of American States condemned this removal proceeding. Because the United States assured Ecuador that Mr. Serrano would not face the death penalty if extradited, Mr. Serrano would not have faced the death penalty if properly extradited. Similar to *Bin Laden*, had the proper extradition procedure been followed, Mr. Serrano could not have been sentenced to death. 156 F. Supp. 2d at 371 (explaining that the defendant was illegally removed from South Africa in a process condemned by the highest South African court).

Because unlawful extradition procedures led to Mr. Serrano's death sentence, Mr. Serrano should have been given the opportunity to present evidence of his illegal removal from Ecuador to the sentencer. *See id.* (permitting the

defendant to present evidence that he would not face the death penalty if proper extradition procedures were followed); *Karake*, 281 F. Supp. 2d at 309 ("Questionable extradition procedures may also give rise to mitigating circumstances to be considered during sentencing."); *cf. Payne*, 501 U.S. at 822 ("[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.").

The State cannot satisfy its burden of proving its failure to disclose this mitigating evidence to Mr. Serrano was harmless. As previously explained, in *Bin Laden*, eleven jurors found that the questionable removal proceedings, which led to the defendant facing the death penalty were persuasive and mitigating against imposition of the death penalty. 156 F. Supp. 2d at 371. The defendant was ultimately sentenced to life imprisonment.

If properly extradited, Mr. Serrano would not have faced the death penalty. The illegalities and improprieties perpetrated and undisclosed by the State of Florida during Mr. Serrano's removal from Ecuador provide a basis for a sentence less than death. In light of the expansive right to present mitigating evidence, Mr. Serrano would have had the opportunity to present this persuasive mitigating evidence during the penalty phase if the State would have disclosed it as required by *Brady* and its progeny.

III. THE STATE KNOWINGLY PRESENTED PERJURED TESTIMONY REGARDING ITS EXTENSIVE INVOLVEMENT IN MR. SERRANO'S "REMOVAL" FROM ECUADOR, IN VIOLATION OF MR. SERRANO'S FEDERAL AND STATE DUE PROCESS RIGHTS

To establish a *Giglio v. United States* violation, a defendant must demonstrate that (1) the testimony was false, (2) the prosecutor knew the testimony was false, and (3) the statement was material. 405 U.S. 150 (1972); *Guzman v. State*, 868 So. 2d 498, 505 (Fla. 2003). Once a defendant establishes the first two prongs of a *Giglio* violation, the burden shifts to the State to establish that the false testimony was not material. *Id.*

On March 15, 2007, FDLE Agent Ray testified at a hearing in this case that he and Assistant State Attorney Wallace traveled to Ecuador to pursue deportation because extradition proceedings would be futile.[26] Contrary to Agent Ray's testimony, the United States could and did pursue the extradition of Mr. Serrano. As previously explained, the United States government completed an Extradition Request on August 23, 2002.[27] On August 29, 2002, Assistant State Attorney Wallace and Agent Ray met with the Ecuadorian Supreme Court to discuss extradition and the immediate incarceration of Mr. Serrano.[28] Despite the pending

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[26] R. at 2394 (Mar. 15, 2007), from Hearing on Amended and Supplemental Motion to Dismiss the Indictment and Divest the Court of Jurisdiction, a copy of which is attached hereto as Exhibit 8.
[27] Request for the Extradition of Nelson Ivan Serrano, from Susana Lorenzo-Giguere, Trial Attorney, U.S. Dep't of Justice, to Linda Jacobson, U.S. Dep't of State (Aug. 23, 2002) a copy of which is attached hereto as Exhibit 1.
[28] FDLE Rep. # 1076 a copy of which is attached hereto as Exhibit 5.

Extradition Request, Assistant State Attorney Wallace and Agent Ray wrongfully and deceptively sought Mr. Serrano's deportation instead of lawfully pursuing extradition. Withholding information of the Extradition Request by the federal government prevented Mr. Serrano, the Court, and the jury from considering the request, which stipulated that Mr. Serrano would not face the death penalty. Mr. Serrano would not have faced the death penalty if the State had not knowingly permitted Agent Ray to testify falsely regarding the status of Mr. Serrano's extradition.

Agent Ray testified that Florida merely paid $300 for the use of off duty Ecuadorian police officers and that Ecuadorian authorities then deported Mr. Serrano.[29] Actually, Florida law enforcement funded the operation to detain and remove Mr. Serrano and was heavily involved in that removal, along with Assistant State Attorney Wallace. We have now discovered that Florida paid "[a] total of $600 of FDLE Information and Evidence funds were paid for items such as meals, vehicle and taxi usage, supplies for the video camera used in surveillance, and to cover the costs of certified documents. The funds were paid to cover the above-noted operational costs incurred in assisting Special Agent Ray in locating Serrano and securing his return to the United States via the Ecuadorian judicial

[29] R. at 2399-2400 (Mar. 15, 2007), from Hearing on Amended and Supplemental Motion to Dismiss the Indictment and Divest the Court of Jurisdiction, a copy of which is attached hereto as Exhibit 8.

order."[30] Furthermore, while in Ecuador, Assistant State Attorney Wallace and Agent Ray directed retired Ecuadorian police Maj. Jorge Pastor to collect the documents that would serve as unauthorized evidence in Mr. Serrano's deportation hearing and reviewed those documents. Thus, the State funded the operation to arrest Mr. Serrano and supplied the misleading evidence to deport Mr. Serrano.

Furthermore, FDLE Agent Ray has offered conflicting stories regarding any funds paid to Ecuadorian authorities. During a post-trial hearing in Mr. Serrano's case, Agent Ray testified to paying off duty Ecuadorian officers $1 an hour through a lump sum he paid of $300 to Maj. Pastor.[31] Maj. Pastor was actually retired from the Ecuadorian National Police at this time. A letter from the FDLE to the Ecuadorian National Police states "Agent Ray indicates that to his knowledge, the members of the ENP [Ecuadorian National Police] who assisted Agent Ray were not paid any overtime or salary supplements by the FDLE for their work in assisting in the return of Serrano…"[32] This same letter also indicates that the FDLE paid $600 to cover expenses related to the surveillance and prosecution of Mr. Serrano; Agent Ray did not testify to the $600 spent on the operation. Thus, Agent

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[30] Letter from Michael R. Ramage, General Counsel, Fla. Dep't of Law Enforcement, to Lt. Col. Acosta Jativa, Ecuador National Police (2007) a copy of which is attached hereto as Exhibit 9. Page 1 of Exhibit 9 is slanted because undersigned counsel has not been able to obtain a better copy of it.

[31] R. at 2399-2400 a copy of which is attached hereto as Exhibit 8.

[32] Letter from Michael R. Ramage, Gen. Counsel, Fla. Dep't of Law Enforcement, to Lt. Col. Acosta Jativa, Ecuador National Police (2007) a copy of which is attached hereto as Exhibit 9. Page 1 of Exhibit 9 is slanted because undersigned counsel has not been able to obtain a better copy of it.

Ray plainly testified falsely regarding funds paid to the Ecuadorian police.

Assistant State Attorney Wallace knew that Agent Ray testified falsely to this material information. Assistant State Attorney Wallace went to Ecuador with Agent Ray and decided to seek deportation instead of lawful extradition. As previously discussed the State's heavy involvement in Mr. Serrano's removal was an unlawful interference in the federal government's extradition proceedings. Agent Ray's false testimony was plainly designed to cover this up.

In sum, the State knowingly presented false testimony regarding its extensive involvement in Mr. Serrano's removal from Ecuador. But for this *Giglio* violation, Mr. Serrano would not have faced the death penalty.

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.

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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 Aguero, 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 June 2013.

BY:________________________________
MARCIA J. SILVERS, ESQ.