

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-444

NELSON SERRANO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

APPEAL FROM CIRCUIT COURT
TENTH JUDICIAL CIRCUIT, POLK COUNTY

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STATEMENT OF FACTS AND OF THE CASE

A. Introduction

This appeal stems from the denial, in part, of Mr. Serrano's motion for post-conviction DNA testing and comparisons filed pursuant to Rule 3.853 of the Florida Rules of Criminal Procedure, Section 925.11 of the Florida Statutes and the Due Process Clause of the federal and state constitutions. An appeal from the denial of such a motion is permitted by Rule 3.853(f) of the Florida Rules of Criminal Procedure.

This is a case in which the death penalty was imposed after a jury returned a verdict finding Mr. Serrano guilty of four counts of first degree murder. Accordingly, this Court has jurisdiction over this appeal.

B. The Trial Evidence

On December 3, 1997, four murders occurred between 5:20 and 5:45 p.m. at a business called Erie Manufacturing and Garment Conveyor Systems (hereinafter "Erie") located in an industrial park in Bartow, Florida. (T2886-89)¹ Mr. Serrano was over 500 miles away that day in an Atlanta hotel. Indeed, it is undisputed that an Atlanta businessman met with Mr. Serrano that day until 11 a.m. Also, hotel

¹ The transcript of the trial is referred to herein as "T" followed by the page number. The evidence is referred to herein as it is found in the record on appeal as "EV" followed by the page number.

videotape footage shows Mr. Serrano in the Atlanta hotel lobby that day at 12:19 p.m. and at 10:17 p.m. In addition, airline and hotel records show that Mr. Serrano traveled to Atlanta the day before the murders and left there the morning after the murders.

The prosecution's theory was that, from 12:19 p.m. until 10:17 p.m., Mr. Serrano could have traveled on a commercial airline from Atlanta to Orlando under a false name, driven 80 miles to Bartow in a rental car in rush hour traffic, shot four people at close range, driven 50 miles in a rental car in rush hour traffic to Tampa, flown back to Atlanta under a different false name via a commercial airline and driven back to his Atlanta hotel.

The defense maintained that the prosecution's theory was preposterous for a number of reasons. First, there was not enough time for Mr. Serrano to have done all of these things and to have arrived at his hotel at 10:17 p.m. Furthermore, not a single witness was found who saw Mr. Serrano leave the hotel, drive to the airport, park there or get on the planes. No airport videotapes showed Mr. Serrano anywhere near the Atlanta, Orlando or Tampa airports that day.

Moreover, there was not a scintilla of forensic evidence that linked Mr. Serrano to the crime scene. Although law enforcement officers conducted forensic searches of the crime scene, the rented automobile allegedly driven by Mr. Serrano

on the day of the crimes and Mr. Serrano's house, they found no incriminating evidence linking Mr. Serrano to the crime scene and no evidence linking the rental car to that scene. In addition, two handguns were used in the murders suggesting that there were two shooters - not one - as the prosecution contended. Neither of the guns was ever found.

Mr. Serrano was a business partner of George Gonsalves, one of the victims, for many years. In the mid-1980s, Mr. Serrano was in the business of designing, selling and installing garment conveyor systems called slick rail systems. During that time, 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. They were equal partners in that company with differing responsibilities. 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. Together the three men purchased the land in Bartow on which the Erie/Garment building was built. This land was owned equally by the three men and their wives. (T3495-3503)

In 1990, Mr. Serrano's son, Francisco Serrano, became Director of Operations of Erie and Garment. (T4141-43) In about 1996, Phil Dosso's son, Frank Dosso, became Director of Operations of Erie and Francisco Serrano remained on as Director of Operations of Garment. (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. Francisco Serrano told Phil and Frank Dosso and George Gonsalves about the improper double books. They claimed that the extra set of books was “for practicing.” Subsequently, in late Spring 1997, Francisco Serrano discovered that about one million dollars was missing from the Erie/Garment accounts. Francisco and Nelson Serrano met with Phil Dosso and George Gonsalves about the missing money. Francisco Serrano testified that Dosso and Gonsalves acknowledged that they had something to do with the missing money but they would not disclose what they had done with it. An attorney for Erie/Garment, Mr. Atkins, advised the Serranos to report the missing money to the Internal Revenue Service and they did so. (T4103-04, 4148-4159)

Shortly thereafter, on May 28, 1997, when Mr. Serrano was out-of-town on business, Phil Dosso and George Gonsalves attempted to fire Francisco Serrano but could not do so because Nelson Serrano was the President of Garment at the time. (T4161-62, EV967)

Phil Dosso claimed that he and Gonsalves fired Francisco Serrano because Francisco Serrano started his own import/export company and was doing work for that company while on Erie’s time. (T3505-09) However, Francisco Serrano testified that it was 1991 - many years before Phil Dosso and Gonsalves fired him - that Phil

Dosso and Gonsalves talked to him about his import/export company and, at the time he was fired, his import/export company had long ceased to exist. (T 4168-69)

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 a check to Garment from J.C. Penney in the amount of \$132,655.30. Mr. Serrano told the bank officer that there was a dispute with his Garment business partners regarding their fraudulent activity. On June 17, 1997, Mr. Serrano deposited another check to Garment for \$140,000 into the new account. Mr. Serrano never spent a dime of this money. (T4433-71) Phil Dosso testified that the opening of this new account caused added tension between the three partners. (T3547-49)

On June 23, 1997, at a Garment board of director's meeting attended by the three partners, Phil Dosso and Gonsalves voted to remove Mr. Serrano as the President of Garment, make Phil Dosso the new President of Garment and have only themselves as authorized signatories on Garment's bank accounts. (T3594-95, 3606, EV762-63) After becoming the President of Garment, Dosso immediately fired Francisco Serrano. (T 4172-73)

Soon thereafter, Dosso and Gonsalves had all of the locks changed at Erie/Garment. (T 3606) Since Mr. Serrano still owned one-third of Erie/Garment and he and his wife still owned one-third of the Erie/Garment property, he called the police upon learning that the locks had been changed. However, he ultimately decided to leave, create a new slick rail company and pursue a resolution of the Erie/Garment issues via the 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, in the presence of Phil Dosso and Francisco 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. Based upon that telephone conversation, she expected him to be home by 5:30 p.m. (T3452)

Many Erie/Garment employees clocked out from work that day shortly after 5:00 p.m. while Gonsalves, Frank Dosso and George Patisso (Phil Dosso's son-in-law who was an Erie employee), 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, Mrs. Stephens, were the last employees to leave the building. Catalan testified that, when he left, he checked the doors to ensure that they were locked and that he told the police that he had done so. (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) Diane Patisso 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 but there was no answer. She also called Frank Dosso's cell phone but there was also 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, his son-in-law and Frank Dosso, his son, 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, Officer James Christian, arrived. 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)

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)

According to the testimony of Leroy Parker, the State's bloodstain pattern analysis expert, the three men were shot in a manner that is consistent with execution-style killings. More specifically, Parker testified that Gonsalves was on his knees when he was shot. George Patisso was shot at close range with his head only two inches from the floor. (T3889, 3896, 3904-05, 3976-81) The blood in the office where the three men were shot was all near the floor indicating that they were all told to kneel on the floor. There was no blood anywhere that was as high as a desk top. (T3126-27) Parker concluded that George Patisso was definitely shot before Gonsalves but he could not make any other conclusions as to the sequence in which the four individuals were shot. Frank Dosso had bullet wounds to his hand and arm indicating a "defensive mechanism." (T3901, 3905, 3919) Parker also concluded that Diane Patisso was standing up when she was shot. (T3922) In Parker's expert 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) The .32 caliber casing was found in an office near Diane Patisso's body. (T2965-72, 2978, 3016, 3136-37) 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 13 fingerprints that could not be matched to anyone. Law enforcement officials compared these unidentified fingerprints to every Erie/Garment employee, Mr. Serrano and the deceased. However, no one testified that these unidentified fingerprints were ever compared to any official fingerprint database (T3035-37, 3045-51, 3070-71, 3156-59, 3302-03).

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)²

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. No people in the world except identical twins share the same DNA profile. Nevertheless, the State only asked FDLE DNA Analyst

² The two emergency medical technicians who were called to the crime scene both told law enforcement officials that this plastic glove “was not theirs.” (R.228-311, Exh.1). These technicians did not testify at the trial.

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. (T4807, 4812-13)

There was evidence that the motive for the shootings was robbery. There were no wristwatches found on any of the three men who were killed. Blood on Frank Dosso's arm showed an outline of his Rolex wristwatch which had been stolen from him after he was shot.³ George Patisso had been wearing a gold neck chain that was also stolen by the perpetrator. 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)

³ Leroy Parker, the State's expert in bloodstain analysis, testified that whoever removed Frank Dosso's watch would have had blood transferred to his hands and possibly elsewhere. (T3919-21)

Notably, a detective in this case testified that he interviewed an Erie/Garment employee about possible suspects in this case and she told him about two Hispanic men. Defense counsel questioned the detective about the fact that this employee told him that these men came to Erie/Garment on the day of the murders seeking employment and their behavior was weird. (T3815-16, 6229-30) The detective further testified that a man who worked near Erie/Garment reported that he saw an African-American male and a blue vehicle at Erie/Garment at the time of the murders and heard a gunshot. (T3811-13) The detective additionally testified that, several times on the day of the murders, a Ford Thunderbird driven by a man who was 30 to 35 years old drove slowly past Erie and a police officer tried to stop the vehicle but it got away. (T3814)

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 prints on the seat. (T2980, 3038, 3118-24, 4385) David Catalan, an Erie/Garment employee 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. As previously explained, an ejected .32 caliber casing from the .32 caliber bullet that shot Diane Patisso was found near her body. Catalan told a detective assigned to this case that the gun shown to him by Mr. Serrano was a *revolver with a wheel in the center*. (T5937-38) In addition, a computer technician for Erie/Garment's computers testified that the gun that Mr. Serrano kept in his office was a *revolver*. (T4074-75) 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. A shooter of a revolver has to manually remove a casing from a revolver and it would be nonsensical for the perpetrator to take the time to manually remove the .32 casing from the chamber of the revolver and throw it on the floor. (T5133-34)

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 owned by Mr. Serrano which Mr. Serrano loaned to his nephew to wear when he appeared before the grand jury investigating this case on June 15, 2000. (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 in a managerial position 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 young, 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 off the side of a road near the Erie/Garment building. (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 looked like he was lighting a cigarette. (T3403) A few weeks after the incident, Purvis described the man to a police forensic artist who then drew a composite sketch. (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. The State elicited from its witness, Alvaro Penaherrera, that Mr. Serrano smoked tobacco and had a tobacco habit. (T.5767). The State also elicited from its witness, Maureen Serrano, that Mr. Serrano smoked a pipe. (T4122, 5767). FDLE Agent Tommy Ray, the lead investigator in this case, testified that Mr. Serrano did not smoke cigarettes. (T4122, 4299).

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 that had occurred at Erie/Garment. (T3678, 5924) However, Francisco Serrano had an alibi in that he was attending a business meeting in Tampa when the crimes occurred. (T4053-65, 4078-82) Francisco Serrano voluntarily met with law enforcement officers on the evening of the incident and agreed to have his hands tested for carbon residue, a substance which would ordinarily be found on someone who had recently fired a firearm (T4194-96)

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 Astechologies 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 Bartow Police Department to be interviewed at the request of law enforcement officers. (T3682-83) Part of the interview was recorded and part was not. He had no injuries on him at that time. (T3065) Prior to being tape-recorded,

Mr. Serrano volunteered to Detective Steve Parker that he and his son had experienced business disputes with George Gonsalves and Phil Dosso and that he had filed a lawsuit against them. Mr. Serrano stated that he had been removed as President of Garment and had not returned there since that time. (T3685-87)

Mr. Serrano told Detective Parker 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) Mr. Serrano said that 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) 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 he returned on 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 speculated that it was possible that the female victim “walked in the middle of something.” (T 3704) 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) Notably, Maureen Serrano, who is divorced from Francisco 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."

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 knew Mr. Serrano while growing up in Ecuador, Mr. Serrano's native country. At age 19, Penaherrera moved to Orlando and lived with Mr. Serrano and his family. Mr. Serrano employed him at Erie/Garment during this time period. In 1993, he quit working at Erie/Garment to attend college and joined the Army Reserve. (T4861-80, 5817)

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) 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) Penaherrera testified that he did not know if Mr. Serrano or his lover actually used the cars that he claimed he rented for them. (T5810) Law enforcement

officers conducted a thorough forensic search of both of those 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)

Thus, the wide-bodied jet from Tampa to Atlanta that the prosecution speculated Mr. Serrano flew on as "John White" touched down in the Atlanta International Airport just 36 minutes before 10:17 p.m. when Mr. Serrano was seen on the video surveillance in the Atlanta hotel lobby. 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, the airport personnel would have had to have connected the jet to the gate and 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 five miles away. Defense counsel further argued that it would be ridiculous for Mr. Serrano, a Hispanic with a thick Spanish accent, to use the alias, John White.

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)

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.

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 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. He made no secret of this hobby and sometimes did some target shooting at the Erie/Garment property, along with Phil Dosso and other Erie/Garment employees. (T4205-06, 4214, 4645-49) 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. Indeed, there was nothing incriminating found in Mr. Serrano's house. (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 about \$247,000 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. Mr. Serrano stated that he and Francisco Serrano built up the company from nothing and the partners stole it from him. 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, who was unintelligent, was connected to the Mafia and had hired a hit man 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 tile area of his office but otherwise would hide it 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) 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) Jones testified that Mr. Serrano told him that he did not commit the murders in this case and that his fingerprint was planted on airport parking tickets by Agent Tommy Ray. (T5473-74, 5478, 5567) Jones acknowledged that Mr. Serrano told him that he was in his room in a Georgia hotel with a severe migraine headache when the murders occurred. (T5577) In addition, Jones testified that Mr. Serrano told him that he wanted DNA testing to be performed on the plastic glove that was found on the scene because it had not been worn by him. (T5573)

According to Jones, Mr. Serrano also told him that he suspected that a Mafia hit man 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 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)⁴

C. The Appeal

Mr. Serrano's conviction and sentence were affirmed on direct appeal in *Serrano v. State*, 64 So.3d 93, 94-103 (Fla. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 816 (2011).

⁴ 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)

D. Post Conviction Motion

Mr. Serrano subsequently timely filed a motion for post-conviction relief in the Circuit Court of the Tenth Judicial Circuit pursuant to Rule 3.851 of the Florida Rules of Criminal Procedure. (R.335-429). That motion is presently pending.

E. Efforts to Obtain DNA Testing and Comparisons

On October 29, 2012, Mr. Serrano filed a “Motion for Post-Conviction DNA Testing and Comparisons” (“DNA Motion”) in the Circuit Court pursuant to Rule 3.853 of the Florida Rules of Criminal Procedure, Section 925.11 of the Florida Statutes and the Due Process Clause of the federal and state constitutions. (R.228-311). In the motion, Mr. Serrano sought STR DNA (Deoxyribonucleic Acid) testing of (1) the plastic disposable 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 the body of Diane Patisso at the crime scene and (2) one of two cigarette butts that were fresh and were found outside the door leading to the parking lot of the building where the crimes occurred close in time to when the crimes occurred, (and DNA extracted therefrom) and for an Order directing that the State compare the DNA profile obtained therefrom and a known DNA profile found on the second cigarette butt in 1997 to Mr. Serrano and to the DNA profiles in the Combined DNA Index System (“CODIS”). CODIS

is a DNA database that stores DNA profiles created by federal, state and local crime laboratories in the United States.

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.) (R.228-311. This Court has recognized that uploading a DNA profile into CODIS and thereby comparing it to the profiles of arrestees and convicted felons in the database can be a useful tool for truth finding in criminal cases. *See Hildwin v. State*, 73 So.3d 339 (Fla. 2010).

In his motion, Mr. Serrano explained and the State did not dispute that, when the two cigarette butts were previously tested in 1997 for the presence of DNA, the State used PCR technology, but, at the time of Mr. Serrano's trial and today, STR technology is available for DNA testing which is much better than PCR technology. Mr. Serrano also attached an affidavit of an expert in forensic DNA who swore that it is her expert opinion that, using STR DNA technology, there is a sufficient amount of DNA on the cigarette butts to obtain a DNA profile from the one on which a DNA profile has not yet been identified. (R.264-265, Exh.11).

On November 15, 2012, the Circuit Court entered an Order to Show Cause directing the State to file a response thereto. (R.312-313). On December 10, 2012, the State filed its "Response to the Court's Order to Show Cause" in which the State

asked the Circuit Court to summarily deny Mr. Serrano's DNA Motion. (R.444-537).

On January 15, 2013, Mr. Serrano filed a "Reply Memorandum in Support of His Motion for Post-Conviction DNA Testing and Comparisons." (R.644-662).

On January 18, 2013, the Circuit Court entered an Order granting in part and denying in part Mr. Serrano's DNA Motion. (R.663-665). In that Order, the Circuit Court ordered the State to have the plastic glove re-examined for DNA using STR DNA technology and compared to Mr. Serrano's DNA and the Combined DNA Index System ("CODIS"). The Circuit Court further ordered that, in regard to the requested DNA testing and comparisons on the cigarette butts, the motion was denied. (R.663-665). Mr. Serrano timely filed his notice of appeal from that Order and this appeal ensued. (R.668-669).

SUMMARY OF THE ARGUMENT

I. Mr. Serrano filed a motion for STR DNA testing and comparisons on two cigarette butts which were viewed to be so relevant by the State that they were seized by crime scene police officers on the evening of the homicides, subjected to DNA testing shortly thereafter and testified about at Mr. Serrano's trial. Now the State has changed its position regarding the relevance of DNA testing of the cigarette butts and has opposed that motion. However, the need for DNA testing of those butts remains. Furthermore with the use of STR DNA technology, such testing will most

certainly reveal the DNA profile for the DNA that the police already extracted from those butts in 1997. Notably, one such DNA profile was already obtained from one of those butts but was never compared to Mr. Serrano's DNA or to the profiles in CODIS. There is, at the very least, a reasonable probability that Mr. Serrano would be acquitted if the DNA on those cigarette butts is found to belong to someone else.

ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR DNA TESTING AND COMPARISONS ON TWO CIGARETTE BUTTS.

A. Preliminary Statement

In May 2012, the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law released the most complete list of exonerations that has ever been compiled. According to their findings, over 2,000 people who were falsely convicted of serious crimes have been completely exonerated.⁵ Among the most compelling finding from this study is its reminder of the significance and the power of DNA evidence. DNA testing led to

⁵ See Pete Yost, "Study: 2,000 convicted then exonerated in 23 years," *Associated Press*, May 21, 2012, available at <http://news.yahoo.com/study-2-000-convicted-then-exonerated-23-years-040242436.html> (last accessed January 11, 2013).

exoneration in nearly one third of the 416 homicides and in nearly two-thirds of the 305 sexual assaults included in the figures.

The Florida State Legislature and this Court have reacted to similar statistics by enacting Section 925.11 of the Florida Statutes and Rule 3.853 of the Florida Rules of Criminal Procedure which allow for individuals who have been convicted of crimes - even individuals who have entered guilty pleas - to obtain DNA testing where it can be shown likely to result in their exoneration or a mitigation of their sentences. *See* § 925.11 Fla. Stat.; Fla. R. Crim. P. 3.853. In combination, these rules operate as a critical safety valve that, when used properly, serves justice and due process.

As the Second District recently observed, “rule 3.853 is not to be construed in a manner that would bar testing based on the notion that it might substitute a postconviction court’s judgment for that of a jury.” *Dubose v. State*, ___ So.3d ___, 2012 WL 2053296, at *3 (Fla. 2d DCA 2012). On the contrary, it offers a chance to ensure the validity of the jury’s verdict in certain defined circumstances. *Id.*

Despite all of this, the State opposed Mr. Serrano’s “Motion for Post-Conviction DNA Testing and Comparisons.” However, the testing and comparisons that were requested in that DNA Motion are needed in order to ensure that justice is served in this capital case.

B. The Law

When reviewing a motion for post-conviction DNA testing, a court must make the following findings outlined in Florida Rule of Criminal Procedure 3.853(c)(5):

A) Whether it has been shown that physical evidence that may contain DNA still exists.

B) Whether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing.

C) Whether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

(1) The Two Cigarette Butts Exist, Are Admissible And Can Be Reliably Authenticated.

In the State's Response to Mr. Serrano's DNA Motion (hereinafter "State's Response"), the State concedes that the two cigarette butts and the DNA extracted from both of them in 1997, one of which already has an identified DNA profile, still exist, the requested DNA results would likely be admissible at trial and reliable proof is available to confirm the authenticity of the items. (R.455-456). This concession was wise in light of the facts pertaining to this matter.

More specifically, a report of FDLE Analyst Theodore Yeshion dated December 17, 1997 provides that, on December 10, 1997, Lynn Ernst, FDLE Crime

Laboratory Analyst, Crime Scene Section, submitted to Yeshion two cigarette butts “collected from outside the southeast door in parking lot.” (R.228-311, Exh.7). A subsequent report by FDLE Analyst Yeshion dated February 17, 1998 provides that a DNA profile was actually obtained from one of the cigarette butts and that it “could not have originated from Diane Patisso, Frank Dosso, George Gonsalves or George Patisso,” the four victims. (R.228-311, Exh.8). However, that DNA profile was not compared to Mr. Serrano, any other individual or any DNA database. Yet, the report provides that “[w]hen a suspect is apprehended, please submit a liquid blood sample in a purple topped tube for comparison purposes.” (R.228-331, Exh.8). The report further provides that a DNA sample was extracted from the second cigarette butt but “[n]o interpretable DNA result” was obtained from it. (R.228-331, Exh.8).

The report, which is addressed to Dennis Herschel, Acting Chief of Police, Bartow Police Department, further provides that the cigarette butts should be picked up “at your earliest convenience.” (R.228-331, Exh.8). In the State’s Response, the State noted that the two cigarette butts and the DNA extracted therefrom are presently in the custody of the Bartow Police Department. (R.455-456).

Furthermore, with respect to the admissibility and authentication of the DNA evidence, the State’s Response provides:

The cigarette butt and glove were taken in evidence at the crime scene, and an appropriate chain of custody can be had to authenticate them. FDLE's work product was extracted from those items. DNA testing results as to these items should therefore be admissible in any retrial, assuming that the proponent of such testing can show that it would be relevant to a material issue.

(R.456).

(2) There Is A Reasonable Probability That Mr. Serrano Would Have Been Acquitted If The Requested DNA Evidence Regarding The Cigarette Butts Had Been Admitted At His Trial.

As previously explained, this is a purely circumstantial case. It is difficult to imagine circumstances under which identification could be any more disputed than it was here. Because DNA evidence offers a chance to ensure the validity of the jury's verdict where the identity of the perpetrator is contested, courts have repeatedly ordered DNA testing even in cases where there is substantial circumstantial evidence. *See, e.g., Dubose v. State*, ___ So.3d ___, 2012 WL 2053296 (Fla. 2d DCA 2012)(reversing order denying post-conviction motion for DNA testing where three separate witnesses positively identified the defendant as the assailant in a murder case); *Montez v. State*, 86 So.3d 1243 (Fla. 2d DCA 2012)(reversing order denying post-conviction motion for DNA testing in a murder case where neighbors observed the defendant at the trailer park where the victim lived on the night of her murder, blood on the victim's fingernail was consistent with that of the defendant and semen

found in the victim's vagina came from the defendant); *Zollman v. State*, 820 So.2d 1059 (Fla. 2d DCA 2002)(reversing order denying post-conviction motion for DNA testing where rape victim identified the defendant as her assailant, a fingerprint expert testified that one partial fingerprint lifted from the outside of the victim's car where the rape occurred belonged to the defendant and another expert testified at trial that one hair consistent with the defendant's hair was found inside the victim's car); *Knighen v. State*, 829 So.2d 249 (Fla. 2d DCA 2002) (reversing order denying post-conviction motion for DNA testing where both victims identified the movant as their attacker at trial); *Ortiz v. State*, 884 So.2d 70 (Fla. 2d DCA 2004)(reversing order denying post-conviction motion for DNA testing where numerous witnesses testified that the defendant was with the rape victim "all night long" on the night she was raped, the defendant's semen was found in the victim and the victim identified the defendant as the perpetrator).

In the instant case, the State plainly viewed the two fresh Marlboro cigarette butts as relevant in December 1997 or the law enforcement officers who processed the crime scene would not have seized them and tested them at that time using DNA technology. At Mr. Serrano's trial, Officer David Brook, the supervisor of the crime scene section of the Bartow Police Department, testified that he seized the two Marlboro cigarette butts when he was "examining the area of the crime scene looking

for *any potential relevant items*” just a few hours after the homicides. (T.2999) (emphasis added). He explained that he saw the butts when he was conducting his “crime scene search of the area outside the building in [the] parking lot” where the cars of some of the victims and Phil and Nicoletta Dosso were parked. (T.2999). Significantly, the unlocked door believed to have been used by the perpetrator to enter Erie faced this parking lot. (T.2999).

Officer Brook only generally described the location of the cigarette butts in this parking lot. He testified that one butt was to the east and right of the car owned by Phil and Nicoletta Dosso and the other was “a little bit east of the first one.” (T.2999-3000). Significantly, Officer Brook was asked, “And [the cigarettes] both appeared fresh to you?” He answered affirmatively. (T.2999). Clearly, the location of the cigarettes in the parking lot abutting the door believed to have been used by the perpetrator and their “fresh” appearance caused law enforcement officials to deem them to be of such relevance that they should be seized and subjected to DNA testing in 1997. Their relevance in this case remains today.

Moreover, as previously explained, the State deemed these butts and the DNA evidence to be so relevant that the State introduced evidence about them at the trial. Both Officer Brooks and the State’s DNA expert, Theodore Yeshion, testified at the trial about the two cigarette butts. Yeshion testified at the trial that he extracted

DNA from both butts. However, he was only able to obtain a DNA profile from one of them using the DNA technology available at that time. He further testified that he only compared this DNA profile to the four victims and Nicoletta and Phil Dosso. Yeshion did not compare this profile to Mr. Serrano or anyone else. (T.4813). Significantly, however, it was Yeshion's professional opinion and expectation that this profile should be compared to the apprehended suspect because he wrote in his report that, "when a suspect is apprehended, please submit a liquid blood sample in a purple topped tube for comparison purposes." (R.228-331, Exh.8).

Furthermore, the existence of these fresh cigarette butts in the parking lot abutting the unlocked door in which the perpetrator was believed to have entered the Erie building significantly bolstered the testimony of John Purvis, who testified for the State that he saw a suspicious person who appeared to be smoking standing outside Erie at the approximate time of the homicides and who provided information to law enforcement officers about that person which enabled them to draw a composite sketch. Purvis testified that the man he observed was standing on a grassy strip which was located between the parking lot where the cigarette butts were found and a road, both of which were directly south of the unlocked door believed to have been used by the perpetrator to gain entry to the Erie building. (T.3378-80, 3395). Significantly, Purvis testified that the man he saw was holding his jacket in front of

his face as if he were lighting a cigarette. (T3403). The State elicited from its witness, Alvaro Penaherrera, that Mr. Serrano smoked tobacco and had a tobacco habit. (T.5767). The State also elicited from its witness, Maureen Serrano, that Mr. Serrano smoked a pipe. (T4122, 5767).

As previously explained, the State also elicited the previously described testimony of DNA Analyst Yeshion that the DNA profile on one of the fresh butts did not belong to the last people known to have been at the Erie building - the four victims and Nicoletta and Phil Dosso - making it more likely that this fresh cigarette had been smoked by the perpetrator. Thus, the two fresh cigarette butts were an important link in the chain of circumstantial evidence at the trial because they made Purvis' testimony about the man he saw smoking and the composite sketch resulting from Purvis' observation more credible and, more importantly, they made it more likely that the man in Purvis' composite sketch was, in fact, the perpetrator.

Notably, Purvis was the only eyewitness who purportedly saw the perpetrator of the crimes. In upholding the sufficiency of the circumstantial evidence in the instant case, this Court relied upon the composite sketch approved by Purvis. As stated by this Court 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.

It is important to note that, at the oral argument in this Court on Mr. Serrano's direct appeal, The Honorable Justice Frederick 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.

In denying Mr. Serrano's motion to compare the known DNA profile from one of the cigarette butts to Mr. Serrano and to the DNA profiles in CODIS and to conduct STR DNA testing on both cigarette butts and compare any new DNA results to Mr. Serrano and the DNA profiles in CODIS, the Circuit Court's Order relied solely upon *Gore v. State*, 32 So.3d 614 (Fla. 2010). That Order noted that the cigarette butts were "found in an area accessible by scores of people" just like many of the items that Defendant Gore, who was convicted of murder, unsuccessfully

sought to have tested for DNA in *Gore, supra.* (R.664-665). However, *Gore* is distinguishable from the instant case for two reasons.

First, none of the items that Defendant Gore sought to have tested using DNA technology which were found in an area accessible by scores of people were ever used by the State to implicate Gore in any way.⁶ The *Gore* Court considered that fact to be of critical importance. *Id.* at 619. In contrast, in the instant case, evidence of the two “fresh” cigarette butts and Mr. Serrano’s smoking habit was plainly introduced by the State at Mr. Serrano’s trial in order to persuade the jury that Purvis’ testimony and composite sketch were credible and that Mr. Serrano was the perpetrator of the crimes. Furthermore, in *Gore*, the items that were found in the area accessible by scores of people were discovered by the police “weeks or months after the murder.” *Id.* In the instant case, however, the cigarette butts were “fresh” and were found shortly after the murders. In addition, unlike the evidence at issue in *Gore*, the cigarette butts at issue in this case have already been tested by the State for DNA because of their clear probative value.

In short, for all of the foregoing reasons, the Circuit Court’s Order does not conclusively refute Mr. Serrano’s claim that there is a reasonable probability that the

⁶These items were located in an area used as an “unauthorized dumping ground for household garbage and refuse.” *Id.* at 619.

requested STR DNA testing and comparisons of the cigarette butts and the DNA already extracted therefrom would result in his acquittal in this case. Accordingly, reversal of that order is mandated.

CONCLUSION

Based upon the foregoing facts, arguments and authorities, this Court must vacate the part of the Circuit Court's order that summarily denies Mr. Serrano's motion for STR DNA testing of the two cigarette butts and the comparison of all profiles obtained from those butts to Mr. Serrano and to the DNA profiles in CODIS and either remand with directions to the Circuit Court to Order the requested STR DNA testing and comparisons pertaining to those butts or, at the very least to conduct an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 10th day of June 2013 by email to capapp@myfloridalegal.com and stephen.ake@myfloridalegal.com.

BY: /s/ Marcia J. Silvers

MARCIA J. SILVERS, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief complies with the font requirements of Fla.R.App.P. 9.210(a)(2) for computer-generated briefs.

/s/ Marcia J. Silvers

MARCIA J. SILVERS