

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.

RECEIVED
JUL 10 2013
Black Srebnick
Kornspan & Stumpf, P.A.

**DEFENDANT SERRANO'S
MOTION TO FILE SECOND AMENDMENT TO
MOTION FOR POST-CONVICTION RELIEF**

The Defendant, NELSON SERRANO, respectfully moves this Court for leave to file the attached amendment to his Motion for Post-Conviction Relief pursuant to Rule 3.851(f)(4) of the Florida Rules of Criminal Procedure and states as follows:

1. Attached to the instant Motion is Mr. Serrano's "Second Amendment to Motion for Post-Conviction Relief."
2. Florida Rule of Criminal Procedure 3.851(f)(4) provides in pertinent part:

A motion filed under this rule may be amended up to 30 days prior to the evidentiary hearing upon motion and good cause shown.

3. An evidentiary hearing has not yet been scheduled on Mr. Serrano's Motion for Post-Conviction Relief. Thus, the instant motion is timely filed under Rule 3.851(f)(4).

4. In Argument II of Mr. Serrano's Motion for Post-Conviction Relief, Mr. Serrano argued that trial counsel was ineffective for failing to depose the sole eyewitness John Purvis or otherwise investigate and prepare for Mr. Purvis' testimony. Mr. Serrano's Second Amendment to his Motion for Post-Conviction Relief expands this claim. Newly discovered evidence indicates that Mr. Purvis, the sole eyewitness, informed law enforcement officials in this case that the purported perpetrator seen outside of Erie Manufacturing was possibly Asian.

5. This Second Amendment also expands Mr. Serrano's claim in Argument I that the State knowingly permitted perjured testimony through Mr. Purvis in violation of *Giglio v. United States*, 405 U.S. 150 (1972). During the trial, Mr. Purvis testified that the man seen outside of Erie Manufacturing was Hispanic, Mediterranean, and had an olive complexion. But, as explained in the Second Amendment, contrary to his previous statements to law enforcement officials, Mr. Purvis did not testify that the man appeared to be Asian. Because the

State knowingly allowed this false and misleading testimony, Mr. Serrano is expanding his Motion for Post-Conviction Relief to include this *Giglio* claim.

6. The limitations period for filing motions for post-conviction relief does not preclude the enlargement of issues raised in a timely-filed first motion for post-conviction relief through the filing of an amendment to such a motion. *Rogers v. State*, 782 So. 2d 373, 376 n.7 (Fla. 2001); *Aguilar v. State*, 756 So. 2d 257, 258 (Fla. 3d DCA 2000); *Bulley v. State* 857 So. 2d 237, 239-40 (Fla. 2d DCA 2003); *Rivet v. State*, 618 So. 2d 377, 378-78 (Fla. 5th DCA 1993); *Graham v. State*, 846 So. 2d 617 (Fla. 2d DCA 2003); *Rozier v. State*, 603 So. 2d 120, 121 (Fla. 5th DCA 1992). Furthermore, defendants filing motions for post-conviction relief may amend their pleadings as needed; this policy is based on Florida Rule of Civil Procedure 1.190(e). Fla. R. Civil P. 1.190(e) (“At every stage of the action the court must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.”); *see Rozier*, 603 So. 2d at 121 (concluding that Rule 1.190(e) applies to amendments for post-conviction relief); *Boyd v. State*, 801 So. 2d 116, 117 (Fla. 4th DCA 2001) (same); *see also Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000) (recognizing that post-conviction claims are quasi-civil in nature).

7. The State’s failure to disclose evidence that the purported perpetrator was likely Asian also violated *Brady v. Maryland*, 373 U.S 83 (1963). Because Mr.

Serrano is not Asian, evidence that the sole eyewitness identified the purported perpetrator as possibly Asian is favorable to Mr. Serrano. Thus, Mr. Serrano must now include this *Brady* claim in his Second Amendment to his Motion for Post-Conviction Relief.

8. These claims have not been presented until now for good cause. As previously explained, evidence that Mr. Purvis identified the purported suspect as Asian was never disclosed by the State in violation of *Brady, supra*. In fact, this information was not even mentioned in the police reports discussing Mr. Purvis' pre-trial statements. It was found on a single audiocassette tape recording of Mr. Purvis that was mentioned in police reports. Undersigned counsel for Mr. Serrano had to contact Elizabeth Golding, an Archivist Supervisor in charge of the Capital Post-Conviction Public Repository, in order to obtain a copy of this audiocassette tape as it could not be found within the boxes of approximately 105,000 pages of documents disclosed in the post-conviction phase of this case pursuant to the Florida Public Records Act.


9. Furthermore, the State has still failed to disclose all evidence relating to Mr. Purvis' statement. The audiocassette tape where Mr. Purvis identifies the purported perpetrator as likely Asian cuts off abruptly. Thus, the State has yet to provide Mr. Serrano the complete recording of Mr. Purvis' pre-trial interview of October 11, 1999. Additionally, police reports indicate that the State videotaped

Mr. Purvis' interview. The State has also failed to provide Mr. Serrano with this videotape of Mr. Purvis' interview. Because this evidence was only recently discovered due to the State's continuous failure to disclose evidence related to Mr. Purvis, Mr. Serrano should be afforded the opportunity to amend his Motion for Post-Conviction Relief.

10. Finally, it is "one of the most important dictates of due process that proceedings involving criminal charges, and especially the death penalty, must both be and appear to be fundamentally fair." *Steinhorst v. State*, 636 So. 2d 498, 500-01 (Fla. 1994); *see Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) ("[D]eath is a different kind of punishment from any other which may be imposed in this country... From the point of view of the defendant, it is different in both its severity and its finality. From the point of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate State action. It is of vital important to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.")

11. For the foregoing reasons, Mr. Serrano requests that this Court enter an order granting this Motion.

Respectfully submitted,

for 

ROY BLACK, ESQ.

Florida Bar No. 126088

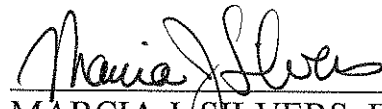
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CERTIFICATE OF SERVICE

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 16th day of July 2013.

BY: 

MARCIA J. SILVERS, ESQ.

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

CRIMINAL DIVISION
CASE NO. CF01-3262

THE STATE OF FLORIDA,

Plaintiff,

v.

NELSON SERRANO,

Defendant/Petitioner.

_____ /

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

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

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

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

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

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

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

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

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

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

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

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

² *Id.* at 21:19 (emphasis added).

³ *Id.* at 21:40 (emphasis added).

⁴ *Id.* at Tape 1 Side B 16:05 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

OATH

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



NELSON SERRANO

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John Aguero, Assistant State Attorney, 255 N. Broadway Avenue, Bartow, FL 33830 and to the Office of the Attorney General, Attn: Stephen D. Ake, Esq., Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33706-7013 on the 16th day of July 2013.

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