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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INITIAL MOTION FOR POST-CONVICTION RELIEF AND INCORPORATED MEMORANDUM OF LAW

The Defendant/Petitioner, NELSON SERRANO, respectfully moves this Court for post-conviction relief pursuant to Rule 3.851 of the Florida Rules of Criminal Procedure. Mr. Serrano seeks an evidentiary hearing on the issues contained in this motion as well as any issue which may arise thereafter before the evidentiary hearing is held.[1] In support of his Motion for Post-conviction Relief, Mr. Serrano states as follows:

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[1] This initial Rule 3.851 Motion is being filed on this date in order to preserve Mr. Serrano's federal rights under the one-year federal timeline for a federal petition for a writ of habeas corpus. Due to the extenuating circumstances of the undersigned not being retained or appearing in this case until August 21, 2012 while the one-year deadline was running and essentially no investigation being done until that time, Mr. Serrano reserves his right to amend the instant motion pursuant to Fla.R.Crim.P. 3851(f)(4).

The judgment of conviction under attack was entered in the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida located in Bartow, Florida on June 26, 2007. (R2509-15)[2] The Indictment charged Mr. Serrano with four counts of First-Degree Murder, contrary to § 782.04 and § 775.087 Florida Statutes, in the deaths of George Gonsalves, Frank Dosso, George Patisso and Diane Patisso on December 3, 1997. The State filed a Notice of Intent to Seek the Death Penalty. (R163) Mr. Serrano pled not guilty to all of the charges and proceeded to a jury trial. Mr. Serrano did not testify at the jury trial or at any pre-trial hearing. He testified at a mid-trial hearing on the admissibility of handwritten notes obtained by a prisoner with whom he was incarcerated. He was convicted as charged on all counts. The trial court imposed a sentence of death on all counts. (R2506) The written sentencing order was filed on June 26, 2007. (R2509-15)

Mr. Serrano appealed to the Supreme Court of Florida. On March 17, 2011, the Supreme Court of Florida affirmed the judgment of conviction and sentence, 64 So.3d 93 (Fla. 2011). On May 5, 2011, Mr. Serrano filed a motion for rehearing. On June 13, 2011, the Supreme Court of Florida denied that motion.

On September 12, 2011, Mr. Serrano filed a petition for a writ of certiorari in the Supreme Court of the United States. On December 5, 2011, that petition was denied. This timely motion for post-conviction relief follows:

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[2] The judgment and sentence are attached as Exhibit 1 to this motion.

(A) Mr. Serrano, through undersigned counsel, is attacking the judgment and sentence of death on all counts. The Honorable Susan Roberts, Circuit Judge of the Tenth Judicial Circuit, imposed a sentence of death on all counts on June 26, 2007, after a jury returned a verdict recommending a sentence of death on all counts, nine-three, on October 24, 2006.

(B) The following is a statement of each issue raised previously by appellate counsel on direct appeal and the disposition thereof by the Supreme Court of Florida. The judgment and sentence of death was affirmed.

Issue I. The trial court erred in denying Mr. Serrano's motion for judgment of acquittal where the evidence was completely circumstantial and failed to prove identity.

The Supreme Court of Florida held that the evidence was sufficient to support Mr. Serrano's convictions and that the trial court did not err in denying his motion for judgment of acquittal. 64 So.3d at 104-05.

Issue II. The trial court erred in denying the motion to suppress Mr. Serrano's pretrial statement. The admission of this statement violated the Fifth and Fourteenth Amendments' prohibition against self-incrimination.

The Supreme Court of Florida held that it would not determine whether the admission of Mr. Serrano's pretrial statements to FDLE Agent Tommy Ray was erroneous under *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) because any possible error was harmless. 64 So.3d at 106.

Issue III. The convictions and death sentence of Mr. Serrano violate his rights to due process under the federal and state constitutions because Florida law enforcement officials committed outrageous acts and violated an extradition treaty when they kidnaped him in Ecuador and forcibly brought him to the United States.

The Supreme Court of Florida held that the trial court did not lack jurisdiction because Mr. Serrano contended he was illegally kidnaped from Ecuador to stand trial in Florida in violation of the Extradition Treaty between the United States and Ecuador and in violation of the Ecuadorian Constitution. In addition, the Supreme Court of Florida held that the actions of FDLE in bringing Mr. Serrano to Florida were not so outrageous that they violated his rights to due process under the federal and state constitutions. 64 So.3d at 107-08.

Issue IV. The cumulative impact of the prosecutorial misconduct required reversal of Mr. Serrano's convictions and sentences: (a) commenting on Mr. Serrano's right to remain silent, (b) vouching for the credibility of State witnesses, (c) eliciting testimony to demonstrate lack of remorse, (d) eliciting testimony to demonstrate bad character, (e) labeling Mr. Serrano as diabolical and a liar, and (f) improperly shifting the burden of proof.

The Supreme Court of Florida held that the trial court did not abuse its discretion in denying Mr. Serrano's motions for mistrials which were based upon his argument that the State improperly commented on his right to remain silent three times. In addition, the Supreme Court of Florida held that any possible error posed by these comments was harmless. The Supreme Court of Florida held that the trial court did not abuse its discretion in denying Mr. Serrano's motions for mistrial based

upon the State improperly vouching for the credibility of two of its witnesses. The Supreme Court of Florida held that the trial court did not abuse its discretion in denying a motion for mistrial based upon the State eliciting that Mr. Serrano did not cry when he was interviewed the day after the murders. The Supreme Court of Florida held that the State did not improperly make comments and elicit evidence for the sole purpose of demonstrating Mr. Serrano's bad character and that, even if the admission of this evidence was error, the error was harmless. The Supreme Court of Florida held that, because Mr. Serrano's counsel failed to contemporaneously object when the State improperly called Mr. Serrano diabolical and a liar during closing arguments, this error was not preserved for appellate review. Mr. Serrano argued on appeal that the State improperly shifted the burden of proof by stating the following during closing arguments: (1) "You can't come up with any other theory that fits anybody else would have done it."; (2) "He talks about this being a professional hit. There is no evidence. There is no evidence that these crimes are any kind of professional hit." The Supreme Court of Florida held that this claim was not preserved for appellate review. 64 So.3d at 108-111.

Issue V. The trial court erred in denying Mr. Serrano's motion for a change of venue. This error violated his rights under the Sixth and Fourteenth Amendments of the federal constitution.

The Supreme Court of Florida held that the trial court did not abuse its discretion in denying Mr. Serrano's change of venue motion because Mr. Serrano's

venire did not possess such prejudice or extensive knowledge of the case as to require a change of venue. 64 So.3d at 111-12.

Issue VI. The hearsay testimony of the State's bloodstain pattern expert violated the Confrontation Clause.

The Supreme Court of Florida held that Mr. Serrano's argument that his constitutional right to confront the witnesses against him was violated when the State's bloodstain pattern expert testified based upon tape measurements taken by another law enforcement officer was without merit. 64 So.3d at 112-113.

Issue VII. The improper cross-examination of defense witnesses regarding unsubstantiated sexual abuse by Mr. Serrano during the *Spencer* hearing denied his right to a fair sentencing which is required by the federal and state constitutions.

The Supreme Court of Florida held that this improper cross-examination of defense witnesses was harmless. 64 So.3d at 113-114.

Issue VIII. The trial court erred in allowing the "avoid arrest" aggravator to be submitted to the jury and in finding the existence of this aggravator in its sentencing order.

The Supreme Court of Florida held that sufficient evidence supported that the murder of Diane Patisso was committed to avoid arrest. 64 So.3d at 114.

Issue IX. Florida's capital sentencing scheme is unconstitutional.

In order to preserve the issues, Mr. Serrano submitted various constitutional claims regarding his death sentences. The Supreme Court of Florida held that these claims lacked merit. 64 So.3d at 114-15.

(C) The nature of the relief sought in the instant motion:

Mr. Serrano seeks to have this Court grant all relief to which he may be entitled in this proceeding, including but not limited to this Court ordering an evidentiary hearing on this motion, vacating and setting aside the judgment and sentence, granting a new trial and sentencing hearing, and such other and further relief as the Court deems just and proper.

(D) A detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought:

Trial Evidence

The trial evidence described below is part of the factual basis for each of the claims below for which an evidentiary hearing is sought:

In the mid-1980s, Mr Serrano, Phil Dosso and George Gonsalves met and together they created a company, Garment Conveyor Systems, (hereinafter "Garment") that designed, installed and sold slick rail systems for the garment industry. Mr. Serrano was responsible for designing, installing and selling the slick rail systems and Dosso and Gonsalves were responsible for manufacturing those systems. (T3182-88, 3362, 3486-93, 3598) In about the late 1980s, the three men moved their business to an industrial park in Bartow, Florida. At that time, Mr. Serrano also became an equal partner with Dosso and Gonsalves in Erie Manufacturing, Inc. (hereinafter "Erie"), a business that made parts for various

industries, with each of them earning equal salaries. In return, according to Phil Dosso, Mr. Serrano orally agreed to pay Dosso and Gonsalves $75,000 each.

In 1990, Mr. Serrano's son, Francisco Serrano, began working at Erie and Garment. (T4141-43) In about 1996, Phil Dosso's son, Frank Dosso, began working there. Phil Dosso's son-in-law, George Patisso, also was an employee there. (T4144-45)

Phil Dosso claimed that Mr. Serrano never paid him or Gonsalves the $75,000 he orally agreed to pay them in the mid-80's and this caused friction between the partners. (T3504-05) However, in reality, this amount of money was incidental compared to the large revenues that Mr. Serrano brought into Erie/Garment. Indeed, in 1994, Mr. Serrano was responsible for bringing in J .C. Penney as a client which significantly increased the companies' revenue. In 1996, the companies had nine million dollars in sales. That year, each of the three partners received a salary of $350,000 plus close to a million dollars each in bonuses. (T3601-02, 4152-56)

Francisco Serrano testified that, although the three partners had their differences, in 1996, most of them seemed to have been resolved with the help of an attorney and an accountant and things seemed to be fairly amicable between the partners in 1996 until the Spring of 1997, when Francisco Serrano discovered that there were two sets of accounting books for Erie/Garment. In the summer of 1997, after Francisco Serrano confronted Phil and Frank Dosso and George Gonsalves

about the improper double books, Phil Dosso and George Gonsalves fired Francisco. (T4103-04, 4148-4159)

On June 16, 1997, after Mr. Serrano learned about the missing money, Mr. Serrano , through an attorney, filed a lawsuit against Dosso and Gonsalves. (T4173-74, 4691-92, 4700-01, 4707-20) That same day, in an effort to protect the company money from possible theft by Dosso and Gonsalves, Mr. Serrano opened a new business checking account under Garment's name at a different bank and deposited two checks to Garment totaling over $200,000.00. Mr. Serrano never spent a dime of this money. (T4433-71) Ultimately, Mr. Serrano was removed as president by a vote of the other two partners and the locks were changed on the building. Mr. Serrano created a new slick rail company and pursued a resolution of the Erie/Garment issues via a civil lawsuit he filed. (T 3367-69, 3606, 4075-76, 4172-75, 4343)

Various employees of Erie/Garment testified that, while Mr. Serrano was at Erie/Garment, Mr. Serrano got along with Phil Dosso but that he had arguments with Gonsalves. (T3194, 4210-11) However, as one Erie/Garment employee testified, Gonsalves frequently got into arguments with lots of Erie/Garment employees because Gonsalves was obnoxious and often spoke to people in a mean manner. (T4228-30) According to Phil Dosso, sometime around 1995 or 1996, Mr. Serrano told Gonsalves that he gets so mad at him that he feels like killing him. However,

Dosso and Gonsalves obviously did not view this statement as a serious threat because they continued to work with Mr. Serrano as their partner and the President of Garment ***for at least one year afterwards***. (T3530)

On December 3, 1997, there were about 50 employees at Erie/Garment. At about 5:00 p.m. that day, Frank Dosso's wife spoke to Frank Dosso on the phone and he was at work at Erie/Garment. (T3452) Many Erie/Garment employees clocked out from work that day shortly after 5:00 p.m. while Gonsalves, Frank Dosso and George Patisso remained behind. (T 3211-14, 3264, 3307-12). David Catalan, a bookkeeper there, clocked out at 5:05 p.m. that day. (T 3210-13) He and another employee were the last employees to leave the building. Catalan testified that, when he left, he checked the doors to ensure that they were locked. (T3227, 3231, 3240-41)

Diane Patisso, who was Phil Dosso's daughter and George Patisso's wife, had plans to pick up Frank Dosso and George Patisso at Erie/Garment that day and take them to Frank Dosso's house for a family party. (T3427-33, 3450-53) She left work between 5:15 and 5:20 p.m. that day and drove a short distance to Erie/Garment to pick them up. At 5:45 p.m., Frank Dosso's wife called Erie/Garment and Frank Dosso's cell phone but there was no answer. (T 3452-53) Phil Dosso and his wife, Nicoletta Dosso, also tried calling Erie/ Garment without success and then drove to Erie/Garment to find out what had happened. (T 3434-35)

Phil and Nicoletta Dosso testified that, when they arrived at Erie/Garment, the front door was unlocked, and as they entered, they discovered the deceased body of their daughter, Diane Patisso, in a doorway in a pool of blood. Her body could be seen from the front door as soon as they entered. Phil Dosso called 911 at 7:34 p.m. He then discovered the deceased bodies of Gonsalves, George Patisso and Frank Dosso in Frank Dosso's office (formerly Mr. Serrano's office when he worked there). (T2884, 3218, 3434, 3437-38, 3559-81, 3585-86) The Dossos were inside the building when the first police officer arrived.[3]

All of the victims were shot multiple times in the head and some were also shot elsewhere. (T3955-68, 3975-4042) Two different guns were used - a.22 caliber semi-automatic gun and a .32 caliber semi-automatic handgun - suggesting that there were two shooters. (T3616-46) Neither of the guns was ever found. (T3646) The men were shot with the .22 caliber semi-automatic gun. (T3631-33, 3976-81, 4009-13, 4014-25) Diane Patisso was shot once with the same .22 caliber semi-automatic gun used to shoot the men and once with the .32 caliber gun. (T4026-31)

The three men were shot execution-style. According to a bloodstain pattern analysis expert,George Patisso was shot before Gonsalves but the expert could not

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[3] The Dossos went into many rooms at the crime scene, including Frank Dosso's office. Nicoletta Dosso was covered in blood and Officer Christian saw her touching Diane Patisso. (T2862-69, 2913, 3575) Several police officers testified that there was so much blood in Frank Dosso's office and in the area where Diane Patisso was shot, including blood smears on the wall and splattered blood, that it was difficult to avoid coming into contact with it. (T2903, 3017-18)

make any other conclusions as to the sequence in which the four individuals were shot. This expert concluded that Diane Patisso was standing up when she was shot. (T3922) In the expert's opinion, the shooter or shooters would have had blood on them from the back splatter. (T3917-18)

There was no forensic evidence linking Mr.Serrano to the crime scene. (T 3779) Inside Erie/Garment, law enforcement officers found eleven .22 caliber shell casings and one .32 caliber shell casing. (T2962-64) None of these casings were linked to Mr. Serrano in any way. (T3028-29, 3041) There were no fingerprints belonging to Mr. Serrano inside Erie/Garment. At the crime scene, law enforcement officials found about 15 fingerprints that could not be matched to anyone, including Mr. Serrano.

Law enforcement officers found no sign of a forced entry on any of the doors that were a point of entry into the Erie/Garment building. (T2993-97) As previously explained, the locks to these doors were changed after Mr. Serrano left.

On the floor just under or beside Diane Patisso's left side, law enforcement officers found a clear plastic glove that did not belong there. (T3008, 3029-31) A crime scene officer testified that it was an "unknown glove found at the scene" and "that is why it has evidentiary value." (T3302)

In February 1998, Theodore Yeshion, a DNA expert with the Florida Department of Law Enforcement, subjected three cuttings he took from the glove to

the type of DNA testing that was then in existence, PCR testing. Using PCR testing, Yeshion was able to extract a DNA sample and obtain some genetic markers but not the 13 genetic markers needed in order to obtain a DNA profile. (T4802) Yeshion testified that, at the time of the trial in this case which was held over eight years later, DNA science had developed to such a degree that it was possible that a new type of DNA testing known as STR DNA testing could obtain a DNA profile from the DNA on the glove. (T4803) However, although the glove must have been left at the crime scene by the perpetrator, neither trial counsel for Mr. Serrano nor the State ever sought to re-test the glove to obtain a DNA profile utilizing this new STR DNA testing. (T4791-4807)

On the evening of the incident, law enforcement officers also found two *fresh* Marlboro brand cigarette butts located close together in the Erie parking lot. (T2999-3001) These two cigarette butts were subjected to DNA testing and a DNA profile was extracted from one of them. Nevertheless, the State only asked FDLE DNA Analyst Yeshion to compare this DNA profile to Phil and Nicoletta Dosso and the four victims. The State never sought to compare this DNA profile to Mr. Serrano or to any DNA databases, although that would have been the logical thing to do unless the State feared that the results would show that its theory of prosecution was wrong. (T4812-13)

There was evidence that the motive for the shootings was robbery. Blood on Frank Dosso's arm showed an outline of his Rolex wristwatch which had been stolen from him after he was shot. George Patisso had been wearing a gold neck chain that was also stolen. Frank Dosso's pants pocket was partially pulled out. Frank Dosso's office and several offices near it were in complete disarray with drawers and file cabinets left open and papers and other items strewn all over the floors. (T3010-11, 3013-15, 3018-19, 3035-37, 3043-45, 3152, 3219-20, 3246, 3680, 3831, 3920, 4297-98, 5882) A detective in this case testified that someone targeting the business for a robbery would not know that the business did not have a lot of cash on hand. (T3832-34)

In Frank Dosso's office, there was a ceiling tile that was "slightly displaced." (T3154) Under it, there was a blue vinyl chair with some dusty shoe impressions on the seat. (T2980, 3038, 3118-24, 4385) Erie/Garment employee David Catalan testified that, in early 1996, he saw Mr. Serrano in his office standing on a chair taking papers out of the ceiling by removing a ceiling tile. On that occasion, Mr. Serrano showed him a large handgun that he owned. Catalan testified that he only saw Mr. Serrano taking papers out of the ceiling - not the handgun. (T3221-25) Catalan further testified that the handgun was in a box. (T3245) An Erie/Garment employee, Velma Ellis, who had been a close friend of Frank Dosso, testified that, years after the murders, she was interviewed by a law enforcement officer and

recalled, years later, that, when she left work on the day of the murders, she had seen the blue chair under a desk. (T4579-80, 4582-87) The prosecution relied upon this testimony of Catalan and Ellis to theorize that Mr. Serrano kept a .32 caliber gun hidden in the ceiling of his office and, on the evening of the murders, he retrieved it and used it to shoot Diane Patisso as she entered the building.

Catalan and another Erie/Garment employee testified that the gun that Mr. Serrano kept in his office was a ***revolver with a wheel in the center***. (T4074-75, 5937-38) The .32 caliber gun used to shoot Diane Patisso was a semi-automatic gun - ***not a revolver*** - because, as an FBI agent testified, a revolver does not automatically eject the cartridge casing.

In support of its theory that Mr. Serrano stood on the blue chair to get the .32 caliber firearm used to shoot Diane Patisso, the prosecution also called an FDLE crime analyst who testified that he tested the shoe impressions on the chair and found that the class characteristics were consistent with a pair of shoes Mr. Serrano owned and loaned to his nephew to wear when he appeared before the grand jury investigating this case. (T5287-99, 5764, 5862) However, this FDLE crime analyst could not positively identify that shoe as having made those impressions and he did not dispute that the class characteristics of that shoe could be consistent with as many as 100 million or more shoes. (T5295-99, 5303-04) Furthermore, defense counsel pointed out that it would be ludicrous for Mr. Serrano to give shoes used to commit

murders to his nephew to wear to the grand jury that was investigating those murders. (T5304, 6232-33)

John Purvis, who worked at a business near Erie/Garment, testified that, when he left work on December 3, 1997 between 5:50 and 6:15 p.m. he saw a medium-built man between the ages of 25 and 30 with an olive complexion, possibly Mediterranean descent, dark black hair and a wispy black mustache standing in a grassy area adjacent to a road in front of Erie/Garment's front door. (T3377-82, 3399-3400, 3422-23) The man was wearing a suit with a white shirt, a v-neck white sweater and a tie under it. (T3395-96) The man was holding his coat up in front of his face in a manner which led Purvis to assume that he was lighting a cigarette. (T3403)[4] A few weeks after the incident, Purvis described the man to a police forensic artist who then drew a composite sketch which was admitted at the trial. (T3382-84, 3407-23, EV744) Purvis did not identify Mr. Serrano as the person he saw or testify that Mr. Serrano matched the description of the person he saw.

On the evening of the murders, the first suspects who law enforcement officers focused on were Francisco and Nelson Serrano, because of the previous business disputes. (T3678, 5924) However, Francisco Serrano had an alibi in that he was

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[4] Maureen Serrano, formerly Francisco Serrano's wife, and FDLE Agent Tommy Ray, the lead investigator in this case, both testified that Mr. Serrano did not smoke cigarettes. (T4122, 4299)

attending a business meeting in Tampa when the crimes occurred. (T4053-65, 4078-82)

Nelson Serrano also had an alibi because law enforcement officers verified that he was in Atlanta that evening. Law enforcement officers confirmed that Mr. Serrano checked into an Atlanta hotel, La Quinta Inn, on December 2, 1997 and checked out on December 4, 1997 at 11:47 a.m. (T4618) Through airline, rental car and airport parking records, they also confirmed that Mr. Serrano, who resided in Lakeland, flew from Washington D.C. where he had been on a business matter to Atlanta on December 2, 1997, rented a car there and then flew back to Orlando on December 4, 1997. (T4992-94, 5048, 5073-76, EV1124-29)

Law enforcement officers additionally confirmed that, on December 3, 1997 from about 10 to 11 a.m., Mr. Serrano attended a business meeting with Larry Heflin of Astechnologies in Roswell, Georgia, a suburb of Atlanta. Heflin testified at the trial that there was a real need for this meeting. (T4343-67)

Law enforcement officers obtained surveillance videotapes from the La Quinta Inn that showed Mr. Serrano in the Atlanta hotel lobby on December 3, 1997 at 12:19 p.m. and at 10:17 p.m. (T4390-96, 6133, EV772, 828, 856)

On December 4, 1997, when Mr. Serrano returned from Atlanta, he voluntarily went to the police station for an interview. (T3682-83) He had no injuries on him at that time. (T3065) Mr. Serrano said that he learned about the murders the previous evening when he called his wife from his Atlanta hotel and she told him that four

people had been killed at Erie/Garment. (T3687-88) He then telephoned an Erie employee named Louis Velandia who told him that, when he left work at Erie on December 3, 1997, Gonsalves, Frank Dosso and George Patisso were there and the only car there was Gonsalves' car. (T3690)[5] Subsequently, Mr. Serrano telephoned his wife again and she told him that three men and one woman had been shot. (T3700-01)

Mr. Serrano told Detective Parker that he had flown to Atlanta on December 2, 1997 for a business meeting with Larry Heflin of Astechnologies. He further stated that he got a severe migraine headache on December 3, 1997 and, therefore, he had to change a business meeting to December 4, 1997. (T3690) It was undisputed that Mr. Serrano suffers from migraines. He was on migraine medication throughout the trial. (T5130) Mr. Serrano said that he remained in Atlanta until December 4, 1997. (T3688)

Detective Parker asked Mr. Serrano what he thought might have happened at Erie. Mr. Serrano said that he did not think that robbery was a motive because no cash was kept there. Unbeknownst to Mr. Serrano, two of the men who were killed had been robbed of their jewelry. Mr. Serrano said he guessed that "somebody is getting even; somebody they cheated, and George [Gonsalves] is capable of that." (T3690-92) In his taped statement, which was played in court, Mr. Serrano

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[5] Gonsalves' car was the only car in the parking lot at the time of the crimes.

speculated that it was possible that the female victim "walked in the middle of something." (T 3704)[6]

Alvaro Penaherrera Mr. Serrano's nephew, testified for the prosecution. He conceded that law enforcement officers had accused him of being involved in the Erie/Garment murders and this had scared him. (T5814-15) Penaherrera claimed that, in 1997, Mr. Serrano asked him to rent a car for him on two occasions because his girlfriend was coming to Orlando to visit him from Brazil and his credit card statements came to his house and he did not want his wife to question him about it. (T4884-89, 5714-17) Penaherrera testified that he had heard from his family that Mr. Serrano was a "womanizer" who was "always cheating" on his wife. (T5800-01) On October 31, 1997 and on December 3, 1997, Penaherrera rented cars in Orlando which he claimed were actually rented for Mr. Serrano and his girlfriend. (T 4884-93, 5708-37)

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[6] The prosecution argued at the trial that this statement showed that Mr. Serrano was the killer because, at the time of Mr. Serrano's police interview, no information had been released about the fact that Diane Patisso's body was found in a different location from the others near the entryway. (T3727, 6122-23, 6139) However, Detective Parker conceded on cross-examination that his investigation revealed that, before Mr. Serrano was interviewed by him, Mr. Serrano had been told by others that three employees and one non-employee had been killed. He further conceded that it is a logical conclusion that, if a non-employee gets killed at a business where three employees are killed, the non-employee probably walked in on something rather than already being there. (T3829-31) Maureen Serrano testified that, on the evening before Mr. Serrano's police interview, she spoke to Mr. Serrano by telephone and told him the names of the four victims. (T 4111-12, 4124-25) As previously explained, Velandia had told Mr. Serrano that only Gonsalves, Frank Dosso and George Patisso were at Erie/Garment when he left there and that only Gonsalves' car was in the parking lot so it would be logical for Mr. Serrano to think that Diane Patisso, who worked elsewhere, came to Erie/Garment to pick up her husband and brother and "walked in on something."

Penaherrera further claimed that, on December 4, 1997, Mr. Serrano telephoned him from Atlanta and asked him to pick up the rental car in the Tampa International Airport parking lot and return it to the Tampa rental car agency because he had to drop off the car at that airport abruptly and leave since things did not work out with his girlfriend. Penaherrera testified that he then drove to Tampa and did as Mr. Serrano requested. (T5743) This testimony differed from Penaherrera's deposition testimony in which he stated that Mr. Serrano's lover picked up the rental car in Orlando on December 3, 1997 and then dropped it off at the Tampa International Airport. (T5806)

According to Penaherrera, he saw Mr. Serrano in Ecuador at Christmas time in 1997 and, at that time, Mr. Serrano told him that he could not say anything about the rental cars because it would cause a divorce and the police investigating the murders at Erie/Garment would not believe that he was in Orlando with his lover. (T5752-59) Law enforcement officers conducted a thorough forensic search of both of the rental cars and did not find a scintilla of evidence linking Mr. Serrano to the murders. (T5863, 5925, 5928-29)

In June 2000, Penaherrera, his girlfriend and his brother, Ricardo, were all subpoenaed to testify before the grand jury in Bartow. They stayed at Mr. Serrano's house the night before they testified. Mr. Serrano gave Penaherrera and his brother suits and dress shoes to wear to the grand jury. (T5762-65) Ricardo Penaherrera

testified that Mr. Serrano told him, his brother and his brother's girlfriend to tell the truth before the grand jury. (T4860-61) Alvaro Penaherrera likewise testified in his deposition that Mr. Serrano told him to tell the truth to the grand jury. (T5772-75) However, at the trial, Penaherrera changed his testimony and claimed that Mr. Serrano told him to lie to the grand jury about the car rentals. (T5766-71) At the trial, Penaherrera admitted that he had lied under oath and to law enforcement officers at least eight to ten times when questioned about this case. (T5775-78, 5783-89, 5817-23) Penaherrera admitted that he had "assumed" that there was a "big reward' in this case for information leading to the arrest and convictions of the perpetrators of the murders that were committed in this case. (T5841-41) Indeed, there was a highly publicized reward of over one hundred thousand dollars. (T5945)

From the time of the murders in 1997 until August 2000, Mr. Serrano and his family members were repeatedly interviewed by law enforcement authorities but Mr. Serrano never fled. Mr. Serrano traveled to Ecuador, where he has family, six times after the murders and always returned to his home in Lakeland. In August 2000, almost three years after the murders, Mr. Serrano retired to Ecuador. (T4114, 4180, 4300-01, 5930, 5936) The lead investigator, FDLE Agent Tommy Ray, conceded that Mr. Serrano retired to Ecuador and did not flee. Indeed, he even wrote that in a report. (T 5930, 5936)

As previously explained, the State's theory was that, on December 3, 1997, Mr. Serrano traveled from Atlanta to Orlando and from Tampa back to Atlanta under the names "Juan Agacio" and "John White." The State introduced airline passenger manifests indicating that, on December 3, 1997 at 1:36 p.m., a passenger named Juan Agacio boarded a Delta flight in Atlanta, scheduled to depart at 1:41 p.m. and scheduled to land in Orlando at 3:05 p.m. (The passenger manifests do not show what time the plane actually took off or landed). (T5021-27, 5042-43, 5051-52,EV741, 901-05)

Mr. Serrano has a son, John Greevan, from a former wife, Gladys Agacio Serrano. When John Greevan was born in 1960, he was named Juan Carlos Serrano. Mr. Serrano and Gladys Serrano divorced when John Greevan was a young child. Gladys Agacio subsequently remarried and legally changed her son's name to John Greevan to reflect the last name of his stepfather. John Greevan testified that he has never gone by the name of Juan Agacio because that has never been his name. (T3164-81) The defense argued that it would be ridiculous for Mr. Serrano to concoct an elaborate scheme to return to Orlando to commit a murder and use this combination of his son's unusual names if he truly wanted to conceal that he was on the flight. (T6064-65)

A passenger manifest indicated that, at 7:28 p.m. on December 3, 1997, a passenger named John White arrived at Tampa International Airport and checked into

a Delta Airlines flight to Atlanta. That flight was scheduled to arrive in Atlanta at 9:41 p.m. (T5021-27, 5040-41, EV743) Mr. Serrano was seen on video surveillance in the Atlanta hotel lobby at 10:17 p.m. Defense counsel argued at the trial that the prosecution's theory could not be true because, in only 36 minutes, the jet would have had to have touched down, the jet would have had to taxi down the runway to a gate, Mr. Serrano would have had to have disembarked from the wide-bodied jet with the many other passengers, make his way through the Atlanta airport, one of the busiest in the world, exit the airport, get a taxi or some other vehicular transport and travel to his hotel about five miles away. Notably, not a single witness was found who saw Mr. Serrano leave his Atlanta hotel, drive to the airport, park there or get on the airplanes on December 3, 1997. No airport security videos showed Mr. Serrano anywhere near the Atlanta, Orlando or Tampa airports that day. (T3837-40)

According to an airport parking ticket, the rental car rented by Penaherrera exited the Orlando International Airport parking garage at 3:59 p.m. on December 3, 1997. According to another airport parking ticket, Mr. Serrano's car entered the Orlando International Airport parking garage on November 23, 1997 at 4:51 p.m. and exited the airport parking garage at 5:33 p.m. (T4998-91, 5029-34) A round trip ticket for Juan Agacio's December 3, 1997 Atlanta-to-Orlando flight was purchased by Juan Agacio at the Orlando International Airport on November 23, 1997 at 5:16 p.m. (T5029-34, EV748-52) A round trip ticket for John White's December 3, 1997

Tampa-to-Atlanta flight was purchased on November 23, 1997 at 3:18 p.m. at Tampa International Airport. (T5034-42, 5057-58, EV773-77)[7]

The State's well-credentialed fingerprint expert, Jim Hamilton, testified that a fingerprint on the November 23, 1997 Orlando Airport parking garage ticket matched Mr. Serrano's right index finger. He further testified that a fingerprint on the December 3, 1997 Orlando Airport parking garage ticket "coincidentally" matched Mr. Serrano's same finger - the right index finger. Although Hamilton was the State's expert witness, he testified that he had serious reservations about these two fingerprints for several reasons. First, he was concerned about the likelihood that a print from the same finger of the same hand of Mr. Serrano would be on both of the tickets. Second, it makes no sense for someone to reach across his body with his right hand between his body and the steering wheel to hand a ticket to a parking attendant who is located at least two to three feet away from the left side of the car. Third, even if someone did use their right hand to reach across in that manner, there should have a fingerprint of Mr. Serrano on each side of the tickets but there is only one fingerprint on one side of the tickets. Notably, the prints that appear on the parking tickets consist of opposite halves of the same right index fingerprint. Mr. Hamilton

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[7] It was the State's theory that Mr. Serrano purchased both of these tickets using cash, although it would be nonsensical to drive to the Tampa International Airport to purchase John White's Delta Airlines ticket on November 23, 1997 at 3:18 p.m. and then drive all the way to the Orlando International Airport to purchase Juan Agacio's Delta Airlines ticket at 5:13 p.m. that same day when both tickets could have been purchased at the same airport.

further testified that fingerprints can be planted and yet not detected by experts. He gave examples of how this could have happened in this case. He testified that, at the time he was retained to give his opinion about the two subject fingerprints, the actual fingerprints on the parking tickets had become invisible and only photographs of them taken by an FDLE laboratory analyst were available. (T5271-84)

Notably, the FDLE laboratory analyst who developed the two subject fingerprints acknowledged that, on the two parking tickets that contained Mr. Serrano's fingerprint, half of his right index finger is on one ticket, the other half of this same right index finger is on the other ticket and there are no other fingerprints on either of those tickets, which is plainly unusual. (T5340-42) This laboratory analyst further testified that these two parking tickets were submitted to her by the lead investigator, Tommy Ray. Notably, two law enforcement officers looked for these parking tickets at the Orlando parking garage in late 1998/early 1999 but they did not find them. Then, according to Agent Ray, years later, in March 2001, after a great deal of frustration in trying to solve the crimes in this high profile case, he went back to that parking garage and "discovered" the two parking tickets containing the fingerprints that he claimed miraculously survived all those years. (T5333-34, 5880, 5891-93)

It was undisputed that Mr. Serrano was a gun collector. During the investigation of the murders, law enforcement officers searched Mr. Serrano's house

twice. These law enforcement officers seized firearms from Mr. Serrano's gun collection and firearms permits from Mr. Serrano's house but ultimately determined through testing and research that none of them were linked in any way to the murders. (T5113-38, 5148, 5926)

On May 17, 2001, the grand jury returned a sealed indictment charging Mr. Serrano in this case. At that time, he lived in Quito, Ecuador where he had retired. On August 31, 2002, Mr. Serrano was forcibly taken from the streets of Quito by men hired by Agent Tommy Ray, kept in an animal cage overnight and then delivered the next morning to Agent Ray and another law enforcement officer who were waiting for him on an American Airlines commercial airplane. (T 4300, 4738-52)

On the airplane flight to the United States, Mr. Serrano sat by Agent Tommy Ray and the other law enforcement officer. Ray testified that Mr. Serrano was in his custody at the time and that Mr. Serrano spoke to him on the plane. (T5898-5900)

Agent Ray claimed that, on the plane, he asked Mr. Serrano if he had planned to come back to the United States on September 18, 1997 for a hearing on the civil lawsuit and that Mr. Serrano said, "No, why should I come back and you could trick me?" Ray also testified that he asked Mr. Serrano why he had deposited the two Garment checks totaling over $200,000 into a new bank account and Mr. Serrano said he did that to keep Phil Dosso and Gonsalves from stealing it because Gonsalves was a thief who Francisco Serrano had reported to the IRS. Ray testified that Mr. Serrano

told him he was in Atlanta - not Orlando - on the day of the murders and that Mr. Penaherrera rented a car for Mr. Serrano's girlfriend, Anna Gillian, that day. According to Ray, he asked if Mr. Serrano had a way to reach her and if she was Brazilian. He replied that the Brazilian was a different girlfriend. Ray testified that Mr. Serrano told him he had a theory that Frank Dosso was connected to the Mafia and had hired a hitman without meeting him in person to kill Gonsalves. According to Ray, Mr. Serrano said that, when he was working at Erie/Garment and would go out-of-town, he would keep a .357 caliber revolver in the ceiling of his office or behind his office computer. As previously explained, the guns used in this case were semi-automatics - not revolvers - and they were .22 and .32 caliber guns. (T5899-5900)

Leslie Jones testified that he was incarcerated with Mr. Serrano in late 2005 and early 2006 and that, during that time, Mr. Serrano spoke to him about this case. (T5491-92, 5510-11, 5537-38)[8] According to Jones, Mr. Serrano also told him that he suspected that a Mafia hitman named John may have committed the murders because Frank Dosso had been involved in drugs and owed over one million dollars as a result or that somehow the murders were connected to Frank Dosso wanting to get a larger share of the business from Gonsalves. (T5472-78, 5570-71) Jones also

[8] Jones received a lighter sentence on a criminal felony case pending against him because he agreed to testify against Mr. Serrano at the trial. (T5502-67)

testified that Mr. Serrano told him that he suspected that a man named John who was owed a substantial amount of money by the Dosso and Gonsalves families committed the murders. (T5590-94) According to Jones, Mr. Serrano told him that he and John drove to the Tampa and Orlando airports together and that, although he went to the airport with John, he did not know why John was going, but he subsequently learned that John had purchased airline tickets under the aliases of Todd - not John - White and Juan Agacio. (T5475-76, 5572) Jones also testified that Mr. Serrano told him that John had planned to approach the business partners on Halloween night but it was raining and the business was closed. (T5477)[9] Serrano also told Jones that an FDLE agent had planted his fingerprint found on a parking ticket in Orlando.

I. The State knowingly used perjured testimony in violation of Mr. Serrano's rights to due process under the Florida and United States Constitutions.

During the trial, the State violated *Giglio v. United States*, 405 U.S. 150 (1972) by presenting the false testimony of two State witnesses, John Purvis and Leslie Todd Jones. To establish a *Giglio* violation, a defendant must show that:

1. The testimony given was false;

2. The prosecutor knew the testimony was false; and

3. The statement was "material."

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[9] On Halloween 1997, Juan Agacio traveled from Charlotte to Orlando arriving in Orlando at 3:07 p.m. John White was scheduled to depart on a flight from Tampa to Charlotte that evening. (T 5219-38, 5228-31)

Guzman v. State, 868 So.2d 498, 505 (Fla. 2003).

Significantly, once a defendant establishes the first two prongs of a *Giglio* violation - that a prosecutor knowingly presented false testimony at trial - the burden shifts to the State to establish that the false testimony was not "material." "The State as the beneficiary of the *Giglio* violation, bears the burden to prove that the presentation of the false testimony was harmless beyond a reasonable doubt." *Id.* at 506. *Accord Mordenti v. State*, 894 So.2d 161, 175 (Fla. 2004); *Guzman*, 868 So.2d at 507-508. As the Supreme Court of Florida has recognized, the *Giglio* standard is more "defense friendly" and "reflects a heightened judicial concern, and correspondingly heightened judicial scrutiny, where perjured testimony is used to convict a defendant." *Id.* at 507 (citing *United States v. Bagley*, 473 U.S. 667 (1985)).

A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Mordenti*, 894 So.2d at 175; *Guzman*, 868 So.2d at 507-508. Indeed, where it is shown that the government knowingly permitted the introduction of false testimony, reversal is "'virtually automatic.'" *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991)(citations omitted). The use of perjured testimony by prosecutors has resulted in the reversal of convictions in a significant

number of cases, including *Mordenti v. State*, 894 So.2d 161 (Fla. 2004)(reversing defendant's convictions in part because of prosecutor's knowing presentation at trial of false testimony against the defendant), *United States v. Willis,* 606 F.2d 391 (3rd Cir. 1979); *United States v. Young*, 17 F.3d 1201 (9th Cir. 1994), *United States v. Rivera Pedin*, 861 F.2d 1522 (11th Cir. 1988), *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995), and *United States v. Wallach, supra. See also Floyd v. State*, 902 So.2d 775, 778 (Fla. 2005)(recognizing that a prosecutor's knowing use of perjured testimony has been repeatedly condemned by courts).

John Purvis

At Mr. Serrano's trial, John Purvis was the only eyewitness who purportedly saw the perpetrator of the crimes. As previously explained, Purvis testified at the trial that it was his recollection *as of the date of the trial* that, when he left work on December 3, 1997 at about the time that the crimes occurred, he saw a medium-built man with an olive complexion, dark black hair and a black mustache who he thought was about 25 to 30-years-old standing in a grassy area adjacent to a road in front of Erie/Garment's front door. (T3378-80, 3395). Purvis further testified that the man, who was wearing a dark suit, white shirt, white v-neck sweater and tie, was holding his coat in front of his face in a manner which caused Purvis to assume that he was lighting a cigarette. (T4122, 4299). Purvis explained that, on December 23, 1997, he described the man to a police forensic artist who then drew a composite sketch of

the man which was admitted at the trial. (T3382-84,3407-23, EV744). According to Purvis, this composite sketch was as accurate as it possibly could be. (T.3390). Purvis additionally testified that, when he was first interviewed by the police in December 1997, he said that the man was wearing oval, wire rimmed prescription-type glasses but that, when he was interviewed a second time, he said that the man was wearing aviator style lightly tinted sunglasses. (T. 3398-99).[10]

Significantly, at the trial, the jury never heard all of the material facts concerning Purvis' recollection of this event. More specifically, unbeknownst to the jury, law enforcement officials arranged for a forensic hypnotic interview of Purvis regarding his recollection of the events he saw on December 3, 1997. This forensic hypnotic interview was conducted on October 11, 1999 by Neil S. Hibler, Ph.D., FAClinP, who was contracted with the FBI to conduct hypnotic interviews. Many law enforcement officials were present during this interview.

Following hypnosis, Mr. Purvis' memory of the event was hypnotically refreshed and he recalled additional material information about which he never testified at the trial. This information includes that, when he saw the man standing in the grassy area, he also saw (1) a second olive-complexioned, possibly Hispanic, man in his thirties looking out the front glass door/window of the Erie/Garment building towards the road, and (2) the man standing in the grassy area may have had

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[10] This second interview occurred on February 16, 1998.

a gun within the left side of his waistband, he wore a nice watch on his left wrist and he was using a Zippo lighter in his right hand. Purvis also then recalled that he saw two cars in the Erie/Garment parking lot, a red Ford Taurus type car and a luxury type car, possibly a cream or white Lincoln or Cadillac.

Notably, on December 29, 1999, about two and one half months after the hypnosis, Purvis met with the same forensic artist who drew the December 23, 1997 composite sketch for the purpose of modifying that composite sketch. A report by FDLE Agent Louie Jones provides that, "The reason a modification was decided upon was that a hypnotic interview was done on witness Purvis which resulted in Purvis' recall that the subject he saw had a thinner face than was indicated on the original sketch." However, the State never sought to admit this modified composite sketch and Purvis never testified about it. The jury only knew about the December 23, 1997 composite sketch which Purvis falsely testified was as accurate as it could possibly be. The videotape of Mr. Serrano entering the La Quinta Hotel on the evening of December 3, 1997 shows that, on the day of the crimes, Mr. Serrano, then age 59, was a medium-built man with an olive complexion, dark black hair and a black mustache wearing a dark suite and a white turtleneck sweater. (EV772) The December 29, 1999 modified composite sketch bears much less resemblance to Mr. Serrano than the original composite sketch that was admitted at the trial.

On December 19, 2003, the prosecutor wrote a letter to Mr. Serrano's trial counsel, Cheney Mason, listing those witnesses who the State did not anticipate calling at the trial and describing their role. In the list of the witnesses who would be testifying, a copy of which is attached hereto as Exhibit 2, the prosecutor wrote the following:

> Dr. Neal [sic] Hibler - hypnotized witness John Purvis who consequently can't be used because his memory was hypnotically refreshed. ***The police don't believe Purvis anyway***.

(Emphasis added)

Despite this admission, the prosecutor presented Purvis' above-described testimony at Mr. Serrano's trial. The prosecutor elicited from Purvis false testimony that the events of December 3, 1997 to which he testified and the composite sketch which he authenticated were his ***present*** recollection when, in truth and in fact, his recollection had changed after his hypnosis. Notably, when Purvis testified at the trial that the December 23, 1997 composite sketch was as accurate as it could possibly be, the prosecutor knew that this testimony was false because, at that time, the prosecutor had in his possession the December 29, 1999 modified composite sketch which was done because Purvis' recollection had changed.

The State cannot meet its burden of establishing that its knowing presentation of Purvis' false and misleading testimony was harmless beyond a reasonable doubt.

Purvis was the only eyewitness who purportedly saw the perpetrator of the crimes. Notably, in upholding the sufficiency of the circumstantial evidence in the instant case, the *unmodified* composite sketch approved by Purvis was one of the key pieces of evidence relied upon by the Supreme Court of Florida. As stated by the Supreme Court of Florida in its opinion in the instant case:

> [T]he State introduced circumstantial evidence to place Serrano at Erie at the time of the murders.
>
> * * *
>
> The State ... introduced a composite sketch of a male seen outside the crime scene near the time of the murders . The jury was able to view the composite sketch and compare it to Serrano's appearance on the day of the murders as depicted in the Atlanta hotel's surveillance video.

Serrano, 64 So.3d at 93.

At the oral argument in the Supreme Court of Florida on Mr. Serrano's direct appeal, The Honorable Justice Lewis asked Mr. Serrano's appellate counsel, "If the drawing, the sketch of a person seen according the evidence at this business, would match with the person seen on the videotape from the hotel in Atlanta, would that significantly impact this case? When Mr. Serrano's counsel answered, "No," Justice Lewis responded, "Why not?" Justice Lewis and the other Justices went on to ask many more questions regarding the composite sketch and the facts pertaining to Purvis' claimed observations. Because the foregoing facts about Purvis' hypnotically refreshed testimony and the *modified* composite sketch were not part of the record on

appeal, Mr. Serrano's appellate counsel was unaware of these facts and so was the Supreme Court of Florida when it rendered its decision.

This unmodified composite sketch and Purvis' trial testimony were plainly an important component of the State's case. Accordingly, this flagrant *Giglio* violation mandates a new trial.

Leslie Todd Jones

As previously explained, Leslie Todd Jones testified at the trial that, while he was incarcerated with Mr. Serrano in late 2005 - early 2006, Mr. Serrano told him that he suspected that a Mafia hitman named John may have committed the murders because Frank Dosso had been involved in drugs and owed over one million dollars as a result or that the murders were connected to Frank Dosso wanting to get a larger share of the business from Gonsalves. (T5472-78, 5570-71) Jones also testified that Mr. Serrano told him that he suspected that this man named John who was owed a substantial amount of money by the Dosso and Gonsalves families committed the murders. (T5590-94) According to Jones, Mr. Serrano told him that he and John drove to the Tampa and Orlando airports together and that, although he went to the airport with John, he did not know why John was going, but he subsequently learned that John had purchased airline tickets under the aliases of Todd White and Juan Agacio. (T5475-76, 5572) Jones also testified that Mr. Serrano told him that John

had planned to approach the business partners at Erie on Halloween night but it was raining and the business was closed. (T5477)

This trial testimony of Jones was provided by Jones after the trial judge ruled in a hearing outside the presence of the jury that handwritten notes allegedly written by Nelson Serrano and given to Mr. Jones were inadmissible because there was evidence that these notes were stolen from Mr. Serrano by Jones. These handwritten notes concerned essentially the same subject matter as Jones' trial testimony. (T5349-5449, 5453)

Jones has now told undersigned counsel's private investigator and will truthfully testify at the evidentiary hearing on the instant motion that, after the trial judge suppressed the handwritten notes of Mr. Serrano, Assistant State Attorney John Aguero, one of the prosecutors in this case, met with Jones and told him to falsely testify that information in those handwritten notes was told to Jones by Mr. Serrano, including to falsely testify that Mr. Serrano told him the above-described facts about the hitman named John although, in fact, Mr. Serrano did not tell him that information.[11] Jones told this private investigator and will truthfully testify at the evidentiary hearing on this motion that, after this meeting with ASA Aguero, Jones,

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[11] A defendant who files a motion for post-conviction relief is not required to attach supporting affidavits and the trial court is not authorized to deny such a motion on the basis of a defendant's failure to do so. *Valle v. State*, 705 So.2d 1331, 1334 (Fla. 1997); *Butler v. State*, 946 So.2d 30, 31 (Fla. 2006); *Roundtree v. State*, 884 So.2d 322, 323 (Fla. 2d DCA 2004); *Smith v. State*, 837 So.2d 1185 (Fla. 4th DCA 2003).

at ASA Aguero's direction, falsely testified that the information in the handwritten notes of Mr. Serrano was actually told to Jones by Mr. Serrano although this was not, in fact, true. Jones has told the private investigator and will truthfully testify at the evidentiary hearing on this motion that his false testimony at ASA Aguero's direction included that Mr. Serrano told him (1) of his suspicions that a Mafia hitman named John committed the murders, (2) that he and a man named John who was owed money by the Dosso and Gonsalves families drove to the Tampa and Orlando airports together where, unbeknownst to Mr. Serrano, John purchased airlines tickets under the aliases of Todd White and Juan Agacio, and (3) Mr. Serrano told Jones that John had planned to approach Frank Dosso and George Gonsalves at Erie on Halloween night but it was raining and the business was closed.

Evidence that Jones testified falsely as to these matters would have been important evidence for a jury. Indeed, during the prosecutor's opening statement and closing argument, the prosecutor relied heavily upon Jones' testimony that Mr. Serrano told him that John, the hitman, was going to approach the business partners on Halloween. The prosecutor argued that this information from Jones led to the discovery of the Halloween plane flights by Juan Agacio and John White so that these flights were not mere coincidence. (T2733, 2741-44, 6111, 6143, 6149) The prosecutor also argued during his closing argument that Mr. Serrano's statements about John, the hitman, wanting to kill Gonsalves on Frank Dosso's behalf were a

desperate false story. (T6165) Significantly, the recantation by Mr. Jones is not in any way self-serving. For all of the foregoing reasons, this serious *Giglio* violation plainly requires a new trial.

II. Mr. Serrano's trial attorneys, Robert Norgard and Cheney Mason, rendered ineffective assistance of counsel in violation of his rights to the effective assistance of counsel under the Florida and United States Constitutions.

Trial counsel were ineffective in their representation of Mr. Serrano during the trial and sentencing. Not only were trial counsel deficient in their performance, but Mr. Serrano was prejudiced as a result of trial counsel's deficient performance. Accordingly, Mr. Serrano's right to effective assistance of counsel under the Florida and United States Constitutions was violated. The "benchmark" of an ineffective assistance of counsel claim is the "fairness" of the proceedings. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). To obtain relief in a post-conviction motion on a claim of ineffective assistance of counsel a defendant must establish two prongs: deficient performance by trial counsel, and prejudice to the defendant as a result of that deficient performance. *See Strickland*, 466 U.S. at 687, 693; *Rutherford v. State*, 727 So.2d 216, 218 (Fla. 1998). The first prong, deficient performance, is satisfied where the conduct of trial counsel is outside the range of competent performance under prevailing professional standards. *See Strickland*, 466 U.S. at 688. The second prong of prejudice is satisfied where the deficient performance is show to have

affected the fairness and reliability of the proceedings, so that confidence in the outcome is undermined. *Strickland*, 466 U.S. at 694. Mr. Serrano alleges the following specific instances of ineffective assistance of his trial counsel, each of which satisfies the *Strickland* two-prong test and the cumulative effect of which has caused confidence in the outcome to be undermined.

Guilt Phase

1. Trial counsel were ineffective in failing to object to the admission of prosecution witness John Purvis' testimony and the unmodified composite sketch about which he testified on the ground that, as previously explained, this testimony was false and misleading in violation of *Giglio* and its progeny. Trial counsel knew of Purvis'post-hypnosis statements and the existence of the modified composite sketch. If trial counsel had objected to the admission of Purvis' important trial testimony and the unmodified composite sketch under *Giglio*, that testimony and the unmodified sketch would have been excluded. A claim that trial counsel failed to object to inadmissible evidence is a sufficient basis for post-conviction relief. *Rodriguez v. State*, 860 So.2d 455 (Fla. 1st DCA 2003). *See also Williams v. State*, 515 So.2d 1042 (Fla. 3d DCA 1987). Furthermore, by failing to so object, trial counsel failed to preserve the meritorious *Giglio* issue for appellate review. *See Moore v. State,* 418 So.2d 435 (Fla. 3rd DCA1982) (if proper objection is not interposed at the time the evidence is presented, the appellant will be deemed to have

waived the objection). But for defense counsels' failure to preserve this issue for appellate review, Mr. Serrano's convictions would have been reversed on appeal because this issue was a meritorious issue warranting reversal. The failure to preserve a potentially reversible error for appellate review is sufficient to establish a claim of ineffective assistance of counsel.[12] Courts have not hesitated to reverse convictions based on ineffective assistance of counsel where, as in the instant case, trial counsel fails to preserve an issue that would have resulted in reversal on appeal if properly preserved. *E.g., Austing v. State*, 804 So.2d 603 (Fla. 5th DCA 2002); *Vaz v. State*, 626 So.2d 1022 (Fla. 3d DCA 1993).

2. Trial counsel were ineffective in failing to depose prosecution witness John Purvis or otherwise investigate and prepare for the trial testimony of Purvis. Notably, although trial counsel were aware that a modified composite sketch of the possible perpetrator had been prepared with Purvis' assistance, trial counsel never followed up with the prosecutor and actually obtained a copy of that sketch or sought its admission at trial. At the trial, Purvis and the forensic artist who drew the modified sketch would have been available to testify so as to satisfy the legal prerequisites for the admission of the modified sketch. This undermines confidence in the outcome

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[12] *E.g., Daniels v. State*, 806 So.2d 563 (Fla. 4th DCA 2002); *Dwyer v. State*, 776 So.2d 1082 (Fla. 4th DCA 2001); *Thomas v. State*, 700 So.2d 407 (Fla. 4th DCA 1997); *Bouchard v. State*, 847 So.2d 598 (Fla. 2d DCA 2003); *Tidwell v. State*, 844 So.2d 701 (Fla. 1st DCA 2003); *Crumbley v. State*, 661 So.2d 383 (Fla. 1st DCA 1995).

for several reasons. First, the original sketch was an important component of the State's case. Second, the fact that, at Purvis' direction, the original sketch was changed would have cast doubt on Purvis' memory of what he saw on December 3, 1997. Finally, the modified sketch looked much less like Mr. Serrano than the original sketch.

3. Trial counsel was ineffective in failing to elicit the following facts from Purvis during cross-examination although these facts were admissible because Mr. Serrano had a constitutional right to present a complete defense:

(1) After Purvis' memory was hypnotically refreshed, Purvis realized that his original composite sketch of the man standing in the grassy area was not accurate because the man had a thinner face than was portrayed in that sketch. Accordingly, about two and one half months after the hypnosis, Purvis met with a forensic artist and a modified composite sketch was drawn based upon his refreshed recollection, and

(2) After Purvis' memory of the December 3, 1997 event was hypnotically refreshed he recalled that, when he saw the man standing in the grassy area, he also saw a second man peeking out the front glass door/window of the Erie/Garment building,

(3) The man standing in the grassy area may have had a gun in his waistband and was using a Zippo lighter in his right hand,[13] and

(4) Purvis saw two cars in the Erie/Garment parking lot, a red Ford Taurus type car and a larger luxury type car possibly a cream or white Lincoln or Cadillac.[14]

Although the Supreme Court of Florida in *Bundy v. State*, 471 So.2d 9 (Fla. 1985), *cert. denied*, 479 U.S. 894 (1986), held that hypnotically refreshed testimony is per se inadmissible in a criminal trial, subsequent case law and Mr. Serrano's constitutional right to present a defense would have mandated that the above-described cross-examination of Purvis be permitted. Subsequent to *Bundy*, the United States Supreme Court held, in *Rock v. Arkansas*, 483 U.S. 44 (1987), that States cannot have a per se rule that excludes hypnotically recalled testimony of a defendant who takes the stand. The Court explained, "Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand but arbitrarily excludes material portions of his testimony." *Id.* at 55. The Supreme Court of Florida relied upon *Rock* in *Morgan v. State*, 537 So.2d 973 (Fla. 1989), and receded from *Bundy's* per se rule. The *Morgan* Court held that a defendant's

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[13] Mr. Serrano was not a smoker.

[14] Defense counsel should have objected to any claim by the State that these facts were inadmissible. The cars in the parking lot at the time of the murders did not match this description.

hypnotically refreshed statements made to experts by a defendant in preparation of a defense are admissible.

Rules or case law pertaining to evidence, such as *Bundy's* per se rule, although valid in the abstract, must yield to a criminal defendant's constitutional right to present a defense. *E.g., Chambers v. Mississippi*, 410 U.S. 284 (1973). The three leading cases on the constitutional right to present a defense are *Chambers* (constitutional violation to prevent defendant from impeaching state witness with his own confessions to charged crime although state "voucher" and hearsay rules prohibited such impeachment), *Davis v. Alaska*, 415 U.S. 308 (1974)(constitutional violation to prevent defendant from impeaching crucial state witness with his juvenile probationary status; defendant's need to show witness' bias overrides any state law predicated upon an interest in confidentiality) and *Holmes v. South Carolina*, 547 U.S. 319 (2006)(defendant's constitutional right to present a defense was violated by state supreme court case restricting the admission of evidence of third party guilt). These cases "establish, at a minimum, that criminal defendants have ... the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). "If ... *Chambers* mean[s] any thing, it is that a judge cannot keep important yet possibly unreliable evidence from the jury." *Pettijohn v. Hall*, 599 F.2d 476, 481, n.3 (1st Cir. 1979). "Relevant evidence [that] tends in any way, even indirectly to establish a reasonable doubt of defendant's guilt"

is constitutionally protected. *Story v. State*, 589 So.2d 939, 942 (Fla. 2nd DCA 1991). *Accord Gamez v. State*, 643 So.2d 1105 (Fla. 4th DCA 1994).

Furthermore, in *Morgan*, 537 So.2d at 976, the Supreme Court of Florida recognized that "[t]he use of hypnosis is an evolving issue and, clearly, some safeguards are appropriate to assure reliability in the courts." Defense counsel's performance was also deficient in failing to make this argument at the trial.[15]

The above-described deficiencies in the performance of defense counsel with respect to prosecution witness Purvis undermine confidence in the outcome. Notably, the fact that Purvis recalled seeing a second man peeking out the front glass door or window of the Erie/Garment building would have conflicted with the State's theory that Mr. Serrano was the sole perpetrator of the crimes and would have supported the defense's argument that there were two perpetrators because two different guns were used. As previously explained, the failure of defense counsel to elicit from Purvis that the composite sketch admitted at the trial was not his best or present recollection because a modified composite sketch was subsequently drawn at his direction plainly undermines confidence in the outcome, especially since the modified composite sketch bears much less resemblance to Mr. Serrano. As noted by the Supreme Court

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[15] This would also have been a meritorious issue for appeal if defense counsel had preserved it. Defense counsel was ineffective in failing to preserve this issue.

of Florida in the direct appeal herein, the modified sketch was a key piece of evidence.

4. Trial counsel were ineffective in failing to object to the prosecutor's improper comments during closing argument which are described below. But for these failures, Mr. Serrano's convictions would have been reversed on appeal. Furthermore, as explained below, these failures undermine confidence in the outcome of the trial. Notably, the Supreme Court of Florida has recognized that "the decision not to object to improper comments is fraught with danger ... because it might cause an otherwise appealable issue to be considered procedurally barred." *Chandler v. State*, 848 So.2d 1031, 1045 (Fla. 2003). Courts have repeatedly held that defense counsel was ineffective for failing to object to a prosecutor's improper closing arguments. *See e.g., Eure v. State*, 764 So.2d 798 (Fla. 2d DCA 2000); *Ross v. State*, 726 So.2d 317 (Fla. 2d DCA 1998). *See also Flint v. State*, 84 So.3d 468 (Fla. 2d DCA 2012).

Impermissible Comments On The Presumption of Innocence

During his closing argument, the prosecutor stated:

> This is lawyers' only opportunity to talk about not only the facts but the law. And the Judge will tell you this about the presumption of innocence, and it is important that you think about it. The presumption of innocence stays with the Defendant as to each material allegation in the Indictment through each stage of the trial unless it has been overcome by the evidence. *That doesn't mean that Mr.*

> *Serrano is proved - - is presumed innocent now*. We spent five weeks proving his guilt. If you believed on the third, or fifth day, or tenth day of the trial, or when I sit down that he is guilty and you have an abiding conviction of guilt, it is at that point that the presumption of innocence disappears. *The presumption of innocence is something to be begin a trial with. That is the law*. Then the State starts to put evidence on to take that presumption of innocence away.

(T. 6107) (emphasis added). This comment was plainly impermissible because it undermined fundamental aspects of the presumption of innocence, namely that the presumption (1) remains with the accused throughout every stage of the trial, including the jury's deliberations, and (2) is extinguished only upon the jury's determination that guilt has been established beyond a reasonable doubt.

It is beyond cavil that a defendant is presumed innocent until his guilt is proved to the exclusion of a reasonable doubt. *See Davis v. State,* 90 So.2d 629, 631 (Fla. 1956). The United States Supreme Court has long recognized that the presumption of innocence is a fundamental precept guiding the jury's evaluation of guilt of innocence. *E.g., Estelle v. Williams,* 425 U.S. 501, 504-04 (1976)(citations omitted). Indeed, the presumption of innocence is a "constitutionally rooted" right of the accused.[16]

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[16] *See, e.g., Cool v. United States,* 409 U.S. 100, 104 (1972) (referring to "constitutionally rooted presumption of innocence"); *Zygadlo v. Wainwright,* 720 F.2d 1221, 1223 (11th Cir. 1983) ("[t]he constitution grants every defendant a presumption of innocence"), *cert. denied,* 466 U.S. 941 (1984); *Mahorney v. Wallman,* 917 F.2d 469, 472 (10th Cir. 1990)(expressly holding that the presumption of innocence is "constitutionally rooted").

The prosecutor's comments in this case are strikingly similar to those of the prosecutor in *Mahorney, supra,* which led to the reversal of the defendant's conviction. In *Mahorney,* 917 F.2d at 471, the prosecutor misstated the law during his closing argument by telling the jurors that, although when they started the trial they had a duty to presume the defendant was innocent unless he was proven guilty beyond a reasonable doubt, under the law and under the evidence that presumption had been removed and was "not there anymore." The Court condemned these comments because they undermined the defendant's presumption of innocence. 917 F.2d at 471 n.2.

In the instant case, as in *Mahorney*, the prosecutor's statement that it "is the law" that the presumption of innocence is just "something to begin a trial with" and not something that applies during deliberations was an impermissible missstatement of law that affirmatively negated Mr. Serrano's constitutionally rooted right to the presumption of innocence. Defense counsel's performance was deficient in failing to object to this egregious misstatement of the law. *See Moore*, 418 So.2d at 437. This failure of defense counsel plainly undermines confidence in the outcome of the trial and the appeal because there is a grave danger that, during deliberations, the jurors who followed "the law" as incorrectly explained by the prosecutor abandoned the constitutionally rooted requirement to presume that Mr. Serrano was innocent until such time as a determination was made that guilt had been proven beyond a

reasonable doubt. Furthermore, trial court's preliminary instructions to the jury did not include an instruction on the presumption of innocence. The trial court's charge on the presumption of innocence at the conclusion of the evidence was not sufficiently specific to preserve the presumption in light of (1) the prosecutor's statement that "it is the law" that this presumption only applies at the start of the trial - not during deliberations and (2) the fact that the trial court's final instruction never explained that the presumption of innocence continues through the jury's deliberations. (T6269) Defense counsel was ineffective in failing to request that the Court's preliminary instructions to the jury include the instruction on the presumption of innocence in Section 3.7 of the Florida Standard Jury Instructions in Criminal Cases. This deficient performance was especially prejudicial to Mr. Serrano because, as a result, the first time that the jury was informed as to the law regarding the presumption of innocence was when the prosecutor impermissibly told the jury that this presumption was only "something to begin a trial with" and not something that applies during deliberations.

The Prosecutor's Improper Comments That Mr. Serrano Was Diabolical And A "Liar."

During closing argument, the prosecutor called Mr. Serrano a "liar " (T6162) and said three different times that Mr. Serrano was "diabolical" (defined as being "of or like the Devil, especially in being evil or cruel"). (T6102, 6122, 6171) However,

defense counsel never objected to these improper comments. "It is clearly improper for the prosecutor to engage in vituperative or pejorative characterizations of a defendant or witness." *Gore v. State*, 719 So.2d 1197, 1201 (Fla. 1998). *See also, e.g., Goddard v. State,* 196 So. 596, 598 (1940) (prosecution referred to the defendant as a "low down scoundrel" and a "skunk").

In *Rodriguez v. State*, 822 So.2d 587 (Fla. 2d DCA 2002), the Court reversed the defendant's conviction because the prosecutor characterized the defendant as a liar during the closing argument. And, in *Ruiz v. State*, 743 So.2d 1, 5-6 (Fla. 1999), the prosecutor compared the defendant to Pinocchio. The prosecutor then proceeded to tell the jury that "truth equals justice" and "justice is that you convict him." The Supreme Court of Florida held that these comments were improper because the prosecutor was inviting the jury to convict the defendant of first-degree murder on the basis that he was a liar.

Significantly, when Mr. Serrano argued on direct appeal that the State improperly called him diabolical and a liar during closing arguments, the Supreme Court of Florida held that these comments were improper but that, "Because Serrano failed to contemporaneously object, this claim is not preserved for appellate review." *State v. Serrano*, 64 So.3d 93, 111 (Fla. 2011).

Improperly Shifting The Burden Of Proof

On direct appeal, Mr. Serrano argued that the State improperly shifted the burden of proof by stating the following during closing arguments: (1) "You can't come up with any other theory that fits that anybody else would have done it." (T6101); (2) "He talks about this being a professional hit. There is no evidence. There is no evidence that these crimes are any kind of professional hit." (T6104). It is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict for some reason other than that the State did not prove its case beyond a reasonable doubt. *Gore v. State*, 719 So.2d 1197, 1200; *Atkins v. State*, 878 So.2d 460 (Fla. 3d DCA 2004). Accordingly, these arguments were plainly improper. Although these arguments were improper, the Supreme Court of Florida held that, "Like Serrano's liar claim, this claim is not preserved for appellate review because defense counsel failed to contemporaneously object." *Id.*

5. Trial counsel was ineffective in failing to object to (1) the testimony of the two lead detectives that it was their belief that the murders were not motivated by robbery or burglary, and (2) the prosecutor's remarks during opening statement about these beliefs. During the prosecutor's opening statement, he told the jury that, "The police do not believe that [the crime in this case] is a robbery, a rape, a burglary." (T706) Defense counsel did not object to this statement. Thereafter, Agent Tommy Ray, the lead FDLE detective in this case, testified as follows:

> Q At the time that you became involved were there any persons, or was there a person or persons who were suspects by December the 5th in the murders at Erie Manufacturing?
>
> A Yes, sir. The Defendant, Nelson Serrano, as well as his son, Francisco Serrano.
>
> Q Have you continued to be the Lead Detective, or the Lead Agent, in this case since December 5th of 1997?
>
> A Yes, sir I have.
>
> * * *
>
> Q *In your investigation into these four homicides, did you ever develop any information that would lead you to believe that there was any robbery - - that robbery was a motive or extramarital affairs, drug involvement, any other reason why these four people were killed?*
>
> A *No, sir, none whatsoever.*

(T4296-97)(emphasis added). In addition, Detective Parker of the Bartow Police Department testified that, although ransacking often occurs during burglaries and robberies, the ransacking that happened at the crime scene in the instant case far exceeded the extent of the usual burglary or robbery. (T3680)

The cumulative effect of this opinion testimony and the opening statement remark of the prosecutor improperly invaded the province of the jury. Opinions by law enforcement officers on issues that should ultimately be left for the jury to decide are often held in higher regard than the opinion testimonies of other lay witnesses. As such, there is an increased danger of prejudice in allowing their opinions to be heard by a jury. Courts have repeatedly reversed convictions where the opinion testimony of a law enforcement officer invaded the province of the jury. *Bartlett v.*

State, 993 So.2d 157, 160 (Fla. 1st DCA 2008); *Charles v. State*, 79 So.3d 233, 235 (Fla. 4th DCA 2012).

As previously explained, there was a plethora of evidence that the motive for the shootings was robbery. A detective in this case testified that someone targeting the business for a robbery would not know that the business did not have a lot of cash on hand. (T3832-34) Relying upon this evidence, defense counsel argued at closing that the murders were committed by a robber. (T6193) The admission of the police officers' opinion testimony and the prosecutor's remark improperly bolstered the prosecutor's case and greatly prejudiced Mr. Serrano's defense. Accordingly, the failure of defense counsel to object to these errors undermines confidence in the outcome. Furthermore, defense counsel was ineffective in failing to preserve this issue for appeal. This issue would have been a meritorious issue for appeal had defense counsel objected.

6. Trial counsel was ineffective in failing to contemporaneously object to the State arguing inconsistent theories during the guilt phase and the penalty phase of the trial. At the guilt phase of the trial, it was the State's theory that Mr. Serrano retrieved a .32 caliber firearm from the ceiling tile of the office where the three men were killed which was formerly Mr. Serrano's office and then used that firearm to shoot Diane Patisso. (T6152-55). The State theorized that the .32 caliber firearm had been left there when Mr. Serrano was fired from Erie Garment without warning.

However, at the penalty phase of the trial, the prosecutor argued to the jury as follows:

> He gets on that plane [in Atlanta] in the name of Juan Aggacio [sic] and flies to Orlando. And when he gets off the plane before he goes to the rental car where does he go? He goes to his car. Why does he go there? *Because that's where he's got the .22 and the .32. And the reason he put the two guns in his car is because even when he left flying legitimately up to D. C. is he knew he wanted a gun because of his plan.* His plan was to kill George Gonsalves. He was not going to be deterred.

(Penalty phase transcript of 10/24/06 at 32). Defense counsel failed to contemporaneously object to this argument by the State. However, it is a violation of a defendant's right to due process under the federal and State constitutions for the State to use inconsistent theories to secure convictions and a death sentence in a capital case.[17]

Thus, had defense counsel contemporaneously objected to the State using inconsistent theories, the objection would have been sustained and there is, at the very least, a reasonable probability that a mistrial would have been granted or a different sentence imposed. As previously explained, during the guilt phase, the State relied

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[17] *See e.g., Bradshaw v. Stumpf*, 545 U.S. 175 (2005) (remand was warranted to determine if imposition of death penalty violated due process where the State allegedly used inconsistent theories to secure the defendant's death sentence); *Jacobs v. Scott*, 513 U.S. 1067, 1070 (1995)(observing that "serious questions are raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens," and that "[t]he heightened need for reliability in capital cases only underscores the gravity of those questions....") (citations and internal quotations marks omitted).

heavily upon the evidence regarding the footprint on the blue chair, the displaced ceiling tile and Mr. Serrano keeping papers in the ceiling and a firearm in his office to argue that Mr. Serrano retrieved a .32 caliber firearm from the ceiling to shoot Diane Patisso and, thus, that there was only one shooter - not two shooters. The State's subsequent argument during the penalty phase that *both* the .22 and the .32 caliber firearms were retrieved from his car which was parked in the Orlando airport is plainly inconsistent with this trial evidence and trial theory and demonstrates that the prosecution itself had doubts as to its evidence and theories regarding the source of the .32 caliber firearm.

Defense counsel also were ineffective in failing to preserve this issue for appeal by contemporaneously objecting to the prosecutor making the inconsistent statement during the penalty phase. The State's use of inconsistent theories to secure Mr. Serrano's convictions and death sentence would have been a meritorious issue for appeal had defense counsel objected to same.

Furthermore, defense counsel were ineffective in failing to capitalize upon this inconsistency and point it out to the jury during defense counsel's penalty phase closing arguments. This failure undermines confidence in Mr. Serrano's sentence.

7. Trial counsel were ineffective in failing to present available evidence that, at the time of the crimes, Mr. Serrano wore a size 8 ½ shoe.[18] This failure undermines confidence in the outcome because the shoe impressions on the blue chair were a size 7 as were the pair of shoes which Alvaro Penaherrera claimed he obtained from Mr. Serrano and which were consistent with those shoe impressions. The prosecutor argued during closing that it was not coincidental that these shoes were the same size as the impressions on the blue chair.

8. Trial counsel was ineffective in failing to present at the trial the available testimony of FDLE Agent Louie Jones that the flight from Tampa to Atlanta on December 3, 1997 on which the State contends Mr. Serrano was a passenger utilizing the name John White arrived in Atlanta at 9:55 p.m. A report authored by Agent Jones provides as follows:[19]

> The name John White appears to have been used by Nelson Serrano on December 3, 1997, as fictitious identification for a Delta airlines flight departing Tampa International Airport at 2020 hours on December 3, 1997 and arriving in Atlanta ***at 2155 hours*** on December 3, 1997.

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[18] This evidence was available either by presenting the testimony of the police officers who observed Mr. Serrano's size 8 ½ shoes at his home during the execution of a search warrant or by private investigative testimony or an in-court demonstration that Mr. Serrano stepped on a Brannock Device, the measuring instrument used to measure a person's shoe size, and that device showed him to be a size 8 ½ shoe.

[19] This report is serial number 954.

Such testimony would have been important to Mr. Serrano's defense that he could not possibly have traveled from the Atlanta airport to his Atlanta hotel by 10:17 p.m. because the only testimony at the trial regarding the arrival time of the plane in Atlanta was that the plane was scheduled to land in Atlanta at 9:41 p.m., 14 minutes earlier than the time actually reported by Agent Jones in his report. Accordingly, the failure of defense counsel to present this testimony was a "deficient performance."

Where a defendant's motion for post-conviction relief identifies witnesses who may have been able to cast doubt on the defendant's guilt, states what their testimony would have been, that they were available to testify and that the defendant was prejudiced by their absence at trial, a defendant has presented a facially sufficient claim for ineffective assistance of counsel entitling him to an evidentiary hearing. *Ford, supra*; *Bulley, supra*; *Sorgman v. State*, 549 So.2d 686 (Fla. 1st DCA 1989); *Greeson v. State*, 729 So.2d 397 (Fla. 1st DCA 1998); *Gutierrez v. State*, 778 So.2d 372 (Fla. 2d DCA 2001); *Highsmith*, 617 So.2d 825 (Fla. 1st DCA 1993).

9. Trial counsel was ineffective in failing to elicit key evidence during the cross-examination of prosecution witness David Catalan. More specifically, Catalan, who, along with Karen Stevens, was the last employee to leave the Erie/Garment premises on the day of the crimes, told law enforcement officers that he saw George Gonsalves at about 5:05 p.m. carrying items to his (Gonsalves') vehicle out of the metal door east of the front glass doors. Catalan told these officers that he offered to

assist Gonsalves but Gonsalves declined the offer. Defense counsel never cross-examined Catalan about this observation of Gonsalves carrying items to his vehicle although defense counsel were aware of it from police reports in their possession. The failure to elicit this information from Catalan undermines confidence in the outcome. The State's theory was that Mr. Serrano's motive was to kill Gonsalves. If Gonsalves was alone in the parking lot at the time of the crimes, Mr. Serrano could have killed him there and sped away, rather than risking taking Gonsalves inside the Erie/Garment premises where others could have been and were, in fact, present. On the other hand, a robber would have forced Gonsalves inside. Thus, the failure of defense counsel to elicit this key evidence from Catalan was highly prejudicial.

10. Trial counsel were ineffective in failing to file a pre-trial motion requesting STR DNA testing of (1) the plastic glove (and the cuttings and DNA extracted therefrom) presumably left by the perpetrator of the crimes herein and found on the floor under or beside the left side of Diane Patisso's body, and (2) one of two cigarette butts that were fresh and were found outside the door leading to Erie/Garment (and DNA extracted therefrom) and a comparison of the DNA profile obtained therefrom and the known DNA profile on one of the two cigarette butts to Mr. Serrano and to the DNA profiles in the Combined DNA Index System ("CODIS") which is a DNA database that stores DNA profiles created by federal, state and local crime laboratories in the United States. Notably, although a DNA profile was

extracted from one of the cigarette butts, that profile has never been compared to Mr. Serrano or to the DNA profiles in CODIS. The STR DNA testing and comparisons would have identified the perpetrator of the homicides for which Mr. Serrano stands convicted and would have shown that Mr. Serrano is innocent of these homicides.[20]

11. Trial counsel were ineffective in failing to file a pre-trial motion requesting an Order directing comparisons of about 15 unidentified latent print impressions which were found at the crime scene and which did not belong to Mr. Serrano, the victims, or any Erie/Garment employees. Although these unidentified prints were submitted to Florida's Automated Fingerprint Identification System in about December 1997, defense counsel never requested that these unidentified prints be resubmitted to Florida's AFIS database or that they be submitted to the Integrated Automated Fingerprint Identification System which is the National fingerprint database. The results would have identified the perpetrator of the homicides for which Mr. Serrano stands convicted and would have shown that Mr. Serrano is innocent of these homicides.[21]

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[20] This Court has not yet ruled on Mr. Serrano's pending "Motion for Post-Conviction DNA Testing and Comparisons." Mr. Serrano will be requesting leave to amend his Rule 3.851 Motion after the results of that testing and those comparisons is obtained.

[21] This Court has not yet ruled on Mr. Serrano's pending "Motion for Comparisons of Latent Print Impressions." Mr. Serrano will be requesting leave to amend his Rule 3.851 Motion after this Court rules on his "Motion for Comparisons of Latent Print Impressions" and the results of the latent print comparisons are obtained.

Penalty Phase

12. Trial counsel was ineffective in failing to object to improper victim impact evidence. There are clear parameters as to the type of victim impact evidence that is permissible. Pursuant to Section 921.141(7) of the Florida Statutes, "[o]nce the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence." *See also Windom v. State*, 656 So.2d 432,438 (Fla. 1995)(holding that victim impact testimony was improper because it was not limited to victim's uniqueness and the loss to the community members by the victim's death); *Sexton v. State*, 775 So.2d 923, 933 (Fla. 2000) (same).

Florida courts have cautioned that any victim impact evidence must conform strictly to the parameters of the statute in order to avoid any potential danger of the testimony exceeding the purposes for which it is admissible. Victim impact evidence must not interfere with the right of a defendant to a fair trial. *Wheeler v. State*, 4 So.3d 599, 607 (Fla. 2009). When presentation of the victim impact evidence places

undue focus on victim impact, it can constitute a due process violation. *Id.* at 606. "In the event that [victim impact] evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

During the sentencing phase of the trial in this case, the State impermissibly presented to the jury torrents of inflammatory testimony about the emotional turmoil and "nightmare" experienced by 26 people who were the victims' family and friends.[22] On numerous occasions, witnesses made improper inflammatory remarks that were not limited to the "victims' uniqueness and the loss to the community" in violation of Section 921.141(7) and Mr. Serrano's rights to due process, fundamental fairness and a reliable jury determination, including but not limited to: "[W]e feel compelled to share with you the *nightmare* we have been living", (P.T. 73), "When we received the horrifying news December 3rd, 1997, our life as we knew it ceased,") (P.T. 76), "Time did nothing to lessen the pain. We feel that there's a 10-ton truck on our chest from the weight of our sorrow," (P.T.76), "I cannot comprehend what you must be going through losing such a son," (P.T. 77); "We cannot fix it. This is the most frustrating experience. Anyone that is a parent knows exactly what we are talking about" (P.T. 79), "In our minds Georgie and Diane are away on a beautiful

[22] The transcript of this testimony is referred to herein at P.T. followed by the pertinent page number.

trip, helping and taking care of children and eventually they'll come home, But, in truth, we'll go home to them," (P.T. 79), "May God always protect my son George throughout eternity," (P.T. 81), "Unbelievable grief in the form of parents and a sister virtually immobilized by pain and rendered physically unrecognizable to all those that knew them," (P.T. 102), "the sickening reaction that triggers in me the memory of the eulogy, and my inability to put in words all that could be said about Diane and George, the final rose left on a bitterly cold December day. The warmth that always seems to radiate from the headstone of George and Diane's burial place no matter how cold outside, symbolizing to the energy and love of lives cut short," (P.T. 103), "There are not enough words in this English language that can explain how my life has ended," (P.T. 113), "On December 3rd, 1997, our world exploded like thousand of shards of glass piercing through my heart," (P.T. 127), " You pick up the pieces of glass from your heart everyday," (P.T. 128), "Soon after I developed panic attacks and suffered insomnia. And I questioned my faith in God...It is not fair that my beautiful and vivacious friend was robbed of life." (P.T. 134), and numerous other emotional statements of unending heartbreak (P.T. 128, 133-134, 136, 138, 142).

During the entire presentation of victim impact evidence, defense counsel made no specific objections to any portion of that testimony although they renewed their general objection to the presentation of victim impact evidence. This general objection was insufficient to preserve for appellate review these violations of Section

921.141(7) and Mr. Serrano's rights to due process, fundamental fairness and a reliable jury determination. *See Wheeler v. State,* 4 So.3d 599, 606 (Fla. 2009); *Windom v. State,* 656 So.2d 432, 438 (Fla. 1998). If these violations had been preserved for appellate review, they would have resulted in Mr. Serrano's death sentence being vacated. Furthermore, but for defense counsel's failure to specifically object to these repeated improper remarks, there is, at the very least, a reasonable probability that the jury would not have recommended death because the jury weighed these highly prejudicial, inflammatory remarks in making its sentencing recommendation.

13. Trial counsel rendered ineffective assistance in failing to conduct an investigation into Nelson Serrano's mental health and present available mental health mitigation evidence during the penalty phase. Trial counsel failed to conduct an investigation into Nelson Serrano's mental health. Trial counsel never sought to have a psychological/neuropsychological evaluation of Mr. Serrano. Trial counsel failed to retain an expert in mental health to conduct such an evaluation and then testify at the penalty phase of this case. During the penalty phase of this case, trial counsel did not present any mental health mitigation evidence. However, such evidence was available.

More specifically, undersigned counsel retained Dr. Harry D. Krop, a licensed psychologist, to aid in addressing Mr. Serrano's mental state at the time of the

offenses and to uncover possible mitigating mental health factors.[23] Beginning on October 9, 2012 and continuing to November 6, 2012, Dr. Krop conducted a psychological evaluation of Mr. Serrano which included neuropsychological testing. As a result of Dr. Krop's psychological evaluation of Mr. Serrano, it is Dr. Krop's expert opinion that, at the time of the crimes, Mr. Serrano had serious frontal lobe deficits which would have had an impact on his executive functioning, including his judgment. It is also Dr. Krop's expert opinion that Mr. Serrano can function well in general prison population as there is no evidence of psychopathic traits or a major psychiatric disorder which would suggest violent tendencies. In Dr. Krop's expert opinion, the probability of Mr. Serrano engaging in future violence is very low as it appears that the acts of which Mr. Serrano was accused were out of character for him.

Notably, the trial judge in this case expressed concern about Mr. Serrano's competency just before the *Spencer* hearing began. (R1518-19). Dr. Krop's current evaluation of Mr. Serrano which suggests that Mr. Serrano may have been experiencing paranoid ideation at the time of the offenses indicates that, a mental

[23] Dr. Krop is a licensed psychologist with a Ph.D. degree from the University of Miami in clinical psychology. From 1973 to the present, he has been in private practice at Community Behavioral Services located in Gainesville, Orange Park and Jacksonville, Florida. Dr. Krop's professional experience also includes being a courtesy associate professor with the Department of Psychiatry for the University of Florida College of Medicine from 2006 to 2011. He has testified as a mental health expert in 1,423 criminal cases. In addition, Dr. Krop has authored numerous articles in the field of mental health and has served as an instructor in many mental health workshops. Dr. Krop has conducted psychological evaluations of 479 death row inmates.

health professional should have been retained by defense counsel to conduct a formal competency evaluation prior to the *Spencer* hearing.

Dr. Krop or a similarly experienced mental health professional would have been available to testify at the penalty phase of Mr. Serrano's trial to all of these above-described expert opinions if defense counsel had retained Dr. Krop or a similarly experienced mental health professional to conduct a psychological/neuropsychological evaluation of Mr. Serrano and had called Dr. Krop or a similarly experienced mental health professional as a witness during that proceeding. Dr. Krop will testify to these expert opinions at an evidentiary hearing on this motion.

Defense counsel's failure to conduct an investigation into Mr. Serrano's mental health and present the above-described available mental health mitigation evidence was not reasonable under prevailing professional norms. "[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." *State v. Riechmann*, 777 So.2d 342, 350 (Fla. 2000). As to counsel's duty of securing evidence of mental health mitigation, the Supreme Court of Florida has recognized that "[w]here available information indicates that the defendant could have mental health problems, 'such an evaluation is fundamental in defending against the death penalty.'" *Jones v. State*, 998 So.2d 573, 583 (Fla. 2008)(quoting *Arbelaez v. State*, 898 So.2d 25, 34 (Fla. 2005). In light of its

significance, "a reasonable investigation into mental mitigation is part of defense counsel's obligation where there is *any* indication that the defendant may have mental deficits." *Hurst v. State*, 18 So.3d 975, 1010 (Fla. 2009)(emphasis added).

Defense counsel in this case plainly had an indication that Mr. Serrano could have mental deficits. Mr. Serrano, a successful businessman, was charged with and convicted of the cold-blooded murders of four people after having lived as a law-abiding citizen for 59 years. Such an aberration in behavior should have raised a suspicion of the presence of psychological/neuropsychological defects. Moreover, prior to the *Spencer* hearing in this case, defense counsel asked the trial judge to directly question Mr. Serrano with respect to his competency. The trial judge then did so. During that colloquy, Mr. Serrano stated, *inter alia*, that he was being "tortured" in prison by the Sheriff's Department in many ways, including being intentionally subjected to contagious maladies. At the conclusion of this colloquy, the trial judge asked if Mr. Serrano "needs to be evaluated to see if he is competent to proceed." (R1512-21).

Despite these facts, defense counsel never sought to investigate Mr. Serrano's mental health by consulting with a mental health expert. There were sufficient facts in this case to place counsel on notice that investigation of mental health mitigation was necessary. Consequently, counsel's failure to investigate this line of defense and

present the above-described available mental health mitigation evidence constituted a deficient performance.

This failure of trial counsel undermines confidence in the outcome of the penalty phase because it resulted in the jury and the judge not being permited to weigh and consider these important mitigating factors. Notably, under our death penalty system, trial courts are required to consider *all mitigating evidence* presented by the defendant and supported by the record." *Griffin v. State*, 820 So.2d 906, 913 (Fla. 2002). It is well recognized that the failure of defense counsel to investigate and present mental health mitigation evidence can constitute ineffective assistance of counsel. *Simmons v. State*, __ So.3d __, 2012, WL4936109 (Fla. 2012)(vacating death sentence because penalty phase counsel was deficient in failing to fully investigate and present mental and background mitigation); *Porter v. McCollum*, 558 U.S. 30, 130 S. Ct. 447, 450-51 (2009) (holding that the failure of trial counsel to conduct a thorough investigation into potential mitigation evidence for the penalty phase, including the possible existence of a brain abnormality and cognitive defects, substance abuse, and impairments to the defendant's mental health, constituted ineffective assistance of counsel); *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1350-57 (11th Cir. 2011)(holding that trial counsel's failure to investigate and present possible evidence of physical and emotional abuse inflicted upon the defendant, the defendant's history of drug and alcohol abuse, abandonment of the defendant by his

mother, as well as the learning deficits and depression of the defendant, prejudiced the defendant and constituted ineffective assistance of counsel); *Middleton v. Dugger*, 849 F.2d 491, 493-95 (11th Cir. 1988)(when mental health mitigating evidence was available and none was presented by counsel to the sentencing body, the omission constituted ineffective assistance of counsel). *See also Perri v. State*, 441 So.2d 606, 609 (Fla. 1983)(a defendant in a capital case may be legally responsible for his actions and legally sane but still deserves some mitigation of sentence because of his mental capacities being diminished; new sentencing ordered).

14. Defense counsel was ineffective in failing to present the available testimony of numerous witnesses who would have testified as to substantial mitigating factors. During the "jury recommendation" sentencing phase of the trial, the State and Mr. Serrano stipulated that Mr. Serrano was 68-years-old at the time of trial, Mr. Serrano was 59-years-old at the time of crimes, and Mr. Serrano has no prior criminal history. Thereafter, at that proceeding, defense counsel presented only one witness, Tony Maloney, a capital case mitigation consultant, who testified that Mr. Serrano had no prison disciplinary reports. In stark contrast, as previously explained, the State called 26 victim impact witnesses. (R5-134-205).

Subsequently, at the *Spencer* hearing, defense counsel presented the testimony of 34 witnesses who testified as to substantial mitigating factors. These factors included but are not limited to Mr. Serrano's (1) good school performance; (2) good

social history; (3) no history of alcohol or drug abuse; (4) successful Hispanic immigrant; (5) good employment history; (6) good husband; (7) good father; (8) positive religious involvement; and (9) significant history of good works. Defense counsel's performance was deficient in failing to investigate and present to the jury at the sentencing phase this plainly admissible mitigation testimony of these 34 available witnesses.

Because of this failure, the jury heard almost nothing that would humanize Mr. Serrano and knew virtually nothing of his background and good character. There exists too much mitigating evidence that could have been presented to the jury through these 34 witnesses for it to now be ignored by this Court. Trial counsel's deficient performance in failing to present this evidence to the jury was highly prejudicial because the jury never had an opportunity to consider these numerous mitigating factors and was inundated with victim impact witnesses who were called by the State. "[T]he Constitution requires that 'the sentencer in capital cases must be permitted to consider any relevant mitigating factor.'" *Simmons v. State*, ___ So.3d ___, 2012 WL 4936109 *25 (Fla. 2012) (quoting *Porter v. McCollum*, 558 U.S. 30, 130 S. Ct. 447, 454-55 (2009)). Accordingly, confidence in the death sentence in this case is undermined.

III. Jurisdiction over Mr. Serrano was barred at the trial and is presently barred under *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) and the Due Process Clause of the federal and State Constitutions because United States officials forcibly removed him from Ecuador in violation of an Extradition Treaty that is the sole lawful means by which the United States was able to remove Mr. Serrano from Ecuador where Ecuador has issued a formal protest letter to the United States regarding Mr. Serrano's removal and Mr. Serrano is sentenced to death although that Treaty prohibits extradition in death penalty cases.

As previously explained, Mr. Serrano unsuccessfully made this argument on appeal. *Serrano*, 64 So.3d at 107-08. This argument was preserved in the trial court. However, the following evidence was not part of Mr. Serrano's direct appeal record so the following evidence could not be considered by the Supreme Court of Florida on direct appeal: (1) in March 2009, Ecuador, after a thorough investigation of the manner in which Mr. Serrano, a citizen of Ecuador, was deported to the United States, issued a formal protest letter to the United States demanding that Mr. Serrano be returned to Ecuador on the grounds that one of the prosecutors in this case and FDLE Agent Tommy Ray took illegal actions to deport Mr. Serrano to the United States, including failing to follow the procedure established by the Extradition Treaty between the United States and Ecuador which does not permit Ecuadorian citizens to be deported in cases where they will be subjected to the death penalty, allegedly bribing Ecuadorian police officials, treating Mr. Serrano in cruel, inhumane and degrading ways and violating his due process rights and (2) in July 2008 and March

2009, the Inter-American Commission on Human Rights, Washington, D.C., after investigating the manner in which Mr. Serrano was deported to the United States from Ecuador, issued reports concluding that Mr. Serrano was illegally deported from Ecuador in violation of his human rights and demanding that Ecuador investigate the illegal acts committed and take legal and diplomatic measures to return Mr. Serrano to Ecuador. If this information had been available to the defense at the trial and on appeal, Mr. Serrano would have used it in those proceedings to support his above-stated meritorious claim that the indict must be dismissed and his death sentence vacated based upon his illegal deportation. This new information should now be considered by this Court.

The general rule under the *Ker/Frisbie* line of cases is that the means used to bring a criminal defendant before a court do not deprive that court of jurisdiction over the defendant. *United States v. Alvarez-Machain*, 504 U.S. 655, 661-62 (1992) (citing and quoting *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952)). Nevertheless, the *Ker/Frisbie* doctrine does not apply, and a court is deprived of jurisdiction over a defendant if: (1) the removal of the defendant violated the applicable extradition treaty, that treaty provides that it is the sole means by which a fugitive may be removed to another country and the offended nation objects to the removal of its citizen, or (2) the actions of American law enforcement officials in removing a defendant from a foreign country were outrageous. *See e.g., Alvarez-*

Machain, 504 U.S. at 662-64, 667; *United States v. Anderson*, 472 F.3d 662, 666 (9th Cir. 2006).

The removal of Mr. Serrano to the United States without complying with the United States-Ecuador Extradition Treaty deprived the trial court of jurisdiction over Mr. Serrano. That Treaty provides, *inter alia*, as follows:

> [W]hen the fugitive is merely charged with 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 the 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)(emphasis added). Thus, the Treaty states explicitly that it is the ***sole*** means by which the United States is able to secure the presence of a fugitive. Yet, the Treaty was not complied with in this case, it prohibits the extradition of an Ecuadorian citizen such as Mr. Serrano to face the death penalty and now Ecuador has officially protested Mr. Serrano's removal. (R2414, 2418-19, 2421-23, 2438).

Moreover, the actions of American law enforcement officials in illegally kidnaping Mr. Serrano were so outrageous that the due process clause of the federal

and Florida Constitutions required the trial court to divest itself of jurisdiction over Mr. Serrano. The Second Circuit in *United States v. Toscanino*, 500 F.2d 267, 275 (2nd Cir. 1974), citing due process concerns, carved out an exception to the *Ker/Frisbie* doctrine and held that due process requires a court to "divest itself of jurisdiction over the person of the defendant where it has been acquired as a result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."

There were illegal actions taken by FDLE Agent Tommy Ray in Ecuador in connection with the removal of Mr. Serrano and there is presently an ongoing organized criminal investigation by Ecuador concerning these acts which include intentionally illegally removing Mr. Serrano under the false pretense that he was not an Ecuadorian citizen. Four Ecuadorian officials who were Agent Ray's co-conspirators in this matter in Ecuador have already been criminally charged in Ecuador. Mr. Serrano reserves the right to amend his Rule 3.851 Motion based upon facts learned in this ongoing investigation, including but not limited to information that the State and Agent Ray lied to the trial court in asserting that Mr. Serrano's removal from Ecuador was properly done according to Ecuadorian law.

CONCLUSION

Mr. Serrano has made a sufficient showing for post-conviction relief based on the cumulative errors in his trial and sentencing. Mr. Serrano respectfully requests

that this Court vacate his convictions and sentence of death and order a new trial and sentencing. Additionally, Mr. Serrano respectfully requests an evidentiary hearing on all matters set forth in this motion.

OATH

Under penalties of perjury, I declare that I have read the foregoing motion and that the facts stated in it are true.

NELSON SERRANO

Respectfully submitted,

ROY BLACK, ESQ.
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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 33607-7013 on this 20th day of November 2012.

BY: Marcia J. Silvers
MARCIA J. SILVERS, ESQ.

EXHIBIT 1

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

CASE NO.: CF01-03262A-XX

STATE OF FLORIDA
Plaintiff,

v.

NELSON SERRANO,
Defendant.

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BOOK 14710 PAGE

SENTENCING ORDER

On May 17, 2001, the Defendant, Nelson Serrano, was indicted for four Counts of First Degree Murder of George Emanuel Gonsalves, Frank Dosso, the son of Felice Dosso, George A. Patisso, the son-in-law of Felice Dosso, and Diane Patisso, the daughter of Felice Dosso, occurring on December 3, 1997. He was tried before a jury on September 5, 2006 thru October 11, 2006. The jury found the Defendant guilty of each of the 4 Counts of Murder in the First Degree and reconvened October 17, 2006 for the presentation of evidence in support of aggravating and mitigating factors. On October 24, 2006 the jury recommended by a vote of nine to three (9 – 3) that the Defendant be sentenced to death for each of the four murders. On January 3, 2007, the Court held a sentencing or *Spencer* hearing during which both sides made legal argument. The Defendant declined to make a statement. Subsequently, Sentencing Memoranda were filed with the Court by both parties and final sentencing was set June 26, 2007.

This Court heard the evidence presented in both the guilt and penalty phases, had the benefit of the parties' legal memoranda and heard argument in favor or and in opposition to the death penalty. This Court accords great weight to the recommendations of the jury and reweighs the evidence to determine whether or not the State proved each aggravating circumstance beyond a reasonable doubt (See *Reynolds v. State*, 934 So.2d 1128 (Fla. 2006)) and finds as follows:

AGGRAVATING FACTORS

F.S.921.141(5)(i)
The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The facts that tend to establish this aggravating factor are that Felice Dosso, George Gonzalves and the defendant were partners in two businesses that they moved from New York to Florida. George Gonsalves and Felice Dosso were the initial two partners who brought the defendant in as a third partner while still in New York. The

three men were partners for many years beginning with Erie Manufacturing, the business Dosso and Gonsalves brought the defendant into in New York, and continuing thru the move of the business to Florida and the creation of another business, Garment Conveyor Systems. A dispute arose over the distribution of the assets. The defendant sought legal advice. Later the defendant took money belonging to Garment Conveyor Systems from business dealings with J.C.Penney and Rapistan. He opened a bank account with this money in the name of the business at First Union National Bank in Bartow, Florida, and the only signature on the account was his. The defendant filed a lawsuit regarding distribution of the money in the account and litigation was continuing at the time of the murders.

The defendant is originally from Ecuador. He presents himself as a gentleman known for his generosity with his money, his possessions, his connections and his time. He found jobs for many Ecuadorians in the companies. George Gonsalves had a loud manner of speaking and arguing. He and the defendant had temperaments that were disparate. Gonsalves would yell and threaten to get his point across while the defendant was a negotiator who prided himself on his gentlemanly manner of taking care of business. The third partner, Felice Dosso, from his testimony, tried to maintain friendly relations with both George Gonsalves and Nelson Serrano.

The defendant's two business partners abruptly removed him from any control of the businesses. Among other actions, they denied him access to his computer and locked him out of his office. The defendant became outraged by their treatment of him.

George Gonsalves had the habit of staying later than the other workers in the two businesses. His car was often the last car in the parking lot at the end of the day, and this was the case on December 3, 1997.

The defendant made elaborate plans to arrive at the business property shortly after the working day ended on two occasions one of which was December 3, 1997.

The defendant's plans included having cars rented in the name of someone else and placed for his use enabling him to appear to be in one location when he was actually in Bartow committing the murders on December 3, 1997.

He used the name of his first son, Juan Agacio, and that of a John White to purchase airline tickets to several cities in several States. The defendant bought airline tickets in those names on Halloween of 1997, when there was what appears to be an aborted attempt to commit the murder of George Gonsalves. The defendant's first son, Juan Agacio, had been adopted as a small child and given the name of John Greeven. He testified that the name Juan Agacio was not a name known even to him. The defendant had his nephew, Alvaro Penaherrero, use his personal credit card to rent cars on the promise of future repayment and park those cars where the defendant designated. The defendant arranged for that debt to be paid by Alvaro's godfather in Ecuador.

The defendant made plans to commit and hide his identity as the perpetrator of the December 3, 1997 murders. The arrangements were similar to those made for the October, 1997 attempt. He purchased airplane tickets in the same names for both occasions and his nephew rented and placed cars for his use. The defendant purportedly explained that he would use the cars to entertain a girlfriend. The defendant made plans to cover his movements. During the time of the murders he claimed that he had a migraine and had to confine himself to his room in an Atlanta motel. Possibly for alibi purposes the defendant placed calls on phones in his possession from Charlotte, North

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Carolina in October and from Atlanta, Georgia in December to his people in Florida. Despite the defendant's attempts to show he was not in the State of Florida during the time of the murders, the defendant's fingerprint was located on two parking tickets at the Orlando International Airport dated December 3, 1997, the date of the murders.

The defendant's plan included the timing of his arrival in Bartow. He knew from working with George Gonsalves that it was his habit to stay at the office after everyone had left the premises for the day. The defendant made arrangements on two occasions to arrive at the business when he would reasonably expect to find only George Gonsalves on the premises. The first time was the evening of Halloween, 1997, during a thunderstorm when no one stayed late resulting in an aborted attempt. The second time was on December 3, 1997.

Three men, including George Gonsalves, were found murdered in a room that had been formerly occupied by the defendant as his office. At the murder scene a ceiling tile was found to be dislodged with a blue chair situated under it. The defendant had previously stored papers and a pistol in the space above the ceiling tile. The chair held shoe prints of the brand of shoe that the defendant wore. Shoes of that type were located in the possession of the defendant's nephew, Ricardo Penaherrero. Ricardo reported that the defendant had given those shoes to him to wear to give his statement to the authorities in June 2000..

The evidence showed that each of the four victims' entry wounds were in a unique pattern. Each of the victims was shot three times below and behind the ear with a .22 caliber firearm. Leroy Parker, a blood spatter/splatter expert testified that he thought that Gonsalves and Patisso were on their knees at the time they were shot.

The caliber of bullet indicates that the type of gun used was of the same type that the defendant owned as a gun collector.

The defendant and George Gonsalves had angry, loud verbal confrontations in the office concerning the use of the profits from the businesses. Felice Dosso testified that he overheard the defendant threaten to kill George Gonsalves over business matters sometime prior to the defendant leaving the businesses in July of 1997.

The State proved that the defendant was angry with Gonsalves and that the defendant had reason to believe that Gonsalves would have been the only one in the building when he arrived.

The court also finds that Nelson Serrano's intent to murder George Gonsalves transferred to Frank Dosso, George Patisso and Diane Patisso. The transferred intent doctrine applies to the other three victims because the premeditated design to kill George Gonsalves directly resulted in their deaths; and the manner in which the defendant effectuated his design was cold, calculated and premeditated beyond a reasonable doubt.

The court finds this aggravator was proved beyond a reasonable doubt and assigns it great weight.

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F.S. 921.141(5)(e)
The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody

The victim, Diane Patisso, was found murdered in the front vestibule. The room where the three male victims were murdered could be reached from that vestibule. The defendant, in a taped statement, given to Bartow Police Detective Steve Parker the day after the murders said ". . . I know Diane. Diane is a tall woman." In that same taped statement, the defendant remarked that he "assumed" she was murdered because "she walked in, in the middle of something."

She was shot with a .32 caliber pistol and a .22 caliber pistol. The pattern of the .22 caliber bullet placement was similar to that seen on the other victims. Neither of the murder weapons has been located.

The defendant was not in custody at the time of the murders and the court does not discuss 'effecting an escape from custody' as part of the enumerated Aggravator.

The court finds this aggravator was proved beyond a reasonable doubt and assigns it great weight.

F.S.921.141(5)(b)
The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person

In this case the defendant was adjudicated guilty of First Degree Murder of four people on December 3, 1997. All victims were found at the same location.

The court finds this aggravator was proved beyond a reasonable doubt and assigns it great weight.

MITIGATING FACTORS

STATUTORY

FS 921.141(6)(a) The defendant has no significant history of prior criminal activity.

No history of the defendant's prior criminal record was presented to the court.

This mitigator was proved beyond a reasonable doubt and the court gives it great weight.

FS921.141(6)(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

No expert psychological, neurological or medical testimony was presented as to any mental of emotional disturbance of the defendant at the time of the event. No testimony was presented involving the use of controlled substances by the defendant at the time of the event. No testimony was presented suggesting that the defendant was under the influence of drugs or alcohol at the time of the event. The evidence presented is that the

murders were committed according to a plan formulated and executed by the defendant over a period of months.

There is no evidence of extreme mental or emotional disturbance. To the contrary, it appears from the evidence presented that the defendant was not under the influence of 'extreme' mental or emotional disturbance. The court finds that this factor in mitigation was not established.

FS 921.141(6)(g) The age of the defendant at the time of the crime.

The defendant was in his late fifties at the time of the crimes. The offense occurred on December 12, 1997. The Court finds that this factor has been reasonably established by the evidence and gives it some moderate weight.

NON-STATUTORY

1. **Good school performance.**
   The defendant obtained several college degrees. In order to do that, the court finds, one must display good school performance. The defendant is a highly educated individual as are the majority of his friends, family and acquaintances who testified either during the trial or by video deposition for the *Spencer* hearing. The court is reasonably convinced that this factor has been established and gives it moderate weight.

2. **Good social history.**
   The defendant is well socialized in the community, his church, his family and extended family. He is involved in the vicissitudes of the lives of the people in his family and has a history of helping those in need. The witnesses at the penalty phase and those presented for consideration for the Spencer hearing clearly establish this factor, and it is given moderate weight.

3. **No history of alcohol or drug abuse.**
   No evidence was presented or suggested to establish any record of abuse of either alcohol or illegal or prescription drugs. The court finds this factor was reasonably established and gives it some weight.

4. **Successful Hispanic immigrant.**
   Evidence was presented during the trial, the penalty phase and for the *Spencer* hearing clearly establishing that the defendant was a successful businessman for many years in this country to which he emigrated from his country of origin, Ecuador. The defendant and his wife raised their children in this country while supporting several members of their families and their acquaintances at least part of the time they were in this country. The defendant and his wife are clearly generous people. The court finds this factor was reasonably established and gives it moderate weight.

5. **Positive behavior during pretrial incarceration.**

The defendant displayed appropriate courtroom behavior during his lengthy pretrial detention. He displayed respect for the court. The court is reasonably convinced that this factor has been established and it is given some weight.

6. **Positive behavior during court appearances.**
Defendant's court appearances were devoid of any negative behavior directly observed by the Court. Accordingly, the court is reasonably convinced that this factor has been established and it is given some weight.

7. **Remorse.**
The defendant listed Remorse as a Mitigator for the Court to consider. The only evidence that could possibly be construed as remorse on the part of the defendant is found in the remark the defendant made about the death of Diane Patisso. He asserted that she was where she should not have been at the time of her death. The court considers this factor as though it was established and affords it slight weight.

8. **Good employment history.**
The evidence is that the defendant had and kept jobs commensurate with his training as an engineer. He was at times highly paid for his work according to the evidence. The court finds that this factor was established and affords it some weight.

9. **Good husband.**
The evidence presented during the trial, the penalty phase and the *Spencer* hearing including the video depositions that the court observed in their entirety, established that the defendant loves his wife and cared for her prior to his incarceration for these offenses. The court finds that this factor has been established and affords it some weight.

10. **Good father.**
The evidence is that the defendant was a good father in that he loved and cared for his children and they for him. The court finds that this factor has been established and affords it some weight.

11. **Positive religious involvement.**
The evidence is that the defendant was fully engaged in his religion as a Catholic. The court finds that this factor has been established and affords it some weight.

12. **Significant history of good works.**
The evidence is that the defendant supported various relatives as they came to this country to further their education and employment opportunities. He also financially supported family and friends when asked with their medical care. He was extremely generous with his time, connections and money. The court finds this factor has been established and affords it moderate weight.

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13. **Significant stressors at the time of the incident.**
There were three partners in two businesses. Mr. Dosso, Mr. Serrano and Mr. Gonsalves were the partners. The businesses were Erie Manufacturing and Garment Conveyor Systems. More than one lawsuit had been filed prior to the murders involving the three partners and the two businesses. At least one lawsuit was then pending between the three partners. The cases involved; among other issues, money, distribution of the land on which the businesses were located and the buildings and equipment. The defendant discussed being in a position of gaining or losing significant assets in a taped interview with Bartow Police Detective Steve Parker on December 4, 1997. The court finds this factor has been established and gives it some moderate weight.

The court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake. The court finds, as did the jury, by a nine to three (9-3) recommendation, that the aggravating circumstances outweigh the mitigating circumstances in this case.

Accordingly, it is,

ORDERED AND ADJUDGED that the Defendant, NELSON SERRANO, is hereby sentenced to death for each of the murders of George Gonsalves, Frank Dosso, George Patisso and Diane Patisso.

The defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

The defendant is hereby notified that this sentence is subject to automatic review by the Florida Supreme Court.

May God have mercy on the defendant's soul.

Done and Ordered in Bartow, Polk County, Florida this 26 day of June, 2007.

Susan W Roberts

Susan W. Roberts, Circuit Judge

Cc:
John Aguero, Esq., Attorney for the State
Paul Wallace, Esq., Attorney for the State
Cheney Mason, Esq., Attorney for the Defendant
Robert Norgard, Esq., Attorney for the Defendant
Nelson Serrano, Defendant

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IN THE CIRCUIT COURT, 10TH JUDICIAL CIRCUIT, IN AND FOR POLK COUNTY, FLORIDA
DIVISION: 9
CASE NUMBER: CF01-03262A-XX
(UCN NO:53-2001-CF-003262-AOXX-XX)
D.C. NUMBER:
OBTS NUMBER: 5302047501

STATE OF FLORIDA
VS.
NELSON IVAN SERRANO

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J U D G M E N T

THE DEFENDANT NELSON IVAN SERRANO
BEING PERSONALLY BEFORE THIS COURT REPRESENTED BY ROBERT MORGARD, PA
HIS ATTORNEY OF RECORD, AND THE STATE REPRESENTED BY JOHN AGUERO
ASSISTANT STATE'S ATTORNEY, AND HAVING

BEEN TRIED AND FOUND GUILTY OF THE FOLLOWING CRIME(S);

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME
001	FIRST DEGREE MURDER	782.04	FC
002	FIRST DEGREE MURDER	782.04	FC
003	FIRST DEGREE MURDER	782.04	FC
004	FIRST DEGREE MURDER	782.04	FC

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BY Re Recorded 6/26/07 FJ.

X AND NO CAUSE BEING SHOWN WHY THE DEFENDANT SHOULD NOT BE ADJUDICATED GUILTY, IT IS ORDERED THAT THE DEFENDANT IS HEREBY ADJUDICATED GUILTY OF THE ABOVE CRIME(S).

X AND PURSUANT TO SECTION 943.325, FLORIDA STATUTES, HAVING BEEN CONVICTED OF ATTEMPTS OR OFFENSES RELATING TO SEXUAL BATTERY (CH.794) OR LEWD AND LASCIVIOUS CONDUCT (CH. 800); INDECENT EXPOSURE, 782.04-MURDER, 784.045-AGGRAVATED BATTERY, 812.133-CARJACKING, 812.135-HOME INVASION ROBBERY, (CH. 787) - KIDNAPPING, 782.04 - HOMICIDE, 782.07 - MANSLAUGHTER, 812.13 - ROBBERY, 812.131 - ROBBERY/SUDDEN SNATCHING, 810.02 - BURGLARY; THE DEFENDANT SHALL BE REQUIRED TO SUBMIT BLOOD SPECIMENS.

_____ DOC - COMMUNITY CONTROL (FOR ADULT OFFENDERS ONLY)- SECTION 827.071, FLORIDA STATUTES-SEX PERFORMANCE BY A CHILD, 847.0145-SELL OR BUY OF MINORS

_____ AND GOOD CAUSE BEING SHOWN; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD. (TO BE CHECKED ONLY IF DEFENDANT IS FINGERPRINTED)

REVISED 04/04

NAME: Nelson Serrano
NELSON IVAN SERRANO
CASE NUMBER: CF01-03262A-XX

S. S. #: 112-38-3409

CHARGES: " SEE SENTENCING FORM "

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BY Re Recorded 6/26/07 FJ.

BOOK 03362 PAGE 03334

FINGERPRINTS OF DEFENDANT

FINGERPRINTS TAKEN BY: R.C.B. 05109 (NAME & TITLE)

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	**7. Left Index**	**8. Left Middle**	**9. Left Ring**	**10. Left Little**
				

BOOK 03362 PAGE 1484

DONE AND ORDERED IN OPEN COURT AT BARTOW, POLK COUNTY, FLORIDA THIS 11 **DAY OF** OCTOBER **A.D., 2006.**

I HEREBY CERTIFY THAT THE ABOVE AND FOREGOING FINGERPRINTS ARE OF THE DEFENDANT, NELSON IVAN SERRANO **, AND THEY WERE PLACED THEREON BY SAID DEFENDANT IN MY PRESENCE, THIS DATE IN OPEN COURT.**

CIRCUIT / COUNTY JUDGE
SUSAN W. ROBERTS

I certify that a copy of this order has been furnished to the State Attorney and the Defense Attorney, this 13 day of Oct, 2006
RICHARD M. WEISS, Clerk of Courts
By _____ Deputy Clerk

Page 9 of 16 Pages

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THE DEFENDANT, BEING PERSONALLY BEFORE THIS COURT, ACCOMPANIED BY HIS ATTORNEY, CA: ROBERT NORGARD/JAMES CHENEY AND HAVING BEEN ADJUDICATED GUILTY HEREIN, AND THE COURT HAVING GIVEN THE DEFENDANT AN OPPORTUNITY TO BE HEARD AND TO OFFER MATTERS IN MITIGATION OF SENTENCE, AND TO SHOW CAUSE WHY HE SHOULD NOT BE SENTENCED AS PROVIDED BY LAW, AND NO CAUSE BEING SHOWN,

(CHECK ONE IF APPLICABLE)

SENTENCE (AS TO COUNT 001)

__X__ AND THE COURT HAVING ON 10/11/2006 DEFERRED IMPOSITION OF SENTENCE UNTIL THIS DATE.

_____ AND THE COURT HAVING PREVIOUSLY ENTERED A JUDGEMENT IN THIS CASE ON _____ NOW RESENTENCES THE DEFENDANT.

_____ AND THE COURT HAVING PLACED THE DEFENDANT ON PROBATION/COMMUNITY CONTROL AND HAVING SUBSEQUENTLY REVOKED THE DEFENDANT'S PROBATION/ COMMUNITY CONTROL.

IT IS THE SENTENCE OF THE COURT THAT:

_____ THE DEFENDANT PAY A FINE OF $_____ PURSUANT TO F.S. 775.083, FLORIDA STATUTES, PLUS $ _____ AS THE 5% SURCHARGE REQUIRED BY F.S. 960.25, FLORIDA STATUTES.

__X__ THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS.

_____ THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE SHERIFF OF POLK COUNTY, FLORIDA.

_____ THE DEFENDANT IS SENTENCED AS A YOUTHFUL OFFENDER IN ACCORDANCE WITH SECTION 958.04, FLORIDA STATUTES.

TO BE IMPRISONED (CHECK ONE; UNMARKED SECTIONS ARE INAPPLICABLE):

_____ FOR A TERM OF NATURAL LIFE.

__X__ DEATH

_____ SAID SENTENCE SUSPENDED FOR A PERIOD OF _____ SUBJECT TO CONDITIONS SET FORTH IN THIS ORDER.

IF "SPLIT" SENTENCE COMPLETE THE APPROPRIATE PARAGRAPH

_____ FOLLOWED BY A PERIOD OF _____ ON PROBATION/COMMUNITY CONTROL UNDER THE SUPERVISION OF THE DEPARTMENT OF CORRECTIONS ACCORDING TO THE TERMS AND CONDITIONS OF SUPERVISION SET FORTH IN A SEPARATE ORDER ENTERED HEREIN.

FILED AND RECORDED
BOOK_____ PAGE_____
JUN 26 2007
RICHARD M. WEISS, CLERK
BY_____

BOOK PAGE

REVISED 04/04

2518

_____ HOWEVER, AFTER SERVING A PERIOD OF _____ IMPRISONMENT IN _____ THE BALANCE OF THE SENTENCE SHALL BE SUSPENDED AND THE DEFENDANT SHALL BE PLACED ON PROBATION/COMMUNITY CONTROL FOR A PERIOD OF _____ UNDER SUPERVISION OF THE DEPARTMENT OF CORRECTIONS ACCORDING TO THE TERMS AND CONDITIONS OF PROBATION/COMMUNITY CONTROL SET FORTH IN A SEPARATE ORDER ENTERED HEREIN.

IN THE EVENT THE DEFENDANT IS ORDERED TO SERVE ADDITIONAL SPLIT SENTENCES, ALL INCARCERATION PORTIONS SHALL BE SATISFIED BEFORE THE DEFENDANT BEGINS SERVICE OF THE SUPERVISION TERMS.

SENTENCE (AS TO COUNT 002)

__X__ AND THE COURT HAVING ON 10/11/2006 DEFERRED IMPOSITION OF SENTENCE UNTIL THIS DATE.

_____ AND THE COURT HAVING PREVIOUSLY ENTERED A JUDGEMENT IN THIS CASE ON _____ NOW RESENTENCES THE DEFENDANT.

_____ AND THE COURT HAVING PLACED THE DEFENDANT ON PROBATION/COMMUNITY CONTROL AND HAVING SUBSEQUENTLY REVOKED THE DEFENDANT'S PROBATION/ COMMUNITY CONTROL.

IT IS THE SENTENCE OF THE COURT THAT:

_____ THE DEFENDANT PAY A FINE OF $_____ PURSUANT TO F.S. 775.083, FLORIDA STATUTES, PLUS $ _____ AS THE 5% SURCHARGE REQUIRED BY F.S. 960.25, FLORIDA STATUTES.

__X__ THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS.

_____ THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE SHERIFF OF POLK COUNTY, FLORIDA.

_____ THE DEFENDANT IS SENTENCED AS A YOUTHFUL OFFENDER IN ACCORDANCE WITH SECTION 958.04, FLORIDA STATUTES.

TO BE IMPRISONED (CHECK ONE; UNMARKED SECTIONS ARE INAPPLICABLE):

_____ FOR A TERM OF NATURAL LIFE.

__X__ DEATH

_____ SAID SENTENCE SUSPENDED FOR A PERIOD OF _____ SUBJECT TO CONDITIONS SET FORTH IN THIS ORDER.

IF "SPLIT" SENTENCE COMPLETE THE APPROPRIATE PARAGRAPH

_____ FOLLOWED BY A PERIOD OF _____ ON PROBATION/COMMUNITY CONTROL UNDER THE SUPERVISION OF THE DEPARTMENT OF CORRECTIONS ACCORDING TO THE TERMS AND CONDITIONS OF SUPERVISION SET FORTH IN A SEPARATE ORDER ENTERED HEREIN.

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BOOK_____ PAGE_____
JUN 26 2007
RICHARD M. WEISS, CLERK
BY_____

BOOK 0139 PAGE 1441

2519

_____ HOWEVER, AFTER SERVING A PERIOD OF _____ IMPRISONMENT IN _____ THE BALANCE OF THE SENTENCE SHALL BE SUSPENDED AND THE DEFENDANT SHALL BE PLACED ON PROBATION/COMMUNITY CONTROL FOR A PERIOD OF _____ UNDER SUPERVISION OF THE DEPARTMENT OF CORRECTIONS ACCORDING TO THE TERMS AND CONDITIONS OF PROBATION/COMMUNITY CONTROL SET FORTH IN A SEPARATE ORDER ENTERED HEREIN.

IN THE EVENT THE DEFENDANT IS ORDERED TO SERVE ADDITIONAL SPLIT SENTENCES, ALL INCARCERATION PORTIONS SHALL BE SATISFIED BEFORE THE DEFENDANT BEGINS SERVICE OF THE SUPERVISION TERMS.

SENTENCE (AS TO COUNT 003)

__X__ AND THE COURT HAVING ON 10/11/2006 DEFERRED IMPOSITION OF SENTENCE UNTIL THIS DATE.

_____ AND THE COURT HAVING PREVIOUSLY ENTERED A JUDGEMENT IN THIS CASE ON _____ NOW RESENTENCES THE DEFENDANT.

_____ AND THE COURT HAVING PLACED THE DEFENDANT ON PROBATION/COMMUNITY CONTROL AND HAVING SUBSEQUENTLY REVOKED THE DEFENDANT'S PROBATION/ COMMUNITY CONTROL.

BOOK 01

PAGE 1452

IT IS THE SENTENCE OF THE COURT THAT:

_____ THE DEFENDANT PAY A FINE OF $_____ PURSUANT TO F.S. 775.083, FLORIDA STATUTES, PLUS $ _____ AS THE 5% SURCHARGE REQUIRED BY F.S. 960.25, FLORIDA STATUTES.

__X__ THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS.

_____ THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE SHERIFF OF POLK COUNTY,FLORIDA.

_____ THE DEFENDANT IS SENTENCED AS A YOUTHFUL OFFENDER IN ACCORDANCE WITH SECTION 958.04, FLORIDA STATUTES.

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BOOK_____PAGE_____
JUN 26 2007
RICHARD M. WEISS, CLERI
BY_____

TO BE IMPRISONED (CHECK ONE; UNMARKED SECTIONS ARE INAPPLICABLE):

_____ FOR A TERM OF NATURAL LIFE.

__X__ **DEATH**

_____ SAID SENTENCE SUSPENDED FOR A PERIOD OF _____ SUBJECT TO CONDITIONS SET FORTH IN THIS ORDER.

IF "SPLIT" SENTENCE COMPLETE THE APPROPRIATE PARAGRAPH

_____ FOLLOWED BY A PERIOD OF _____ ON PROBATION/COMMUNITY CONTROL UNDER THE SUPERVISION OF THE DEPARTMENT OF CORRECTIONS ACCORDING TO THE TERMS AND CONDITIONS OF SUPERVISION SET FORTH IN A SEPARATE ORDER ENTERED HEREIN.

_____ HOWEVER, AFTER SERVING A PERIOD OF _____ IMPRISONMENT IN _____ THE BALANCE OF THE SENTENCE SHALL BE SUSPENDED AND THE DEFENDANT SHALL BE PLACED ON PROBATION/COMMUNITY CONTROL FOR A PERIOD OF _____ UNDER SUPERVISION OF THE DEPARTMENT OF CORRECTIONS ACCORDING TO THE TERMS AND CONDITIONS OF PROBATION/COMMUNITY CONTROL SET FORTH IN A SEPARATE ORDER ENTERED HEREIN.

IN THE EVENT THE DEFENDANT IS ORDERED TO SERVE ADDITIONAL SPLIT SENTENCES, ALL INCARCERATION PORTIONS SHALL BE SATISFIED BEFORE THE DEFENDANT BEGINS SERVICE OF THE SUPERVISION TERMS.

SENTENCE (AS TO COUNT 004)

__X__ AND THE COURT HAVING ON 10/11/2006 DEFERRED IMPOSITION OF SENTENCE UNTIL THIS DATE.

_____ AND THE COURT HAVING PREVIOUSLY ENTERED A JUDGEMENT IN THIS CASE ON _____ NOW RESENTENCES THE DEFENDANT.

_____ AND THE COURT HAVING PLACED THE DEFENDANT ON PROBATION/COMMUNITY CONTROL AND HAVING SUBSEQUENTLY REVOKED THE DEFENDANT'S PROBATION/ COMMUNITY CONTROL.

IT IS THE SENTENCE OF THE COURT THAT:

_____ THE DEFENDANT PAY A FINE OF $_____ PURSUANT TO F.S. 775.083, FLORIDA STATUTES, PLUS $ _____ AS THE 5% SURCHARGE REQUIRED BY F.S. 960.25, FLORIDA STATUTES.

__X__ THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS.

_____ THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE SHERIFF OF POLK COUNTY, FLORIDA.

_____ THE DEFENDANT IS SENTENCED AS A YOUTHFUL OFFENDER IN ACCORDANCE WITH SECTION 958.04, FLORIDA STATUTES.

BOOK PAGE

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BOOK_____ PAGE____
JUN 26 2007
RICHARD M. WEISS, CLE
BY_____

TO BE IMPRISONED (CHECK ONE; UNMARKED SECTIONS ARE INAPPLICABLE):

_____ FOR A TERM OF NATURAL LIFE.

__X__ DEATH

_____ SAID SENTENCE SUSPENDED FOR A PERIOD OF _____ SUBJECT TO CONDITIONS SET FORTH IN THIS ORDER.

IF "SPLIT" SENTENCE COMPLETE THE APPROPRIATE PARAGRAPH

_____ FOLLOWED BY A PERIOD OF _____ ON PROBATION/COMMUNITY CONTROL UNDER THE SUPERVISION OF THE DEPARTMENT OF CORRECTIONS ACCORDING TO THE TERMS AND CONDITIONS OF SUPERVISION SET FORTH IN A SEPARATE ORDER ENTERED HEREIN.

FIREARM (10/20/LIFE)
_____ IT IS FURTHER ORDERED THAT THE _____ MANDATORY MINIMUM IMPRISONMENT PROVISION OF SECTION 775.087(2), FLORIDA STATUTES, IS HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.

LAW ENFORCEMENT PROTECTION ACT
_____ IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL SERVE A MINIMUM OF _____ YEARS BEFORE RELEASE IN ACCORDANCE WITH SECTION 775.0823, FLORIDA STATUTES.

CAPITAL OFFENSE
___ ___ IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL SERVE NO LESS THAN 25 YEARS IN ACCORDANCE WITH THE PROVISIONS OF SECTION 775.082(1), FLORIDA STATUTES.

SHORT-BARRELED RIFLE, SHOTGUN, MACHINE GUN
_____ IT IS FURTHER ORDERED THAT THE FIVE YEAR MINIMUM PROVISIONS OF SECTION 790.221(2), FLORIDA STATUTES, ARE HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.

CONTINUING CRIMINAL ENTERPRISE
_____ IT IS FURTHER ORDERED THAT THE 25 YEAR MINIMUM SENTENCE PROVISIONS OF SECTION 893.20, FLORIDA STATUTES, ARE HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.

TAKING A LAW ENFORCEMENT OFFICER'S FIREARM
_____ IT IS FURTHER ORDERED THAT THE THREE YEAR MANDATORY MINIMUM IMPRISONMENT PROVISION OF SECTION 775.0857(1), FLORIDA STATUTES, IS HEREBY IMPOSED FOR THE SENTENCE SPECIFIED IN THIS COUNT.

OTHER PROVISIONS:

RETENTION OF JURISDICTION
_____ THE COURT RETAINS JURISDICTION OVER THE DEFENDANT PURSUANT TO SECTION 947.16(3), FLORIDA STATUTES (1983).

JAIL CREDIT
___X___ IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL BE ALLOWED A TOTAL OF 1760 DAYS AS CREDIT FOR TIME INCARCERATED BEFORE IMPOSITION OF THIS SENTENCE.

CREDIT FOR TIME SERVED IN RESENTENCING AFTER VIOLATION OF PROBATION OR COMMUNITY CONTROL

_____ IT IS FURTHER ORDERED THAT THE DEFENDANT BE ALLOWED _____ DAYS TIME SERVED BETWEEN DATE OF ARREST AS A VIOLATOR FOLLOWING RELEASE FROM PRISON TO THE DATE OF RESENTENCING. THE DEPARTMENT OF CORRECTIONS SHALL APPLY ORIGINAL JAIL TIME CREDIT AND SHALL COMPUTE AND APPLY CREDIT FOR TIME SERVED AND UNFORFEITED GAIN TIME PREVIOUSLY AWARDED ON CASE/COUNT _____. (OFFENSES COMMITTED BEFORE OCTOBER 1, 1989)

BOOK 1741 PAGE 2522

FILED AND RECORDED
BOOK_____ PAGE_____
JUN 26 2007
RICHARD M. WEISS, CLERK
BY_____

2522

_____ IT IS FURTHER ORDERED THAT THE DEFENDANT BE ALLOWED _____ DAYS TIME SERVED. BETWEEN DATE OF ARREST AS A VIOLATOR FOLLOWING RELEASE FROM PRISON TO THE DATE OF RESENTENCING. THE DEPARTMENT OF CORRECTIONS SHALL APPLY ORIGINAL JAIL TIME CREDIT AND SHALL COMPUTE AND APPLY CREDIT FOR TIME SERVED ON CASE/COUNT _____ (OFFENSES COMMITTED BETWEEN OCTOBER 1, 1989, AND DECEMBER 31, 1993)

_____THE COURT DEEMS THE UNFORFEITED GAIN TIME PREVIOUSLY AWARDED ON THE ABOVE CASE/COUNT FORFEITED UNDER SECTION 948.06(6).

_____THE COURT ALLOWS UNFORFEITED GAIN TIME PREVIOUSLY AWARDED ON THE ABOVE CASE/COUNT. (GAIN TIME MAY BE SUBJECT TO FORFEITURE BY THE DEPARTMENT OF CORRECTIONS UNDER SECTION 944.28(1)).

_____IT IS FURTHER ORDERED THAT THE DEFENDANT BE ALLOWED _____ DAYS TIME SERVED BETWEEN DATE OF ARREST AS A VIOLATOR FOLLOWING RELEASE FROM PRISON TO THE DATE OF RESENTENCING. THE DEPARTMENT OF CORRECTIONS SHALL APPLY ORIGINAL JAIL TIME CREDIT AND SHALL COMPUTE AND APPLY CREDIT FOR TIME SERVED ONLY PURSUANT TO SECTION 921.0017, FLORIDA STATUTES, ON CASE/COUNT _____. (OFFENSES COMMITTED ON OR AFTER JANUARY 1, 1994)

CONSECUTIVE/CONCURRENT AS TO OTHER COUNTS

IT IS FURTHER ORDERED THAT THE SENTENCE IMPOSED FOR THIS COUNT SHALL RUN (CHECK ONE)
_____CONSECUTIVE TO __X__CONCURRENT WITH THE SENTENCE SET FORTH IN COUNT 001 OF THIS CASE. EACH COUNT CONCURRENT WITH EACH OTHER.

CONSECUTIVE/CONCURRENT AS TO OTHER CONVICTIONS

IT IS FURTHER ORDERED THAT THE COMPOSITE TERM OF ALL SENTENCES IMPOSED FOR THE COUNTS SPECIFIED IN THIS ORDER SHALL RUN (CHECK ONE)
_____ CONSECUTIVE TO _____ CONCURRENT WITH (CHECK ONE) THE FOLLOWING:

_____ ANY ACTIVE SENTENCE BEING SERVED.

_____ SPECIFIC SENTENCES

BOOK 0343 PAGE 1432

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JUN 26 2007
RICHARD M. WEISS, CLERK
BY_____

Defendant's Name: NELSON IVAN SERRANO

Case Number: CF 01-03262A-XX

☐ POLK COUNTY JAIL (NO PROBATION) ☒ FLORIDA STATE PRISON

In the event the above sentence is to the Department of Corrections, the Sheriff of Polk County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections, at the facility designated by the Department, together with a copy of this judgment and sentence and any other documents specified by Florida Statutes.

The defendant in open Court was advised of his/her right to appeal this sentence by filing a notice of appeal within thirty (30) days from this date, with the Clerk of this Court, and the defendant's right to the assistance of counsel in taking said appeal, at the expense of the State, upon showing of indigence.

BOOK 0170

PAGE 1458

In imposing the above sentence, the Court further recommends:

ALL COSTS WAIVED

DONE AND ORDERED, IN OPEN COURT, AT BARTOW, POLK COUNTY, FLORIDA.

JUNE 26, 2007
DATE

Susan Roberts
SUSAN W. ROBERTS **JUDGE**

I certify that a copy of this order has been furnished to the State Attorney and the Defense Attorney, this 27th day of June 2007
RICHARD M. WEISS Clerk of Courts
By C. F. Jones
Deputy Clerk

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FILED AND RECORDED
BOOK_____ PAGE_____
JUN 26 2007
RICHARD M. WEISS, CLERK
Revised 1/8/04
BY_____

EXHIBIT 2

OFFICE OF THE STATE ATTORNEY; TENTH JUDICIAL CIRCUIT
State Attorney Jerry Hill

Polk, Highlands, and Hardee Counties

Main Office
255 North Broadway Avenue, 2nd Floor
Drawer SA, P.O. Box 9000
Bartow, Florida 33831-9000 • (863) 534-4800

Lakeland Branch Office
930 East Parker Street, Suite 238
Lakeland, Florida 33801 • (863) 499-2596

Winter Haven Branch Office
3425 Lake Alfred Road 9, Gill Jones Plaza
Winter Haven, Florida 33881 • (863) 401-2477

December 19, 2003

J. Cheney Mason
390 Orange Avenue, Suite 2100
Orlando, FL 32801

re: *State v. Nelson Serrano*
Case No. CF01-03262

Dear Mr. Mason:

At depositions earlier this week I indicated to you that I was willing to give you a list of witnesses that I do not anticipate calling at trial. What follows is that list, along with a short explanation of who the witness is and what their role was to the best of my knowledge.

Officer Stacy Perry, Bartow Police Department (BPD)–was at the scene and assisted with security of scene.
Officer Hiram Saunders, BPD–at the scene
Lt. Robert Green, BPD–at the scene
Lt. Chuck Spencer, BPD–at the scene
Sgt. John McKinney, BPD–at the scene
Donna Harris–victim advocate for BPD
Kathy Trowell–victim advocate for BPD
Officer James Goff, BPD–at the scene and assisted with security of scene.
Officer Michael Quinn, BPD–assisted with surveillance which yielded nothing.
Detective Brad Grice, Lakeland Police Department–on the task force.
Special Agent Brian Criste, FDLE Tampa–took custody of a computer seized from Erie which yielded nothing.
James McKinsey–employee of Erie who knows nothing.
Donna Staton–employee of Erie who knows nothing.
Ann Cutting–employee of Erie who know nothing.
Officer Peter Tong, BPD–searched the dumpster at Erie and found nothing.
Karen Cahill–was a bookkeeper at Erie. She is deceased.
Elaine Trowell, GTE security–assisted with pen registers.
Christine Carroll–employee of Erie who knows nothing.
Braulio (Bob) Davila–employee of Erie who knows nothing.
Kay Dain Brillant, FDLE–criminal investigative analyst who did things like background checks, etc. for the agents.

Det. Jerry Mutterperl, Flushing, New York Police Department–was present for a controlled phone call between Phil Dosso and Nelson Serrano which yielded nothing.

Nick Del Castillo, FDLE–assisted by getting Alvaro's prints and photo from the Orlando Police Department.

Special agent Hilda Kogut, FBI in New York–assisted investigators by contacting friend and family of the victims.

Dr. Neal Hibler–hypnotized witness John Purvis who consequently can't be used because his memory was hypnotically refreshed. The police don't believe Purvis anyway.

Robert Allen, FDLE–assisted in translating an e-mail written in Spanish from Alvaro to Alvaro's mother. The e-mail was not relevant to anything.

Special Agent Lawrence Masterson, FDLE Miami–served Gustavo Concha with a subpoena.

Detective Steve Maddox, Clayton County, Georgia Police Department–was present in an interview of Annie Perdue, the clerk at the La Quinta in Atlanta who is on the video of Nelson Serrano.

Detective Phillip Hanner, Clayton County, Georgia Police Department–same as Maddox above.

Susan Alonzo, FDLE–criminal investigative analyst who researched records regarding Juan Agacio.

Special Agent Jeff Hutcheon, FDLE–same as Alonzo above.

Special Agent Raul Perez, FDLE–worked on passport information regarding Nelson Serrano.

Ann Goeden, FDLE–language special who helped with wiretap which yielded nothing.

Special Agent Richard Dees, FDLE Miami–transported Nelson Serrano from Miami. Serrano made no statements.

Special Agent Tom Maxwell, FDLE Miami–same as Dees above.

Special Agent Dennis Russo, FDLE Lakeland–transported Nelson Serrano from Clewiston to Bartow. Serrano made no statements.

Special Agent William Hudson, DEA Attache in Quito, Ecuador–assisted in deportation of Nelson Serrano.

Detective Ivan Garcia, Polk County Sheriff's Department–assisted with translating during a search of defendant's house on 3/7/01.

Officer Philip Ketcham, BPD–assisted with crime scene security

Officer Kelly Wells, BPD–assisted with crime scene security.

Officer Travis Mitchell, BPD–assisted with crime scene security.

Officer David Reynolds, BPD–assisted with crime scene security.

Officer Jason Griffith, BPD–assisted with crime scene security.

Officer Joe Burgess, BPD–assisted with crime scene security.

Officer Larry Willis, BPD–assisted with crime scene security.

Brandy Powers, PCSD at the time–at the scene.

Tom Brown, PCSD at the time–at the scene.

Officer Douglas Peacock, BPD–at the scene.

Chief Jay Robinson, Bartow Fire Department–at the scene.

Officer Christopher Holle, BPD–at the scene.

Officer Keith Mitchell, BPD–assisted with crime scene security.
Officer Carl Smith, BPD–assisted with crime scene security.
Officer Paul O'Dell, BPD–assisted with crime scene security.
Officer Richard Bias, BPD–assisted with crime scene security.
Jim Sewell, FDLE Tallahassee–at the scene.
Sgt. Rick Morera, FDLE–at the scene.
Special Agent Tom Beach, FDLE–at the scene.
Major W.J. Martin, PCSD–at the scene.
Stephanie Stewart, FDLE–at the scene.
Officer Gregory Rhoden, BPD–assisted with crime scene security.
Sgt. Carl McGee, BPD–assisted with crime scene security.
Special Agent Brock Self, FBI at the time–at the scene.
Special Agent John Smith, FBI–at the scene.
Special Agent Timothy Ryan, FBI–at the scene.
Cynthia Sandusky, FDLE lab–processed evidence to recover trace material which led to nothing of relevance.
Edward Lenihan, FDLE lab–same as Sandusky above.
Tina McMichen, FDLE lab–serologist who found nothing of relevance.
Monica Knuckles, FBI lab, Washington, D.C.–examined plastic gloves which led to nothing of relevance.
Lara Bahnweg, FDLE Tampa lab–serologist who examined some clothes which led to nothing of relevance.
Sylvia Castillo, FBI–translated deportation documents.
Major Jorge Penaherrera, Quito, Ecuador police–provided documents to Special Agent Tommy Ray regarding the arrest and deportation of Nelson Serrano.

If there is anything else I can do to help this case move along, please call me.

Sincerely,

JOHN K. AGUERO
Assistant State Attorney
Director, Special Prosecution
Fla. Bar No. 363588

xc: Robert Norgard
Court file