IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-258

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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PRELIMINARY STATEMENT

References to the court documents in the Record on Appeal for the Direct Appeal will be designated "R." References to the trial transcript in that Record on Appeal will be designated "T." References to the Post-Conviction Record on Appeal will be designated "PCR" with the volume number and page number.

STATEMENT OF THE CASE

Mr. Serrano was convicted of four counts of first-degree murder in the deaths of George Gonsalves, Frank Dosso, George Patisso and Diane Patisso on December 3, 1997. The jury trial was held on September 5 through October 11, 2006. (R1406-09)

The penalty phase was conducted on October 23 through 24, 2006. The jury recommended of death by a vote of 9-3 on each count. (R1500-03)

The Spencer hearing took place on January 2 through 3, 2007. In the sentencing order, the trial court found the aggravating circumstance of murder committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (great weight), prior violent or capital felony conviction for the contemporaneous crime in this case (great weight) and murder committed for the purpose of avoiding or preventing a lawful arrest (as to one victim only) (great weight). The trial court found the following mitigation: no prior criminal history (great weight), age at the time of the crime (age 59) (moderate weight), significant history of good works (moderate

weight), successful Hispanic immigrant (moderate weight), positive religious involvement (some weight), no history of alcohol or drug abuse (some weight), good social history (moderate weight), good employment history (some weight), good school performance (moderate weight), good father (some weight), good husband (some weight), positive behavior during pretrial incarceration (some weight), positive behavior during court appearances (some weight), significant stressors at the time of the incident (moderate weight), remorse (slight weight). (R2509-15) On June 26, 2007, the trial court followed the jury's recommendation and imposed a sentence of death on each count. (R2506,2509-15)

This Court affirmed the convictions and sentences. *Serrano v. State*, 64 So.3d 93 (Fla. 2011). The United States Supreme Court denied certiorari on December 5, 2011. *Serrano v. Florida*, __ U.S. __, 132 S.Ct. 816 (2011).

On October 29, 2012, Mr. Serrano filed a motion to have a plastic disposable glove found under Diane Patisso's body at the crime scene examined for DNA using STR DNA technology and compared to Mr. Serrano's DNA and the Combined DNA Index System ("CODIS"). In that motion, Mr. Serrano also sought STR DNA testing of one of two cigarette butts found outside the building where the crimes occurred and to have the DNA profile obtained therefrom and a known DNA profile obtained from the remaining cigarette butt be compared to Mr. Serrano's DNA and CODIS. On January 18, 2013, the Circuit Court entered an Order granting Mr. Serrano's motion with respect

to the glove and denying it with respect to the cigarette butts. (4 PCR 663-665) Mr. Serrano appealed from the post-conviction court's partial denial of his motion for post-conviction DNA testing and comparisons. On March 14, 2014, this Court reversed the Circuit Court and remanded for further testing and comparisons of the two cigarette butts that were discovered outside the crime scene. *Serrano v. State*, 139 So.3d 300 (Fla. 2014)

On November 21, 2012, Mr. Serrano filed a Rule 3.851 motion for post-conviction relief. (3 PCR 335-429) Subsequently, with the post-conviction court's permission, Mr. Serrano filed five amendments to his 3.851 motion. (7 PCR 1086-1225,1279-89;11 PCR 2004-29;2195-2217)

On November 4, 2013, the parties filed a "Joint Statement of The Issues" in which they listed and numbered Mr. Serrano's post-conviction claims. (9 PCR 1513-20) The post-conviction court denied an evidentiary hearing on Mr. Serrano's claim that trial counsel were ineffective in failing to contemporaneously object to the State arguing inconsistent theories during the guilt phase and the penalty phase of the trial (Ground II, sub-claim 6) (9 PCR 1522-23) An evidentiary hearing was held on all of the remaining claims, other than four that were voluntarily withdrawn by Mr. Serrano.[1] (9 PCR 1522-23; 16 PCR 2955-24; 24 PCR 4453) Thereafter, the court

[1] Ground I, sub-claim 2 and Ground II, sub-claims 9, 11 and 13 of Mr. Serrano's motion for post-conviction relief were withdrawn by Mr. Serrano.

issued an order denying Mr. Serrano's motion for post-conviction relief. (42 PCR 7726-7788) This appeal follows.

STATEMENT OF THE FACTS

Mr. Serrano was represented by attorneys Cheney Mason and Robert Norgard at the trial.

THE TRIAL EVIDENCE

Introduction

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 ("Erie") located in an industrial park in Bartow, Florida. (T2886-89) 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 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.

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. (T3646)

The Trial

Beginning in the late 1980's, Mr. Serrano was in a business partnership with Phil Dosso and George Gonsalves, one of the victims, in Erie. Erie manufactured slick rail systems and parts for various industries. (T3495-3503) In 1990, Mr. Serrano's son, Francisco Serrano, became Director of Operations of Erie and its subsidiary, Garment Conveyor Systems. In 1996, Phil Dosso's son, Frank Dosso, became employed at Erie and Francisco Serrano remained on as Director of Operations of Garment. (T4141-45)

Francisco Serrano testified that, although the three partners had their differences, in 1996, most of them seemed to have been resolved until the Spring of 1997, when Francisco Serrano discovered that there were two sets of accounting books for Erie/Garment and that about one million dollars was missing from the Erie accounts. Francisco Serrano testified that Dosso and Gonsalves acknowledged that they had something to do with the missing money so, he and Mr. Serrano reported the missing money to the Internal Revenue Service. (T4103-04, 4148-4159)

On June 16, 1997, after Mr. Serrano learned about the missing money, Mr. Serrano filed a lawsuit against Dosso and Gonsalves. (T4173-74, 4691-92, 4700-01, 4707-20) Subsequently, 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 but did not spend any of that 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 directors meeting, Phil Dosso and Gonsalves voted to remove Mr. Serrano as the President of Garment, make Phil Dosso the new President 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. (T 3606) Mr. Serrano left and created a new company similar to Garment. (T 3367-69, 3606, 4075-76, 4172-75, 4343)

On December 3, 1997, most Erie employees left work at 5 p.m. or shortly thereafter. However, as was his usual practice, George Gonsalves worked late. David Catalan, an employee at Erie, testified that, when he left with another employee shortly after 5 p.m., he locked the door and saw that George Gonsalves' car was the only car in the parking lot. Although George Patisso and Frank Dosso remained at Erie with Gonsalves, they had no car. George Patisso's wife, Diane Patisso, had planned to pick them up and take them to Frank Dosso's home for a birthday party. (T3210-14,32,27,3231,3240-3264,3307-12)

When family members began calling Frank Dosso and could not get an answer, Phil Dosso and his wife, Nicolette Dosso, drove to Erie. As they entered Erie's unlocked front door, they discovered the deceased body of their daughter, Diane Patisso. Phil Dosso called 911 and ran to Frank Dosso's office (formerly Mr. Serrano's office) where he discovered the bodies of George Gonsalves, George Patisso, and Frank Dosso. (T3427-37,3450-86)

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 handgun and a .32 caliber semi-automatic handgun - suggesting that there were two

shooters. (T3616-46) The men were shot with the .22 caliber gun. (T3631-33, 3976-81, 4009-13, 4014-25) Diane Patisso was shot once with the same gun and once with the .32 caliber gun while she was standing up. (T3922,4026-31) According to the testimony of Leroy Parker, the State's bloodstain pattern analysis expert, the shooter or shooters would have had blood on them from the back splatter. (T3917-18)

Inside Erie, 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 was linked to Mr. Serrano in any way. (T3028-29, 3041)

On the floor underneath Diane Patisso, law enforcement officers found a clear disposable 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- - eight years after the killings, 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 glove. (T4803) Strikingly, 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 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. The State only asked FDLE DNA Analyst Yeshion to compare this DNA profile to Phil and Nicoletta Dosso and the four victims. Neither the State nor trial counsel sought to compare this DNA profile to Mr. Serrano or to any DNA databases. (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. Leroy Parker testified that whoever removed Frank Dosso's watch would have had blood transferred to his hands and possibly elsewhere. (T3919-21) 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 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)

Notably, another detective testified that he interviewed an Erie employee who told him about two men who came to Erie 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 reported that he saw an African-American male and a blue vehicle at Erie 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 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)

The prosecution theorized 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 bullet that shot Diane Patisso was found near her body. Catalan told a detective 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 employed by Erie 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. (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. The expert stated 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, 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 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 could have been 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.

FDLE Agent Tommy Ray, the lead investigator, testified that Mr. Serrano did not smoke cigarettes. (T4122, 4299) Mr. Serrano's daughter-in-law, Maureen Serrano, testified that Mr. Serrano smoked a pipe. (T4122, 5767)

At the time of the murders, Francisco Serrano was attending a business meeting in Tampa. (T4053-65, 4078-82) Mr. Serrano 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 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 and was interviewed. (T3682-83) He had no injuries on him at that time. (T3065)

During his interview, Mr. Serrano told Detective Parker that he learned about the murders the previous evening when he called his wife from his Atlanta hotel. (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) 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 the detective 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, had to change the business meeting to the next day. (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. Mr. Serrano said he guessed that "somebody is getting even; somebody they cheated, and George [Gonsalves] is capable of that." (T3690-92)

Mr. Serrano speculated that it was possible that the female victim "walked in the middle of something." (T 3704) However, Detective Parker testified 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. The detective further testified 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 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 to pick up her husband and brother and "walked in on something."

Alvaro Penaherrera Mr. Serrano's nephew, testified that law enforcement officers had accused him of being involved in the Erie 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) On October 31, 1997 and on December 3, 1997, Penaherrera rented cars in Orlando. He testified that these cars were actually rented for Mr. Serrano's girlfriend to use. (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 girlfriend picked up the rental car in Orlando on December 3, 1997 and then dropped it off at the Tampa International Airport. (T5806) 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 subpoenaed to testify before the grand jury. 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 the police in this case at least eight to ten times. (T5775-78, 5783-89, 5817-23) He "assumed" that there was a "big reward' in this case for information leading to the arrest and convictions of the perpetrators of the murders. (T5841-41) Indeed, there was a highly publicized reward of over $100,000.00. (T5945)

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 testified that Mr. Serrano retired to Ecuador and did not flee. (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. (T3164-81)

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)

As previously explained, Mr. Serrano was seen on the 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 wide-bodied jet would have

had to have touched down in Atlanta, 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.

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) 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 John White's December 3, 1997 Tampa-to-Atlanta flight was purchased earlier that same day, November 23, 1997 at 3:18 p.m. at a different airport, Tampa International Airport. (T5034-42, 5057-58, EV773-77)

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 been 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. (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 sometimes engaged in target shooting at the Erie property, along with other Erie employees. (T4205-06, 4214, 4645-49) During the investigation, law enforcement officers searched Mr. Serrano's house twice. There these law enforcement officers seized guns from Mr. Serrano's collection and gun permits 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. At that time, he lived in Quito, Ecuador. On August 31, 2002, Mr. Serrano was forcibly taken from the streets of Quito by men hired by Agent Tommy Ray, and then delivered the next morning to Agent Ray and another law enforcement officer who were waiting for him on a commercial airplane. (T 4300, 4738-52)

Agent Ray testified that, on the flight back to Florida, Mr. Serrano stated the following: (1) Mr. Serrano did not plan to return to the United States to attend a civil hearing in his lawsuit against his Erie partners because he thought the hearing was a trick; (2) he had deposited the checks in the other bank to stop his partners from stealing the funds; (3) Gonsalves was a liar and a thief; (4) Frank Dosso was connected to the Mafia, and the murders could be a result of Frank Dosso hiring a hitman that he had never met before; and (5) Penaherrera rented a car on December 3, 1997, for Serrano's Brazilian girlfriend; (6) Serrano was in Atlanta – not Florida – on the date of the murders; and (7) when he worked at Erie, he would hide his .357 revolver in the ceiling of his office when he went out of town but otherwise he kept it behind his computer. (T5898-5900)

Leslie Jones testified that, while he was incarcerated with Mr. Serrano in late 2005 and early 2006, Mr. Serrano spoke to him about this case. (T5491-92, 5510-11, 5537-38) Jones received a

reduced sentence on a pending criminal felony case 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 Ray. (T5473-74, 5478, 5567) 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 hypothesized as to various theories of who the perpetrator of the murders might be. Jones 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) Jones claimed that 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. (T5472-78,5570-72) According to Jones, 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)[2]

POST-CONVICTION EVIDENTIARY PROCEEDINGS

In Mr. Serrano's Rule 3.851 motion and the amendments thereto, he raised claims that his trial counsel were ineffective in their trial and penalty phase representation and that there were both *Brady*[3] and *Giglio* violations.[4] Mr. Serrano presented the following 12 witnesses at the post-conviction evidentiary hearing in support of his 11 grounds for relief which had numerous sub-claims:

1. Tommy Ray (retired FDLE Agent and lead agent in the investigation);

2. Paul Wallace (Assistant State Attorney, 10th Circuit, co-counsel for the prosecution);

3. John Aguero (Assistant State Attorney, 10th Circuit, lead prosecutor);

4. Nancy Peterson (forensic DNA expert);

5. Robert Norgard (one of Mr. Serrano's co-counsel at the trial);

6. Linda (Mitchell) Rathsom (former bookkeeper at Erie Manufacturing);

7. Steve Sessler (private investigator who measured Mr. Serrano's shoe size);

8. Francisco Serrano (Mr. Serrano's son and a former employee at Erie Manufacturing);

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[2] 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)

[3] *Brady v. Maryland*, 373 U.S. 83 (1963)

[4] *Giglio v. United States*, 405 U.S. 150 (1972)

9. James Cheney Mason (Mr. Serrano's co-counsel at the trial);

10. Toni Maloney (licensed private investigator and mitigation specialist in Mr. Serrano's case);

11. Velma Ellis (former employee at Erie Manufacturing); and

12. Dr. Robyn Ragsdale (FDLE Senior Crime Analyst).

The following three witnesses were also called by the State:

1. Dr. Theodore Yeshion (former FDLE Analyst in the Forensic Serology Section and later DNA Analyst);

2. Dr. Joshua Bernard (Podiatrist, hired by the State Attorney's Office to provide testimony concerning feet); and

3. Dr. Robyn Ragsdale (called as a witness by the State after being called by Mr. Serrano).

STANDARDS OF REVIEW

INEFFECTIVE ASSISTANCE OF COUNSEL STANDARDS

Strickland claims present mixed questions of law and fact. Where the trial court conducted an evidentiary hearing, the reviewing court will defer to the factual findings of the trial court that are supported by competent, substantial evidence, and will review the application of the law to the facts de novo. *See Johnson v. State*, 104 So.3d 1010, 1022 (Fla. 2012). In *Strickland*, 466 U.S. 668 (1984), the United States Supreme Court established a two-pronged test for determining whether a defendant has received ineffective assistance of counsel. Under the first prong, the court must determine "whether counsel's performance was deficient." *Id.* at 687. Counsel's performance is deficient where it falls below

objective standard of reasonableness. *Strickland,* 466 U.S. at 688. Under the second prong, the court must determine whether "there is a *reasonable probability*, that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to "undermine confidence in the outcome." *Id.* at 694 (emphasis added)

BRADY STANDARDS

There are three elements that must be established in order to successfully assert a *Brady* violation. *Strickler v. Greene*, 527 U.S. 263 (1999) The three elements are: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." "The test for prejudice or materiality under *Brady* is whether, had the evidence been disclosed, there is a reasonable probability of a different result, expressed as a probability sufficient to undermine confidence in the outcome of the proceedings." *Diaz v. State*, 132 So.3d 93, 105 (Fla. 2013)

GIGLIO STANDARDS

A claim under *Giglio v. United States,* 405 U.S. 150 (1972), alleges that the prosecutor knowingly presented false testimony against the defendant. See *Melton v. State*, 949 So.2d 994 (Fla. 2006) In *Guzman v. State*, 868 So.2d 498 (Fla. 2003), this Court discussed how a Giglio violation is established: "[t]o establish a Giglio violation, it must be shown that: (1) the testimony given

was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." The burden is on the State to prove that the presentation of false testimony was harmless beyond a reasonable doubt.

SUMMARY OF THE ARGUMENTS

I. Counsel provided ineffective assistance in the penalty phase of trial by not conducting most of his mitigation investigation until after the penalty phase, only calling one perfunctory witness at the penalty phase and failing to present to the jury the 34 witnesses who would have testified as to substantial mitigating factors, in violation of Mr. Serrano's Sixth and Fourteenth Amendment rights to effective representation.

II. Trial counsel provided ineffective assistance in failing to object to improper victim impact evidence presented during the penalty phase in violation of Mr. Serrano's Fifth, Sixth and Fourteenth Amendment rights to effective representation and a fair trial.

III. The State withheld exculpatory mitigating evidence that would have prohibited a death sentence in violation of Mr. Serrano's federal and State due process rights.

IV. Mr. Serrano's trial counsel were ineffective during the penalty phase for failing to present mitigating evidence that Mr. Serrano would not have faced the death penalty if properly removed from Ecuador in violation of Mr. Serrano's federal and State constitutional rights to effective assistance of counsel.

V. Trial counsel were ineffective in failing to object to the prosecutor's improper comments during closing argument in violation of Mr. Serrano's Sixth and Fourteenth Amendment rights to effective representation

VI. Trial counsel were ineffective for failing to conduct an investigation to show that it was impossible for Mr. Serrano to have traveled from his Atlanta hotel to the crime scene in Bartow and back in the time and manner theorized by the State in violation of Mr. Serrano's Six and Fourteenth Amendment rights.

VII. Trial counsel were 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 in violation of Mr. Serrano's Sixth and Fourteenth Amendment rights to effective representation.

VIII. Trial counsel were ineffective in failing to contemporaneously object to the State arguing inconsistent theories during the death phase and the penalty phase of the trial in violation of Mr. Serrano's Sixth and Fourteenth Amendment rights to effective representation.

IX. 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 in violation of Mr. Serrano's Sixth and Fourteenth Amendment rights.

X. The State knowingly presented perjured testimony from the sole eyewitness in violation of *Giglio v. United States*, 405 U.S. 150 (1972), and Mr. Serrano's Fifth and Fourteenth Amendment rights to due process.

XI. Trial counsel were ineffective in (1)failing to object to inadmissible testimony of Purvis and to Purvis' unmodified composite sketch,(2) failing to depose Purvis or otherwise investigate and prepare for the trial testimony of Purvis, and (3) failing to cross-examine Purvis about his material pre-trial statements in violation of Mr. Serrano's Sixth and Fourteenth Amendment rights.

XII. Trial counsel were ineffective in failing to file a pre-trial motion requesting STR DNA testing of the plastic glove presumably left by the perpetrator of the crimes and found on the floor under Diane Patisso's body and a comparison of the DNA profile obtained therefrom to Mr. Serrano and to the DNA profiles in the Combined DNA Index System ("CODIS")in violation of Mr. Serrano's Six and Fourteenth Amendment rights.

XIII. The newly discovered DNA evidence creates a reasonable doubt about Mr. Serrano's guilt. Accordingly, Mr. Serrano's conviction and sentence must be vacated in order to preserve his Fifth and Fourteenth Amendment rights to due process of law.

XIV. The newly discovered DNA evidence mandates a new trial based upon Mr. Serrano's actual innocence of the crimes for which he was wrongfully convicted and sentenced to death in order to

preserve his Fifth and Fourteenth Amendment rights to due process of law and protection against cruel and unusual punishment.

XV. Trial counsel were ineffective in failing to file a pre-trial motion requesting STR DNA testing of the plastic glove presumably left by the perpetrator of the crimes herein and found on the floor under Diane Patisso's body in violation of Mr. Serrano's Sixth and Fourteenth Amendment rights. 

ARGUMENT

I. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN THE PENALTY PHASE OF TRIAL BY NOT CONDUCTING MOST OF HIS MITIGATION INVESTIGATION UNTIL AFTER THE PENALTY PHASE, ONLY CALLING ONE PERFUNCTORY WITNESS AT THE PENALTY PHASE AND FAILING TO PRESENT TO THE JURY THE 34 WITNESSES WHO WOULD HAVE TESTIFIED AS TO SUBSTANTIAL MITIGATING FACTORS, IN VIOLATION OF MR. SERRANO'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE REPRESENTATION[5]

Mr. Serrano was represented during the penalty phase by attorney Robert Norgard who had three and a half years to prepare for it. (21 PCR 3855) A mitigation investigator, Toni Maloney, was appointed in this case. (22 PCR 3938, 23 PCR 4250, 4281 32 PCR 5958) 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. (38 PCR 7085) At that same proceeding, Maloney ***was the sole witness*** called by Norgard. She testified that Mr. Serrano had no prison

[5] Ground II, Subclaim 14

disciplinary reports. Her entire testimony can be found in eight pages in the transcript. (38 PCR 7086-92, 7094-96)

No evidence of Mr. Serrano's life history, good character and numerous acts of generosity, kindness and charity was presented. As a result, the jury did not hear a scintilla of evidence to humanize Mr. Serrano although, as we will explain below, a plethora of such evidence was available from the family and friends of Mr. Serrano. In stark contrast to Mr. Norgard's perfunctory presentation of the testimony of a lone witness, the State called an extraordinary 26 victim impact witnesses at the jury recommendation phase. (R5-134-205)

Maloney testified that Norgard did not begin "the real work" to prepare for the mitigation part of this case until ***after*** the jury had recommended that Mr. Serrano be executed. (24 PCR 4302) More specifically, Maloney testified that she had no knowledge of Norgard or Mason ever speaking to anyone on her list of mitigation witnesses prior to the jury recommendation phase. (24 PCR 4301;5825-28) She further testified that Norgard did not speak to any of the 30 Ecuadorian mitigation witnesses until after the jury had recommended that Mr. Serrano be executed.[6] She had no knowledge of Norgard ever speaking to Francisco and Maria Serrano (Mr. Serrano's son and wife) about mitigation information before the

[6] At the *Spencer* hearing, 11 witnesses testified in person and 23 testified in videotaped depositions taken in Ecuador. Thirty of these witnesses, including Mr. Serrano's wife, Maria Serrano, resided in Ecuador.

penalty phase. She explained that she was not responsible for deciding when the mitigating witnesses would be interviewed. (23 PCR 4283,4291-92,4300-02)

Maloney further testified that, on October 13, 2006, two days after Mr. Serrano was convicted and ten days before the "jury recommendation" sentencing phase began, Norgard held a "family" meeting at which she, Francisco Serrano and Maria Serrano, were present. (24 PCR 4294-95) Maloney explained that she took contemporaneous and accurate notes of what Norgard said at that meeting so she could give them to Norgard to help him decide who would be on the list of mitigation witnesses. (23 PCR 4283-85, 4293,4295) At the meeting, Norgard attempted to excuse the fact that he had not spoken to or met with the mitigation witnesses by asserting that "jurors don't care about mitigation." (23 PCR 4289-90;32 PCR 5819-24) Norgard also stated, "At this point, we have not decided what we will present" at the *Spencer* hearing. (23 PCR 4287;32 PCR 5820)

Maloney's testimony and her notes of the family meeting are not the only evidence that Norgard conducted most of the mitigation investigation after the jury recommended death. On December 19, 2002, about two months ***after*** the jury recommended death, Maloney received an email from Mr. Serrano's Ecuadorian niece, Ana Luna, confirming the names of the witnesses who would be traveling from Ecuador to testify in Bartow as mitigation witnesses at the *Spencer* hearing and describing what mitigating information they would

provide. Ms. Luna also wrote that, at a later date she would tell Maloney who in Ecuador could testify at the *Spencer* hearing via video deposition and would give her more information about that. (24 PCR 4291-92;33 PCR 5984)

On January 2, 2007, *over two and a half months after the jury recommended death* and in the midst of the *Spencer* hearing, Norgard announced to the sentencing court that there were 46 mitigation witnesses in Ecuador who "***we want more information from,***" and that 25 of them were "critical witnesses." (R.1521-22) (emphasis added) He told the sentencing court that, for that reason, he and the prosecutor would need to go to Ecuador to take videotaped depositions of these witnesses for the judge to then later watch on her own. (R1521-25; 1804-1807) Thus, in the middle of the *Spencer* hearing, Norgard had still not completed his mitigation investigation.

On January 19 and January 20, 2007, Norgard was in Ecuador speaking to the "critical" Ecuadorian mitigation witnesses for the first time. Videotaped depositions of 23 of the Ecuadorian witnesses speaking about numerous mitigating circumstances never heard by the jury at the penalty phase were taken on those days. The sentencing court subsequently viewed those depositions as part of the *Spencer* hearing. (R1827-2256) As previously explained, eleven other mitigation witnesses testified in person at the *Spencer* hearing. Thirty of the 34 Spencer hearing mitigation witnesses were from Ecuador.

The 34 *Spencer* hearing witnesses who Norgard did not even interview until after the jury recommendation sentencing phase gave powerful testimony concerning Mr. Serrano's life history and character, including many acts of extraordinary generosity, kindness and charity that encompassed an expansive 675 pages of transcripts. (R1529-40, 1542-1693, 1712-1798, 1827-2556) Their testimony was available for Norgard to present to the jury at the penalty phase, if only he had just spoken to them beforehand and made arrangements for them to testify.

A synopsis of the direct examination of the 34 mitigation witnesses at the *Spencer* hearing who the jury never knew about is attached hereto as Exhibit A. This considerable and powerful evidence came from well respected family and friends, including Mr. Serrano's nephew, Diego Tamaiz, who is the former Minister of Energy in Ecuador, and Mr. Serrano's brother-in-law, Eduardo Polit, who was formerly both the Vice Minister and the General Director of Income for Ecuador. (R1763-1771, 1944-1966)

The trial court's Sentencing Order (32 PCR 5965-67) accurately described the mitigating evidence presented at the *Spencer* hearing that was never heard by the jury as follows and found the following nine mitigating factors as a result:

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 ...." (132 PCR 5966)

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*." (32 PCR 5966)(emphasis added)

Good husband. "[T]he defendant loves his wife and cared for her prior to his incarceration for these offenses." (32 PCR 5967) (Maria Serrano testified at the *Spencer* hearing but not at the trial. She and Mr. Serrano were married in 1964. (R1543)

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." (32 PCR 5967)

Positive Religious Involvement. "The evidence is that the defendant was fully engaged in his religion as a Catholic." (32 PCR 5967)

Good employment history. "The evidence is that the defendant had and kept jobs commensurate with his training as an engineer." (32 PCR 5967)

No history of alcohol or drug abuse. (32 PCR 5966) (Witnesses testified at the *Spencer* hearing that Mr. Serrano does not drink alcoholic beverages or abuse drugs. (R1540, 2168))

Successful Hispanic immigrant. (32 PCR 5966) Some evidence was presented at the trial that Mr. Serrano was a successful businessman after emigrating from Ecuador. However, the judge also relied upon evidence that was presented solely at the *Spencer*

hearing to find that "he 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" and "he and his wife are clearly generous people." (32 PCR 5966)

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." (32 PCR 5967) (emphasis added)

Notably, at the oral argument at the conclusion of the *Spencer* hearing, Norgard stated that the jury had only heard "*the tip of the iceberg*" of the mitigating evidence. (R2472) (emphasis added) In reality due to Norgard's shocking lack of investigation and preparation, the jury did not even hear the clink of a single ice cube, much less the glacier of evidence that was available. He also told the judge that the most significant mitigating circumstance at the *Spencer* hearing which he had "never seen anything like this in [his] entire life," was the many witnesses testifying about the "significant history of good works by Mr. Serrano toward other people" which were so numerous that he had "*never seen a person who throughout their life who did as many good things for people.*" (R2484-86)(emphasis added)

One example that Norgard cited was a witness who testified about Mr. Serrano having come in contact with an old Ecuadorian friend whom he had not seen in a long time who had what was believed to be terminal cancer because he could not afford to pay for many months of needed medical expenses. Mr. Serrano paid for the man's months of medical treatment as well as his food and transportation costs in Quito. Mr. Serrano also stayed with him while he was being treated and gave him needed emotional support. As a result, this man's life was saved. (R1729-31, 2484-85) This was just one of many extraordinary good works performed by Mr. Serrano over the course of his life that were presented at the *Spencer* hearing but were never known by the jury.

Mr. Serrano's penalty phase attorney performed far below the professional norms in existence at the time of Mr. Serrano's trial. *See Hurst v. State,* 18 So.3d 975, 1008 (Fla. 2009)("[A]n attorney's obligation to investigate and prepare for the penalty portion of a capital case ***cannot be overstated*** because this is an integral part of a capital case.")(emphasis added)

The United States Supreme Court has held that a reasonable investigation into a defendant's social, family, mental, educational, employment and medical histories as well as religious influences must be completed in preparation for making informed decisions as to what to present in a capital penalty phase. *Wiggins v. Smith,* 539 U.S. 510, 524 (2003)(Topics counsel should consider presenting for mitigation include "medical history, educational

history, employment and training history, family and social history, prior adult and juvenile correctional experience and religious and cultural influences."). *Accord Shellito v. State,* 121 So.3d 445, 454 (Fla. 2013) ("it is unquestioned that under the prevailing professional norms counsel has an obligation to conduct a ***thorough*** investigation of the defendant's background")(emphasis added); *Parker v. State,* 3 So.3d 974, 985-86 (Fla. 2009)(same)

As Maloney testified, counsel for Mr. Serrano did not begin the "real work" to investigate the available mitigation until after the jury had recommended death. As she explained, before the jury recommendation sentencing phase, Mr. Serrano's counsel did not interview any of the 34 mitigating witnesses, except perhaps Francisco and Maria Serrano and to her knowledge, even those two were not interviewed by counsel about mitigation. Norgard did not deny this. As a result, at the jury recommendation phase, counsel for Mr. Serrano barely scratched the surface of the available mitigation that was available to present to the jury contrary to *Hurst, Wiggins, Shellito*, *Parker* and a large body of other cases.

It is wholly inconsistent with the norms of the profession (and common sense) for penalty phase counsel to fail to interview mitigation witnesses until after the jury recommendation sentencing phase has concluded. *Williams v. Taylor,* 529 U.S. 362, 395 (2000)(counsel "did not begin to prepare for that phase of the proceedings until a week before the trial"); *Bond v. Beard*, 539 F.3d 256, 289 (3rd Cir. 2008) (recognizing that the ABA Guidelines

"instruct counsel that an investigation for the penalty phase should begin immediately upon counsel's entry into the case and should be pursued expeditiously.")

As a result of counsel's deficient performance, the jury was left with an extremely superficial description of Mr. Serrano. The jury heard no evidence that would humanize Mr. Serrano and knew virtually nothing of his exemplary background. Substantial and significant mitigation evidence about his life history and good character encompassing 675 pages of transcript, including numerous acts of generosity, kindness, and charity, could have been presented. Yet, "[o]ne of the most important functions of the capital sentencing process is the opportunity to humanize the defendant...." *Lawhorn v. Allen,* 519 F.3d 1272, 1296 (11th Cir. 2008) Indeed, this Court, the United States Supreme Court and other courts have repeatedly found penalty phase counsel's performance deficient where counsel failed to thoroughly investigate and then present all relevant evidence of mitigation.[7]

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[7] *E.g., Shellito*, 121 So.3d at 453-459 ("based on consideration of the plethora of available mitigation and the dearth of mitigation actually presented,...confidence in the outcome is undermined"); *Parker*, 3 So.3d at 983-986 (same); *Rose v. State*, 675 So.2d at 570-574 (penalty phase counsel failed in his "obligation to conduct a reasonable investigation, including an investigation of the defendant's background for possible mitigating evidence; *State v. Lara*, 581 So.2d 1288, 1290 (Fla. 1991)(same); *Wiggins v. Smith*, 539 U.S. 510, 514-537 (2003)(penalty phase counsel's claimed strategic decision to end his investigation into defendant's background fell short of prevailing professional standards); *Williams v. Taylor*, 529 U.S. 362, 390-399 (2000)(penalty phase counsel failed to thoroughly investigate and

(continued...)

The post-conviction court ruled that Norgard made a strategic decision not "to thoroughly present and argue mitigation" to the jury so his performance was not deficient. (42 PCR 7778-79) This ruling was error. Strategy assumes knowledge of the courses of action in choosing one over the other. But without having interviewed the numerous witnesses who were available to provide the considerable mitigating evidence, Norgard's failure to call them at the "jury recommendation" sentencing phase was not based on informed judgment and, therefore, was not a reasonable strategic decision subject to deference. Case law rejects the notion that a "strategic" decision can be reasonable when the attorney has failed to thoroughly investigate his options and make a reasonable choice between them. *Wiggins,* 539 U.S. at 527-28; *Rose v. State,* 675 So.2d 567, 573 (Fla. 1996) (quoting *Horton v. Zant,* 941 F.2d 1449, 1462 (11th Cir. 1991); *Shellito*, 121 So.3d at 453-56.[8] The post-

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[7](...continued)
present mitigating evidence); *Williams v. Allen,* 542 F.3d 1326, 1335-1345 (11th Cir. 2008)(penalty phase counsel interviewed some family members but did not interview and present the testimony of all family members with relevant information); *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995)(penalty phase counsel obtained some information regarding the defendant's history but failed to follow up with further interviews and present that information).

[8]The United States Supreme Court has rejected the suggestion that a decision to focus on one potentially reasonable trial strategy is justified by a "tactical decision" when counsel does not conduct a through investigation of the defendant's background. *See Sears*, 130 S.Ct. at 3265. Moreover, the Supreme Court has held that "counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision...because counsel has not 'fulfill[ed] their

(continued...)

conviction court ignored this well-established legal principle, and, therefore used an incorrect analysis in finding that Norgard's performance was not deficient.

Furthermore, the claimed "strategy" of Norgard cited by the post-conviction court is patently unreasonable and the law is clear that "patently unreasonable decisions" cannot ever be considered strategy. *See Rose,* 675 So.2d at 572-73; *Light v. State*, 796 So.2d 610, 616 (Fla. 2d DCA 2001)("'patently unreasonable" decisions, although characterized as tactical, are not immune."). *Accord Strickland*, 466 U.S. at 691 (recognizing that merely invoking the word strategy to explain errors or omissions was insufficient since "particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances").

More specifically, the post-conviction court's order provided:

> The defense's position has consistently been that the Defendant is innocent and that it was Mr. Norgard's belief that attempting to thoroughly present and argue mitigation was inconsistent with the innocence claim. *See Funchess v. Wainwright,* 772 F.2d 683, 689-690 (11th Cir. 1985)

(42 PCR 7778) The mitigating evidence adduced at the *Spencer* hearing, however, was not inconsistent with Mr. Serrano's claim of innocence. If anything, the testimony of the 34 character witnesses would have bolstered rather than undermined Mr. Serrano's

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[8](...continued)
obligation to conduct a thorough investigation of the defendant's background.'"Sears, 130 S.Ct. at 3265 (citing *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (quoting Williams, 529 U.S. at 396)

profession of innocence. Thus, this claimed strategy of Norgard was "patently unreasonable," illogical and ludicrous on its face.

Furthermore, the post-conviction court's reliance upon *Funchess*, *supra,* was misplaced. In *Funchess,* the Court held that, since the defendant had maintained his innocence throughout the trial, "it was reasonable for counsel to elect not to present evidence regarding mitigating factors ***which imply guilt*** [such as the defendant's heavy use of heroin] but which attempt to excuse that culpable conduct." *Id.* at 689-90 (emphasis added) Unlike *Funchess,* the mitigating testimony of the witnesses that Norgard failed to present to the jury did not "imply guilt." Rather, their testimony about Mr. Serrano's exemplary life history and numerous good works was consistent with and even bolstered Mr. Serrano's innocence claim. *See United States ex rel. Kubat v. Thieret,* 679 F.Supp. 788 (N.D.Ill. 1988)(distinguishing *Funchess* and holding that penalty phase counsel's claimed strategic decision to not present the testimony of character witnesses which was consistent with the defendant's innocence was unreasonable and, thus, deficient).

The post-conviction court noted that Mr. Norgard claimed that he made a strategy decision not to present much mitigation to the jury based upon his opinion that jurors at the penalty phase do not pay attention to mitigators, only aggravators. Therefore, Norgard merely argued against the aggravators and held back the vast majority of the mitigating evidence from the jury so he could argue

at the *Spencer* hearing that the judge should override the jury's death recommendation because the jury did not hear the mitigating evidence.[9] (42 PCR 7778-79) However, because the law provides that a "patently unreasonable" decision such as this claimed decision cannot ever be considered strategy[10], the post-conviction court erred. Indeed, because "[a] jury recommendation under [Florida's] death penalty statute should be given great weight" by the sentencing judge[11] and the sentencing judge wrote in her Sentencing Order that she "affords great weight to the recommendations of the jury...." (R2509), a decision to forego presenting mitigating evidence to the jury that is quantitatively and qualitatively superior to that which was presented to them is "patently unreasonable."

Furthermore, Maloney testified and her contemporaneous notes of Norgard's own words at the October 13, 2006 family meeting corroborate that Norgard told the family, "If the jury recommends death, she [the judge] will sentence him to death." (23 PCR 1305;32

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[9] This testimony of Norgard can be found at 22 PCR 3967-72,4181-83,4187-88. Norgard testified as to his personal opinion that jurors are more emotional than judges so they are incapable of considering mitigating evidence after hearing victim impact evidence, making talking to them like "talking to the wall." (22 PCR 4183-84,4187-88) Maloney's notes reflect that Norgard's explanation to the family for presenting hardly any mitigation to the jury was that "jurors don't care about mitigation." (32 PCR 5822)

[10] *See Rose*, 675 So.2d at 575-73; *Light*, 796 So.2d at 616.

[11] *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975) *See also Robinson v. State*, 95 So.3d 171, 183 (2012)

PCR 5820) Since Norgard believed that a jury recommendation of death would result in the judge imposing a sentence of death, his testimony that he intentionally held back considerable mitigating evidence from the jury – which made a jury death sentence recommendation more likely – is not credible.

Maloney's testimony and notes of the October 13, 2006 family meeting are far more credible than Norgard's attempted justification for his omissions. Maloney had no reason to write down anything other than what Norgard stated at that meeting. She testified that she wrote them to give to Norgard, for whom she was working, and that at the time that she wrote them, they were accurate. (23 PCR 4285)

Furthermore, Norgard's expressed alleged rationale that, in certain types of murder cases, it does not matter whether a defendant presents mitigating circumstances because the jury will return a death sentence regardless is a view that is contrary to the United States Supreme Court's cases applying *Strickland's* prejudice prong. In *Rompilla v. Beard*, 545 U.S. 374, 393 (2005), for example, the United States Supreme Court considered counsel's failure to present mitigating evidence and concluded that "the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of Rompilla's culpability, and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached at sentencing." (internal quotation marks, citations and brackets

omitted). The *Rompilla* Court reached its conclusion notwithstanding that Rompilla had been convicted of stabbing a man repeatedly and setting him on fire. *Id.* at 377. Similarly, the United States Supreme Court found *Strickland* prejudice in *Wiggins*, 539 U.S. at 514, even though the defendant had drowned a 77-year-old-woman in her bathtub. *Furthermore, it is important to note that three of the jurors in the instant case recommended a life sentence for Mr. Serrano. Thus, Norgard's claim that it was impossible to get a life recommendation was wrong.*

And, justice "'...requires...that there be taken into account the circumstances of the offense together with the character and propensities of the offender,'" as part of deciding whether the defendant is to live or die. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)(quoting *Pennsylvania ex rel Sullivan v. Ashe*, 302 U.S. 51, 55 (1937)). This also ensures that "'the sentence imposed at the penalty stage...reflect[s] a reasoned moral response to the defendant's background, character, and crime.'" *Abdul-Kibir v. Quarterman*, 550 U.S. 233 (2007)

Because three jury members of the jury voted for life, (R1500-1503), the absence of the substantial mitigating evidence from the penalty phase undermines confidence in the sentence of death. *See Lawhorn v. Allen,* 519 F.3d 1272 (11th Cir. 2008)(holding that counsel's deficient performance during the penalty phase undermined confidence in the death sentence when the defendant "needed only to convince two other jurors to alter the outcome of the proceedings")

The mountain of mitigating evidence presented at the *Spencer* hearing, would have fundamentally altered the jury's evidentiary picture of Mr. Serrano and would have individualize him as human being. Precedent from this Court requires reversal.

***Shellito v. State*, 121 So.3d 445, 459 (Fla. 2013):** Recently, in *Shellito*, this Court reversed a death sentence because defendant's counsel performed below professional norms in failing to conduct a thorough mitigation investigation, resulting in a gap in the mitigation actually presented and what was available. This Court held:

> The postconviction evidence shows a different picture of Shellito's upbringing than what was presented at trial. We conclude that based on consideration of the plethora of available mitigation and the dearth of mitigation actually presented, when reweighed against the aggravation in this case, our confidence in the outcome of the penalty proceeding is undermined.

Id. at 459 (emphasis added) Shellito's jury vote for death was 11-1, and the judge found two aggravating circumstances. *Id.* at 450.

***Simmons v. State*, 105 So.3d 475, 509 (Fla. 2012):** In Simmons, three "strong" aggravators were found, including HAC, "which is considered especially weighty," and the crime was a "particularly cruel and gruesome murder." *Id.* at 508-509. This Court noted that, even with the existence of weighty aggravators, it will not defeat the need for a new penalty phase when substantial mitigation is not presented to the jury, "especially where the only other mitigation is unsubstantial." *Id.* at 509. The Court found Simmons' counsel

deficient because he did not conduct a thorough mitigation investigation before making the strategic choice to present only "favorable" information about Simmons. *Id.* at 508.

This Court vacated Simmons' death penalty although the weighty HAC aggravator was present and explained:

> The State is correct that there were strong aggravators, including HAC – aggravators that were specifically found by the jury on an interrogator verdict in this case – and this was a particularly cruel and gruesome murder...In this case, the mitigation presented to the jury was minimal and actually presented Simmons in a bad light. **If the intent was to present substantial evidence humanizing Simmons, that result does not appear to have been achieved. Very little was presented to show that Simmons was a good and valuable member of society.** The jury did not hear how he worked hard in this father's business and helped his relatives. Although his sister said some good things about him, she undermined her mitigation testimony by criticizing the victim.

Id. (emphasis added)

***Parker v. State,* 3 So.3d 974 (Fla. 2009):** In *Parker*, **a four aggravating factor case**, this Court reversed and remanded a new penalty phase where counsel presented only "bare bones" mitigation at trial, while substantial mental mitigation and background mitigation were discovered and presented at the postconviction evidentiary hearing. *Id.* at 984.

In following the United States Supreme Court and this Court's holdings above, Mr. Serrano's sentence must be remanded for a new penalty phase. The mitigation presented at the *Spencer* hearing was plainly qualitatively and quantitatively different from that presented to the jury.

II. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT TO IMPROPER VICTIM IMPACT EVIDENCE PRESENTED DURING THE PENALTY PHASE IN VIOLATION OF MR. SERRANO'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE REPRESENTATION AND A FAIR TRIAL[12]

Only victim impact evidence which shows "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death" is admissible. §921.141(7), Fla. Stat. *Windom v. State,* 656 So.2d 432, 438 (Fla. 1995) This Court has often recognized that "the admissibility of victim impact evidence is not limitless." *McGirth v. State*, 48 So.3d 777, 791 (Fla. 2010)

Because of the strict requirements of Section 921.141(7), victim impact statements cannot discuss feelings or be overly emotional. *See Kalisz v. State,* 124 So.3d 185, 211 (Fla. 2013)(victim impact testimony was upheld where "statements were not overly emotional...."). Courts are required to consider whether "the nature and extent of [the] victim impact testimony" deprived the defendant of a fair sentencing in violation of his due process rights. *E.g., McGirth*, 48 So.3d at 791.[13]

Here, the nature and extent of the victim impact testimony violated Section 921.141(7) and Mr. Serrano's constitutional rights to due process, fundamental fairness and a reliable jury

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[12] Ground II, Subclaim 12

[13] *See Wheeler v. State,* 4 So.3d 599, 606-07 (Fla. 2009) (recognizing that evidence which places undue focus on victim impact can constitute a due process violation; *Payne v. Tennessee,* 501 U.S. 808, 825 (1991) (same)

determination. The outpouring of grief – both in quantity and quality – went far beyond the witnesses' description of emotions at the loss of loved ones. An unprecedented 26 witnesses unleashed torrents of inflammatory testimony about their personal pain, a veritable tidal wave of grief that engulfed the courtroom, including but not limited to:

> "On December 3rd, 1997, our world exploded like thousands of shards of glass piercing through my heart," (38 PCR 190),"[W]e feel compelled to share with you the ***nightmare*** we have been living", (38 PCR 6984)(emphasis added), "When we received the horrifying news December 3rd, 1997, our life as we knew it ceased,") (38 PCR 6967), "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," *Id.*, "I cannot comprehend what you must be going through losing such a son," (38 PCR 6988), "We cannot fix it. This is the most frustrating experience. Anyone that is a parent knows exactly what we are talking about" (38 PCR 6990), "In our minds Georgie and Diane are away on a beautiful trip, helping and taking care of children and eventually they'll come home, But, in truth, we'll go home to them," (38 PCR 6990), "May God always protect my son George throughout eternity," (38 PCR 6992), "Unbelievable grief in the form of parents and a sister virtually immobilized by pain and rendered physically unrecognizable to all those that knew them," (38 PCR 7012), "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," (38 PCR 7013), "There are not enough words in this English language that can explain how my life has ended," (38 PCR 7023)," You pick up the pieces of glass from your heart everyday," (38 PCR 7038), "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." (38 PCR 7044), and numerous other overly emotional statements of unending

heartbreak (37 PCR 6180-89;38 PCR 7038,7043-44,7046,7048, 7052)[14]

This tsunami of hyperbolic passion deprived Mr. Serrano of a fair sentencing hearing. Clearly, the State exceeded all reasonable limits in opening the floodgates on this outpouring of grief.

Norgard conceded that the following two statements were objectionable: (1)"We cannot fix it. This is the most frustrating experience. Anyone that is a parent knows exactly what we are talking about," and (2)"It is not fair that my beautiful and vivacious friend was robbed of life." (22 PCR 3982,3990)

During the entire presentation of victim impact evidence, Mr. Serrano's counsel made no specific contemporaneous objection to any portion of that testimony when it was presented to the jury. They simply renewed their ***general*** objection to the presentation of the victim impact evidence. (R243-46, 37 PCR 6804,6806-07,6835-38,6877-80,6882-84,6906;38 PCR 6965-67,6982-7054) This general objection was insufficient to preserve for appellate review these violations of Section 921.141(7) and the rights to due process, fundamental fairness and a reliable jury determination. *See Wheeler v. State,* 4 So.3d 599, 606 (Fla. 2009) (a defendant fails to preserve for appellate review a claim that victim impact evidence was improperly admitted where defense counsel makes only a general objection to victim impact evidence and does not make a ***specific*** objection to

[14] Eight witnesses testified in person at the sentencing. Eighteen others had their statements read aloud by the prosecutor.

such evidence ***at the time that it is presented***); *Sexton,* 775 So.2d at 931-32 (same) Mr. Serrano's counsels' failure to specifically and contemporaneously object to the repeated improper statements plainly undermines confidence in the jury's recommendation of death and in the outcome of the direct appeal.

The post-conviction court acknowledged that "some of the comments contained in the victim impact statements arguably demonstrated ***a lot*** of emotion...." (42 PCR 7777)(emphasis added). However, the court ruled without explanation that Mr. Serrano's counsel's performance was not deficient. (42 PCR 7777) In light of the plain failure of Mr. Serrano's counsel to specifically object to and preserve this meritorious issue, this ruling was error.

The post-conviction court also ruled, without citing any law, that *Strickland's* prejudice prong was not met because the jury was instructed that the victim impact statements were not an aggravating circumstance. However, the post-conviction court ignored that the jury was also instructed that it could consider the victim impact testimony in making its decision as to whether Mr. Serrano was to live or die. (38 PCR 7084) In addition, the post-conviction court failed to address Mr. Serrano's claim that the failure to preserve this issue for appellate review undermines confidence in the outcome of Mr. Serrano's appeal.

Thus, for all the foregoing reasons, a new sentencing hearing is mandated.

III. THE STATE WITHHELD EXCULPATORY MITIGATING EVIDENCE THAT WOULD HAVE PROHIBITED A DEATH SENTENCE IN VIOLATION OF MR. SERRANO'S FEDERAL AND STATE DUE PROCESS RIGHTS[15]

Because Arguments III and IV are closely related, they will be argued together.

IV. MR. SERRANO'S TRIAL COUNSEL WERE INEFFECTIVE DURING THE PENALTY PHASE FOR FAILING TO PRESENT MITIGATING EVIDENCE RELATED TO HIS REMOVAL FROM ECUADOR IN VIOLATION OF MR. SERRANO'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL[16]

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

On August 23, 2002, the United States government completed a Request for the Extradition of Mr. Serrano from Ecuador ("Extradition Request"). As part of the Extradition Request, the United States stipulated in a cover letter submitted with the Extradition Request:

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

(25 PCR 4607-45;26 PCR 4646-4762)(emphasis added) Thus, the United States government assured the Ecuadorian government in the cover letter submitted with the Extradition Request that Mr. Serrano would not face the death penalty. The United States Department of State and Department of Justice certified the Extradition Request.

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[15] Ground IV

[16] Ground V

One of the trial prosecutors, Assistant State Attorney Paul Wallace and FDLE Agent Tommy Ray submitted affidavits in support of the Extradition Request. Wallace was copied on the cover letter to the Extradition Request in which the promise not to seek the death penalty was set forth. The Ecuadorian Consulate in Washington D.C. authenticated the document. *Id.*

It is also undisputed that the State Attorney, Jerry Hill, both trial prosecutors in this case, the FDLE and the victims' family members approved that promise not to seek the death penalty. (18 PCR 3213,3239) On or about August 25, 2002, Assistant State Attorney Wallace, FDLE Agent Ray, and retired FDLE Agent Caso traveled to Ecuador with the United States government's Extradition Request in hand. (T5896) At that time Agent Ray and Wallace were aware that Ecuador had a constitutional ban on the extradition of its citizens. (18 PCR 3245)

Wallace and Ray remained in Ecuador that whole week. (18 PCR 3243) During that week they had meetings with various people, including a DEA agent and his assistant, a retired Ecuadorian police officer, in which the possibility of deporting Mr. Serrano (which would enable the death penalty to be imposed) was discussed. (18 PCR 3251-55;3258-65) Mr. Serrano - an Ecuadorian citizen - was deported at the conclusion of the week even though this conflicted with the United States government's request that he be lawfully extradited and returned to the United States to face a maximum sentence of life imprisonment.

The Deportation Request, which was considered by Ecuadorian authorities, differed significantly from the United States' Extradition Request. No representative of the United States government certified this request. The Ecuadorian government did not authenticate it. The Deportation Request repeatedly asserted that Mr. Serrano was a United States citizen and deceptively omitted the fact that he was also a citizen of Ecuador. Furthermore, the Deportation Request did not alert Ecuadorian authorities that Mr. Serrano might face the death penalty although Wallace plainly knew that the crimes for which Mr. Serrano was indicted were punishable by death. (25 PCR 4504-10)

Subsequently, the Government of Ecuador and the Inter-American Commission on Human Rights for the Organization of American States ("IACHR") condemned the proceedings. More specifically, after an extensive investigation into the forcible removal of Mr. Serrano from Ecuador, the IACHR concluded that Mr. Serrano was an Ecuadorian citizen who was illegally deported. (46 PCR 5137-62)

On March 6, 2009, the government of Ecuador sent a note of protest to the United States government demanding the devolution of its citizen, Mr. Serrano, because his removal violated Ecuadorian laws and the Extradition Treaty. (25 PCR 4529-42)

During the sentencing phase, following Mr. Serrano's conviction in Polk County, State Attorney Jerry Hill received a letter from the Ecuadorian Consul protesting the possible imposition of the death penalty and attaching a resolution of the

Ecuadorian National Congress demanding an investigation into Mr. Serrano's deportation. (25 PCR 4516-20) The State Attorney's Office did not disclose this letter to Mr. Serrano or investigate Mr. Serrano's deportation. (18 PCR 3265-71)

Favorable, exculpatory or impeachment evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defendant, the result of the proceeding would have been different. *E.g., Rogers v. State*, 782 So.2d 373 (Fla. 2001)

In order to establish a *Brady* violation, a defendant must prove: (1) the evidence at issue is favorable to the accused; (2) that evidence was suppressed by the State, either willfully or inadvertently; and (3) prejudice ensued. *E.g., Floyd v. State*, 902 So.2d 775, 779 (Fla. 2005) It is clear that the State failed to disclose to Mr. Serrano the United States government's assurances in the Extradition Request that Mr. Serrano would not face the death penalty and the January 25, 2007 letter from the Consul of Ecuador to State Attorney Jerry Hill expressing Ecuador's disagreement with the death penalty. Both Norgard and Mason testified that they had never seen the cover letter to the Extradition Request or the letter to Hill. (21 PCR 3870-72; 23 PCR 4247-48) Significantly, Mason testified that, if he had seen that cover letter, he would have used it as evidence for Mr. Serrano's motions that he filed objecting to this Court's jurisdiction based upon the circumstances surrounding Mr. Serrano's removal from

Ecuador. However, since he had never seen it, he did not use it then. (23 PCR 4247-48)

Furthermore, there is not a single document in evidence establishing that the State disclosed to defense counsel the Extradition Request cover letter promising not to seek to execute Mr. Serrano. At the evidentiary hearing on Mr. Serrano's Rule 3.851 Motion, the State relied solely upon one document in an effort to establish that fact - State's Exhibit 42 found at 40 PCR 7348. That exhibit is a single-page document entitled, "Supplemental Discovery #23" and lists the following "trial exhibits" which were turned over to defense trial counsel: "*151 pages of extradition packet on Nelson Serrano*, copy of 3-page letter and envelope from Russell Rogers dated 12/26/04, and copy of a compact disk containing power point presentation done by FDLE for Ecuadorian authorities." (40 PCR 7348)(emphasis added) Notably, the "151 pages of extradition packet" referred to in this discovery document are not attached to State's Exhibit 42 so we have no way of knowing whether this "151 pages of extradition packet" included the Extradition Request cover letter containing the promise not to seek to execute Mr. Serrano. However, we do know that this cover letter and the actual Extradition Request packet total ***155 pages - not 151 pages***. (25 PCR 4607-45;26 PCR 4646-4762) Thus, something was left out of the "151-page extradition packet" disclosed to defense counsel and it very well may have been the cover letter. ASA Aguero did not testify that he definitely knew that this cover letter was included when he

sent State's Exhibit 42 to defense counsel enclosing the "151-page extradition packet." Rather, he merely testified that, "*I would believe* [the two pages of the cover letter] were part of the 151 pages of the extradition packet" described in State's Exhibit 42 (19 PCR 3559)[17] Furthermore, the prosecutors in this case plainly never issued an official *Brady* notification to defense counsel that the State was in the possession of *Brady* material that constituted the above described promise not to seek to execute Mr. Serrano.

The State's failure to disclose to Mr. Serrano's counsel all relevant evidence that Mr. Serrano was unlawfully removed from Ecuador resulting in him facing the death penalty violated *Brady* and its progeny.

The United States Constitution protects the expansive right to present mitigating evidence during penalty phase proceedings. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) Mitigating evidence encompasses any matter that the "sentencer could reasonably find that warrants a sentence less than death." *Tennard v. Dretke*, 542 U.S. 274, 285 (2004); *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) ("[V]irtually no limits are placed on the relevant mitigating

[17] Mr. Serrano moved to exclude ASA Aguero from the courtroom pursuant to Rule 4-3.7 of the Florida Rules of Professional Conduct which recognizes in its commentary that "[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party...." However, that motion was denied. Now this Court is in the position of trying to separate ASA Aguero's advocacy from his testimony. This is an impossible task. ASA Aguero should be viewed as an advocate, not a witness. He was both the chief prosecutor and the chief witness. His testimony was slanted to assist the case he was presenting.

evidence a capital defendant may introduce concerning his own circumstances.")

"Questionable extradition procedures may also give rise to mitigating circumstances to be considered during sentencing." *Karake v. United States*, 281 F. Supp. 2d 302, 309 (D.D.C. 2004); *see Bin Laden v. United States*, 156 F. Supp. 2d 359, 367 (S.D.N.Y. 2001) The Court in *Karake v. United States, supra*, held that, during the penalty phase, a capital defendant may present evidence that "the United States government represented to any foreign government that defendants would not be subject to the death penalty upon extradition." And, the Court in *United States v. Bin Laden,* 156 F.Supp.2d 359 (S.D.N.Y. 2011), held that evidence that the defendant would not be facing the death penalty if proper deportation procedures had been followed is a mitigating factor that may be considered by the jury during the penalty phase of a capital case.

As previously explained, a defendant will successfully establish a *Brady* violation when (1) the evidence is favorable to the accused, (2) the State willfully or inadvertently suppressed the evidence; (3) the defendant suffered prejudice; and (4) the State cannot satisfy the burden of establishing that the omission was harmless error. *E.g., Floyd v. State*, 902 So.2d 775, 779 (Fla. 2005); *Carroll v. State*, 815 So.2d 601, 619 (Fla. 2002)

The following circumstances surrounding Mr. Serrano's removal from Ecuador, which the State did not disclose to Mr. Serrano, are

favorable to Mr. Serrano because they provide a basis for a sentence less than death: (1) as part of the Extradition Request, the United States government assured the Ecuadorian government that Mr. Serrano would not face the death penalty, (2) the United States pursued Mr. Serrano's extradition, (3) when the State prosecutor, was in Ecuador a decision was make to seek Mr. Serrano's deportation while the United States' Extradition Request was pending, (4) the Deportation Request did not advise Ecuadorian authorities that Mr. Serrano would face the death penalty, and (5) prior to Mr. Serrano being sentenced, Ecuador sent a letter to the State Attorney's Office protesting the imposition of the death penalty. Indeed, Mr. Serrano plainly would not have faced the death penalty if properly extradited.

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

In light of the expansive right to present mitigating evidence, Mr. Serrano would have had the opportunity to present this persuasive mitigating evidence during the penalty phase if the State would have disclosed it as required by *Brady* and its progeny.

Assuming *arguendo* that the State disclosed to defense counsel

the Extradition Request cover letter assuring that Mr. Serrano would not face the death penalty, the Ecuadorian Counsul's January 25, 2007 letter to State Attorney Jerry Hill, as well as all relevant evidence that Mr. Serrano was unlawfully removed from Ecuador causing him to be subjected to the death penalty, Mr. Serrano's counsel was then ineffective for failing to present this mitigating evidence during the penalty phase. The failure to present this mitigating evidence undermines confidence in the outcome of the sentence.

As previously discussed, during the penalty phase of a capital trial, the defendant may present any evidence that argues against the imposition of a death sentence. *Tennard, supra*; *Payne*, *supra*. Evidence that a defendant would not face the death penalty if returned to the United States via lawful removal proceedings qualifies as mitigating evidence. *Karake, supra; Bin Laden*, *supra.*

Furthermore, although the State withheld substantial information concerning the illegality of Mr. Serrano's removal from Ecuador, Mr. Serranos's counsel were ineffective for failing to present the information known to them regarding Mr. Serrano's illegal deportation. At the time of sentencing proceedings, counsel knew (1) that Mr. Serrano was an Ecuadorian citizen, (2) that Ecuador will not extradite or deport Ecuadorian citizens, and (3) that Ecuador will not remove an individual from Ecuador who may face the death penalty. Mr. Serrano's counsel were ineffective for failing to present this known information because it provided a

basis for a sentence less than death. Counsel's failure to present this evidence resulted in prejudice because evidence of improper removal is a persuasive mitigating factor that would have likely led to a life sentence. *Bin Laden, supra*. (noting that eleven jurors found the mitigating factor related to unlawful removal and that the defendant ultimately received a life sentence).

THE TRIAL

V. TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO OBJECT TO THE PROSECUTOR'S IMPROPER COMMENTS DURING CLOSING ARGUMENT IN VIOLATION OF MR. SERRANO'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE REPRESENTATION[18]

IMPERMISSIBLE COMMENTS ON THE PRESUMPTION OF INNOCENCE

During his closing argument, the prosecutor stated:

> This is [sic] 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 - - 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 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)

[18] Ground II, Subclaim IV

The presumption of innocence is a fundamental precept guiding the jury's evaluation of guilt or innocence. *Estelle v. Williams,* 425 U.S. 501, 504-05 (1976) (citations omitted) It is a "constitutionally rooted" right of the accused.[19]

The prosecutor's comments about "the law" pertaining to this right were improper because they 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. *E.g., Mahorney v. Wallman*, 917 F.2d 469, 472 (10th Cir. 1990); *Nurse v. State*, 932 So.2d 290, 292 (Fla. 2d DCA 2005)

The prosecutor's comments are strikingly similar to those 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 innocent, unnder the law and the evidence that presumption had been removed and was "not there anymore." The *Mahorney* Court condemned these comments because they undermined the defendant's presumption of innocence. *Id.* at 471 n.2.

Here, too, the prosecutor's statement that it "is the law" that the presumption of innocence is just "something to begin a

[19] *Cool v. United States,* 409 U.S. 100, 104 (1972)

trial with" and that presumption does not mean that Mr. Serrano is "presumed innocent now" was an impermissible misstatement of law that negated Mr. Serrano's right to the presumption of innocence.

Norgard conceded that he erred in failing to object to these comments. (21 PCR 3895-96;22 PCR 4048-52) He testified that he may not have heard the comments because he was not paying attention. *Id*. He further testified that, if he had heard these comments, he would have objected. (22 PCR 4049, 4051) The post-conviction court ruled that these comments were "an improper statement of the law and objectionable." (42 PCR 7758) Mr. Serrano's counsel's performance was plainly deficient in failing to object to this egregious misstatement of the law.

This failure undermines confidence in the outcome of the trial and the appeal. The law is clear that "[a] misstatement of law [by the prosecutor] that affirmatively negates a constitutional right or principle [such as the presumption of innocence] is...a... serious infringement...." *Mahorney,* 917 F.2d at 473. There is a grave danger that, during deliberations, the jurors who followed "the law" as incorrectly explained by the prosecutor abandoned the requirement to presume that Mr. Serrano was innocent until proven guilty beyond a reasonable doubt. The trial court's preliminary instructions to the jury did not include an instruction on the presumption of innocence. Accordingly, the first time the jury was informed of the law regarding that presumption was when the prosecutor incorrectly described it to them.

Additionally, the trial court's charge on the presumption of innocence at the conclusion of the evidence did not adequately protect the presumption because that instruction never explained that the presumption of innocence continues through the jury's deliberations. (T6269) *See Mahorney,* 917 F.2d at 473-74 (trial court's instruction not sufficiently specific to preserve the presumption of innocence in light of the prosecutor's comment that it had been extinguished). Furthermore, because Mr. Serrano's counsel failed to object to the prosecutor's comments, this error was not preserved for consideration on direct appeal. *See Weaver* v. *State,* 894 So.2d 178, 196 (issues not objected to at the trial level are not preserved for direct appeal). For that reason, it was not raised on Mr. Serrano's direct appeal. *See Serrano*, 64 So.3d at 108. But for counsels' failure to object, this error would have resulted in reversal on appeal. See *Mahorney, supra; Nurse, supra.*

Courts have repeatedly held that defense counsel is ineffective where he fails to object to a prosecutor's improper closing arguments and thereby does not preserve the issue for appeal. *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) Notably, the post-conviction court's order failed to address Mr. Serrano's claim that his counsel were ineffective for failing to preserve this issue for appeal. (42 PCR 7757-58) Accordingly, a remand is mandated.

The post-conviction court cited *Taylor v. State,* 62 So.3d 1101 (Fla. 2011)and *Daily v. State,* 965 So.2d 38 (Fla. 2007) (42 PCR.

7758) However, those cases are distinguishable. In those cases, the prosecutor's comments were statements of their ***belief*** that the state's evidence was strong enough to overcome the presumption of innocence. Thet did not mistake the law. By contrast here, the prosecutor twice mentioned that he was explaining ***"the law"*** and even stated that ***"it is the law"*** that the presumption of innocence is merely something to begin a trial with and "then the State puts on evidence to take that presumption of innocence away." (T. 6107)

In *Dessaure v. State,* 55 So.3d 478, 486 (Fla. 2011) (emphasis added), this Court recognized that there is a distinction between "a prosecutor's comment [about the presumption of innocence] which states his ***opinion or belief*** that the evidence is strong from a prosecutor's comment [about the presumption of innocence] ***which projects a statement of the law***." The *Dessaure* Court held that the latter is improper. Accordingly, the failure of Mr. Serrano's counsel to object to the prosecutor's statements both undermined Mr. Serrano's presumption of innocence and violated his right to the effective assistance of counsel.

THE PROSECUTOR'S IMPROPER COMMENTS THAT MR. SERRANO WAS DIABOLICAL AND A "LIAR."

During closing argument, the prosecutor twice 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"). (T6102-03, 6122, 6165, 6171; 34 PCR 6168-73) Mr. Serrano's counsel never objected to these

improper comments although he testified that these comments could have been objectionable. (21 PCR 3896) It is beyond cavil that these comments were improper.[20] Indeed, when Mr. Serrano argued on direct appeal that the prosecutor improperly and repeatedly called him diabolical and a liar, this Court held that these comments were improper but that, "[b]ecause Serrano failed to contemporaneously object, this claim is not preserved for appellate review." *State v. Serrano*, 64 So.3d 93, 111 (Fla. 2011)

But for the failure of Mr. Serrano's counsel to object to these improper comments, Mr. Serrano's convictions would have been reversed on appeal. These serious failures also undermine confidence in the outcome of the trial.

IMPROPERLY SHIFTING THE BURDEN OF PROOF

On direct appeal, Mr. Serrano argued that the prosecutor improperly shifted the burden of proof by stating the following during his closing: (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.

[20] "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 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), this 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), where the prosecutor referred to the defendant as Pinocchio, this Court held that these comments were improper because the prosecutor was inviting the jury to convict the defendant on the basis that he was a liar.

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 improper. Indeed, the post-conviction court acknowledged that they "might have been objectionable." (42 PCR 7761)

Although these arguments were improper, this Court held that, "Like Serrano's liar claim, this claim is not preserved for appellate review because defense counsel failed to contemporaneously object." *Serrano,* 64 S.3d at 111. But for Mr. Serrano's counsel's failure to object to these improper comments, Mr. Serrano's convictions would have been reversed on appeal. These failures also undermine confidence in the outcome of the trial. Furthermore, the cumulative impact of the prosecutor's many improper statements during his closing argument deprived Mr. Serrano of the fair trial and appeal to which he was entitled.

VI. TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO CONDUCT AN INVESTIGATION TO SHOW THAT IT WAS IMPOSSIBLE FOR MR. SERRANO TO HAVE TRAVELED FROM HIS ATLANTA HOTEL TO THE CRIME SCENE IN BARTOW AND BACK IN THE TIME AND MANNER THEORIZED BY THE STATE IN VIOLATION OF MR. SERRANO'S SIX AND FOURTEENTH AMENDMENT RIGHTS[21]

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 that 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.

Defense counsel knew that the most important area of investigation with respect to the defense case was the alibi defense. For that reason, they knew that it was important to have an investigator investigate it. Indeed, on March 15, 2004, Norgard wrote a memorandum to Mason in which he wrote the following:

> ALIBI DEFENSE: ***The most important area of investigation with respect to the defense case is our alibi defense. I would suggest that we get an investigator appointed to handle this*** as part of the case in addition to our mitigation specialist. We can discuss this matter when we meet on Friday.

(32 PCR 5958-59) (emphasis added). Mr. Serrano's counsel never had an investigator retrace the steps that the State claimed Mr.

[21] Defendant Serrano's Fifth Amendment to Motion for Postconviction Relief

Serrano took to get to and from Bartow in the time between 12:19 p.m. and 10:17 p.m. (23 PCR 4253-54)[22]

Instead, defense counsel merely argued during closing argument, without any evidentiary support, that the prosecution's theory was impossible because there was not enough time for Mr. Serrano to have done all of these things and to have arrived at his Atlanta hotel by 10:17 p.m. (T6062-64,6209-12,6245-47;34 PCR 6164-65) This theory that it was impossible for Mr. Serrano to have traveled to and from Bartow in the time given was a major focus of defense counsel's closing remarks. However, defense counsel simply made this closing argument without making an effort to have an investigator retrace the steps that the State alleged Mr. Serrano took on the day of the crime. As a result, the jury had no evidence to support defense counsel's argument. This was a deficient and unreasonable performance.

In *Visger v. State*, 953 So.2d 741, 745 (Fla. 4th DCA 2007), where the defendant's defense to a burglary charge was that he was invited in the house, the Court held that defense counsel rendered an unreasonable and deficient performance in arguing to the jury that he was invited in without presenting any evidence to support it. As explained by that Court:

> [W]e find it unreasonable and [a] deficient performance to believe that counsel could argue to the jury a theory that appellant was invited in without any evidence whatsoever to

[22] Mason and Norgard testified that Mr. Serrano always maintained that he was in Atlanta at the time of the murders. (23 PCR 1268)

> support it and all the evidence clearly contrary to that theory. Such an argument amounts to sheer speculation. Closing argument is supposed to present ***the lawyer's view of the evidence*** and all reasonable inferences which may be drawn from it.

Id. (emphasis added)

Norgard testified that he thought the trip was doable so he did not investigate it. His sole basis for this "opinion" was him flying into the Atlanta airport once for a deposition and driving around in a cab. (21 PCR 857-69) He acknowledged that Mason had been to Atlanta more often than him and he relied on Mason's experience. (21 PCR 3866) However, Mason testified at the evidentiary hearing that the trip was ***not*** doable. (23 PCR 4261-62,4267-68,4276) Mason testified that a reporter named Mr. Dow told him that he or a member of his staff had retraced the steps of the theorized trip and had been unable to do it within the required time period. (23 PCR 4253-54)

In addition, Mason testified that, after Mr. Serrano was convicted, Mason was sued by a law student named Dustin Kolodziej because Kolodziej claimed that Mason had stated on a news program that he would pay a million dollars to anyone who could duplicate the steps of the theorized trip within the time period required under the State's theory. Mason explained that Kolodziej claimed that he had succeeded in doing so when, in fact, he "conjured up something entirely different to try to do it." The case was ultimately dismissed. (23 PCR 4254-55)

Mason hired an expert in aviation to help him defend that lawsuit who prepared an expert report about "the times of [the] planes landing and [the times] people [would have taken in] exiting the planes." (23 PCR 42-56) This report was used by Mason as an exhibit to Mason's "Motion for Summary Judgment" which was granted.

Although the post-conviction court did not admit that expert report, which was marked as Defendant's Exhibit 127 for identification (32 PCR 5829-44), that court recognized that the report supported an argument that Mr. Serrano's counsel could have retained a similar expert for Mr. Serrano's trial to reduplicate the alleged trip as opposed to waiting until after the trial when defense counsel himself needed an expert to show that the alleged trip could not have been done. (23 PCR 4256-58)

Mr. Mason's proffer about his expert's report was as follows:

> A. He [the expert] was hired for the purpose of establishing that the conjured trip by Mr. Kolodziej basically was a fraud. He did not do what it was alleged that Mr. Serrano did. He bought a ticket for seat 1-B, first class, on a jet so he could be the first one to jump off of it and not have to wait in line behind people getting off the airplane, and not having time to go from whatever gate you arrive at Hartsfield [Atlanta airport] to go to the tram to get to the terminal to get out.
>
> So you and I have both been through Hartsfield hundreds of times and ***this was the idea to show that you couldn't do that***. And, in fact, Colonel Mcdyre [sic] also verified from the flight number the type of airplane, the configuration, the seating and so forth to show that indeed Mr. Kolodziej's claim of performance was a conjured up one and it wasn't true.

> And furthermore, they had not timed the wheels down, the FAA time, to getting to the gate and so forth. There were a lot of things that we felt were not something that was alleged to have been done by Mr. Serrano.
>
> Q All right. And, in fact, it was fairly substantial evidence that attacked what Mr. Kolodziej allegedly did, correct?
>
> A Say that again. I'm sorry.
>
> Q Okay, Colonel Mcdyre [sic] presented substantial evidence as an expert that Mr. Kolodziej's trip was inaccurate?
>
> A. Yes, sir.

(DE1277-78)(emphasis added) Thus, as Mr. Serrano's post-conviction counsel explained during his closing argument at the evidentiary post-conviction hearing, "[T]he best evidence that they [Mr. Serrano's counsel] could have investigated [whether the trip was doable, was] when Mr. Mason's money was on the line, they did it. But when Mr. Serrano's life was on the line, nobody did this work." (24 PCR 4385)[23]

Because Mr. Serrano's counsel never had an investigator retrace the alleged trip, their failure to present any evidence to support their theory that the trip was not doable cannot be justified as a tactical decision since it was not based on an informed judgment. *E.g.*, *Strickland*, 466 U.S. at 690-1; *Wiggins*,

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[23] Mr. Serrano respectfully asserts as an issue in this appeal that the post-conviction court erred in ruling that McDyre's expert report (32 PCR 5829-44) is inadmissible hearsay. (23 PCR 4256-59) The report would not have been admitted for the truth, that the times are as the expert reported; but for two non-hearsay purposes. First, Norgard testified that it was too late in 2006 to get an expert on this, so it rebuts his claim. Second, it shows what Mr. Serrano's counsel could have done to retrace the alleged trip if they tried.

539 U.S. at 521–22; *Sears*, 130 S.Ct. at 3265; *Shellito*, 121 So.3d at 453–56. Significantly, Mason's explanation for failing to hire an investigator to retrace the alleged trip was that there was some unexplained "financial" issue since this was an "indigency for costs" case. (23 PCR 4261) But without ever having applied for funds to hire an investigator to retrace the steps of the alleged trip, defense counsel's failure to hire such an expert cannot be deemed to have been a reasonable strategic decision. *See, e.g.*, *Hinton v. Alabama*, ___ U.S. ___, 134 S.Ct. 1081, 1087–89 (2014)(holding that it was unreasonable for Hinton's lawyer to fail to seek funds to hire an expert where that failure was based not on any strategic choice but on a mistaken belief that the necessary funding was not available).

Thus, the failure of Mr. Serrano's counsel to have conducted an investigation and presented evidence on this issue deprived him of effective representation.

VII. TRIAL COUNSEL WERE 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 IN VIOLATION OF MR. SERRANO'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE REPRESENTATION[24]

Mr. Serrano's counsel were 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,

[24] Ground II, Subclaim 5

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;34 PCR 6174)(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 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. *Martinez v. State*, 76 So.2d 1074 (Fla. 2000); *Bartlett v. State*, 993 So.2d 157, 160 (Fla. 1st DCA 2008); *Charles v. State*, 79 So.3d 233, 235 (Fla. 4th DCA 2012)

There was a plethora of evidence that the motive for the shootings was robbery. As stated in Mr. Serrano's Rule 3.851 Motion at 14:

> 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;3 PCR 348)

Relying upon this evidence, defense counsel argued at closing that the murders were committed by a robber. (T6193) Norgard

conceded this improper opinion testimony of the police officers was improper and, therefore, he should have objected to it. (21 PCR 3901-02) Norgard also acknowledged that part of Mr. Serrano's defense was that the crimes charged in this case could have been motivated by a robbery. (21 PCR 3904)

Nevertheless, Norgard claimed that he did not object to this opinion testimony of Agent Ray and Detective Parker because he feared that such an objection would have caused the State to elicit evidence that some valuable items at Erie were not taken. (21 PCR 3902) The post-conviction court ruled that this was a reasonable tactical decision. (42 PCR 7764) However, Norgard's after-the-fact explanation fails because it is patently unreasonable. Even without defense counsel objecting to this improper testimony, the State was free to elicit evidence that there were some valuable items at Erie that were not taken and, in fact, did so, including presenting evidence that petty cash box in an open file cabinet, wallets, Diane Patisso's jewelry and her purse were not taken. (T3100,3059-60,3842)

The admission of the police officers' opinion testimony and the prosecutor's remark improperly bolstered the State'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 of the trial. 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.

VIII. TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO CONTEMPORANEOUSLY OBJECT TO THE STATE ARGUING INCONSISTENT THEORIES DURING THE DEATH PHASE AND THE PENALTY PHASE OF THE TRIAL IN VIOLATION OF MR. SERRANO'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE REPRESENTATION[25]

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 without warning.

However, at the penalty phase of the trial, the prosecutor argued a different theory 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

[25] Ground II, Subclaim 6

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. *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). *Raleigh v. State*, 932 So.2d 1054, 1066 (Fla. 2006) (recognizing that "[t]he United States Supreme Court [in *Bradshaw*] held that the use of such inconsistent theories warranted remand to determine what effect this may have had on [the defendant's] sentence").

At the evidentiary hearing, Mason testified in a proffer that he was surprised by this change in the State's theory. (23 PCR 4244) He further testified that he recalled writing a letter to Norgard after Mr. Serrano was convicted concerning issues for a motion for a new trial. In that letter, he wrote the following:

> Referencing the gun issues, it is critical to know that Mr. Wallace, in closing, argued for the first time that the Defendant had hidden the guns in his car which was parked at Orlando International Airport and that he retrieved them to bring with him in the rental car. There was no evidence of that at all,

> from any witness and such an argument is totally contrary to the theory set forth in opening as well as the evidence regarding the blue chair and the tile, etc. If Mr. Wallace was correct, then all of that evidence and all the witnesses related thereto were irrelevant and certainly prejudicial.

(23 PCR 4244-47;32 PCR 5845-46)

Thus, Mr. Serrano's counsel plainly considered the State's arguing of inconsistent theories during the guilt phase and the penalty phase of the trial to be objectionable and prejudicial. Accordingly, their failure to contemporaneously object to the prosecutor arguing inconsistent theories is wholly without any justification.

Furthermore, this failure of defense counsel to contemporaneously object to the State using inconsistent theories was highly prejudicial. Indeed, it is apparent that the prosecutor was seeking the cold, calculated and premeditated aggravating factor when he argued in the penalty phase that Mr. Serrano planned ahead by storing two guns in his alleged rental car. In the sentencing order, the court found that this aggravating factor existed. Without holding an evidentiary hearing on this issue, the post-conviction court ruled that, "[a]lthough some inconsistency is arguably present in these theories" the claim is procedurally barred because it should have been raised on direct appeal. (42 PCR 7766) This was error. An appellate court cannot consider an issue that was not contemporaneously objected to. *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003) (internal citations omitted) Accordingly,

for all the foregoing reasons, the post-conviction court erred in not holding an evidentiary hearing on this issue and then granting relief.

IX. 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 IN VIOLATION OF MR. SERRANO'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS[26].

At the post-conviction evidentiary hearing, it was undisputed that Mr. Serrano wears a size 9 shoe. (23 PCR 4125-4131;27 PCR 4841-77) This would have been powerful evidence at the trial because the shoe impressions on the blue chair at the crime scense 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 two impressions.

Because there was no physical evidence linking Mr. Serrano to the crime scene, the State relied heavily on the slightly displaced ceiling tile and the shoe print on the blue chair near it to support its trial theory that Mr. Serrano was at the crime scene and, while there, retrieved a .32 caliber gun from the ceiling tile.[27] During defense counsel's closing argument, defense counsel argued that there was insufficient evidence to link Alvaro

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[26] Ground II, Subclaim 7

[27] During the prosecutor's closing argument, he argued that Mr. Serrano must have taken a .22 caliber gun to Erie, and since a .22 caliber gun can only hold eleven bullets and eleven .22 shell casings were found at the crime scene, he must have shot all eleven .22 bullets and then had to use a .32 caliber gun that he had retrieved from the ceiling by standing on the blue chair. (T6151-54)

Penaherrera's size 7 shoe to the crime scene. (T6043-44, 6232-33) Thus, the shoe print on the blue chair which the State's expert testified had class characteristics that were consistent with a size 7 pair of shoes Mr. Serrano allegedly gave to Alvaro Penaherrera to wear to the grand jury was clearly important to the State's case.[28]

Norgard testified that he believed that the State's evidence had established that Mr. Serrano possessed size 8½ shoes so there was no need for Norgard to present any evidence of Mr. Serrano's shoe size and to thereby lose the rebuttal closing argument. (22 PCR 3958-64) However, Norgard was mistaken in this belief. The evidence presented by the State did not establish that Mr. Serrano possessed size 8½ shoes.

The State's shoe expert merely testified that he was provided with a pair of size 8½ Boston Florentine shoes. ***However, he did not explain where those shoes came from.*** He simply testified that those Boston Florentine shoes could not have made the shoe impression on the blue chair below the displaced ceiling tile. (T5297) ***No other testimony or other evidence was presented at the trial about these size 8½ Boston Florentine shoes or where they came from. Neither***

[28] Notably, in discussing the sufficiency of the evidence in this case, this Court explained that there was "testimony that a shoe impression on the chair below the dislodged ceiling tile was consistent with a shoe that Serrano owned." *Serrano v. State*, 64 So.3d 93, 105 (Fla. 2011) Earlier in the opinion, this Court noted that the State introduced evidence that this shoe that Serrano owned was the shoe that Serrano had "loaned to a nephew." *Serrano*, 64 So.3d at 99.

Alvaro nor Ricardo Penaherrera testified that the shoes that Mr. Serrano allegedly gave them to wear to the grand jury were Boston Florentine shoes. Ricardo Penaherrera was never asked by either the prosecutor or defense counsel what size the shoes were that Mr. Serrano allegedly gave to him. (T4851)

The trial court found that size "8½ Bostonian Florentine shoes had been given to Ricardo....". (42 PCR 7767) This finding was erroneous. The State's shoe expert, Oral Woods, merely testified that he was provided with a pair of size 8½ Bostonian Florentine shoes ***but he did not testify were those shoes came from***. (T5297)

Accordingly, Norgard's decision was based upon a mistake and thus, it was not a reasonable strategic decision. *See, e.g., Hinton*, ___U.S. ___, 134 S.Ct. at 1088-89 (strategic choices based upon mistakes of the law or facts constitute an unreasonable performance under *Strickland*).

CLAIMS RELATED TO PROSECUTION WITNESS JOHN PURVIS[29]

The facts about state witness John Purvis and the description of Mr. Serrano's claims concerning Purvis are accurately described in the post-conviction court's order on Mr. Serrano's Rule 3.851 Motion at 42 PCR 7745-50 and are incorporated by reference herein.

[29] Ground II, Subclaims 1-3, Second and Fourth Amendments.

X. THE STATE KNOWINGLY PRESENTED PERJURED TESTIMONY FROM THE SOLE EYEWITNESS IN VIOLATION OF *GIGLIO v. UNITED STATES*, 405 U.S. 150 (1972), AND MR. SERRANO'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS

THE COMPOSITE SKETCH

At Mr. Serrano's trial, John Purvis was the only eyewitness who purportedly saw the perpetrator of the crimes. Purvis testified, *inter alia*, that, on December 23, 1997, he described the man he saw on the day of the crimes to a police forensic artist who then drew a composite sketch of the man. This composite sketch was admitted at the trial. (T3382-84,3407-23;34 PCR 6341)

The prosecutor caused John Purvis to testify on direct examination at the trial that this composite sketch of the purported perpetrator "resembles the person ***best you could describe it for this artist***." (T3384) However, this testimony was false because, on December 29, 1999, months after Purvis was hypnotized at the request of law enforcement, he met with the same forensic artist who drew the December 23, 1997 composite sketch for the purpose of modifying that sketch because he recalled the purported perpetrator differently.

Thus, when Purvis testified that the December 23, 1997 composite sketch was as accurate as he could describe it to the forensic artist, 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 modified composite sketch

bears much less resemblance to Mr. Serrano than the first composite sketch. (34 PCR 6342) (The prosecutor never sought to admit this modified composite sketch and Purvis never testified about it.)

The State cannot meet its burden of establishing that Purvis' false testimony was harmless beyond a reasonable doubt. *See, e.g., Guzman*, 868 So.2d at 505. Purvis was the only eyewitness who purportedly saw the perpetrator of the crimes. The lead detective, FDLE Agent Ray, testified in a pre-trial deposition and at the post-conviction evidentiary hearing that the first sketch looked like Mr. Serrano. (23 PCR 4205; 28 PCR 5119) Norgard testified that Purvis' first composite sketch and the modified composite sketch "looked like very different people." (21 PCR 3888) And, in upholding the sufficiency of the circumstantial evidence in the instant case, the *first* composite sketch was one of the key pieces of evidence relied upon by this Court which, like the jury, did not know that there had been a modified sketch. *Serrano,* 64 So.3d at 93; 30 PCR 5416) This flagrant *Giglio* violation requires a new trial.[30]

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[30] The post-conviction court held that it is permissible to present false testimony such as this under *Stokes v. State,* 548 So.2d 188 (Fla. 1989). However, the *Stokes* Court did not give prosecutors free rein to have a witness testify that his pre-hypnosis recollection is his *present day best* recollection when, in fact, it is not. Rather, the *Stokes* Court merely held that a witness who has been hypnotized can testify about what he told the police the first time that he described an event to them. That Court did not hold that a witness can testify that his pre-hypnosis description of an event is his *present day best* recollection when, in fact, it is not. *Id.* at 196. The *Stokes* Court never authorized (continued...)

THE FALSE AND MISLEADING DESCRIPTION OF THE PURPORTED PERPETRATOR

Purvis testified that the man outside of Erie was "Hispanic," "Mediterranean," and "olive complected." (T3339) He also testified that the first composite sketch of the man outside Erie, which portrays a man who looks Hispanic or Mediterranean – not Asian, was accurate. (T3384) However, during an October 11, 1999 videotaped interview that occurred *prior to Purvis being hypnotized,* Purvis informed six law enforcement officers during a videotaped interview that the man seen standing outside Erie was possibly Asian. (34 PCR 6261-6333) Accordingly, the prosecutor knew that Purvis' trial testimony omitting that the man was possibly Asian and describing the man solely as Hispanic or Mediterranean was false and misleading. However, the prosecutor failed to correct it.

This false and misleading testimony was plainly material. As previously explained, Purvis is the only witness who saw and could describe the purported perpetrator. Thus, by failing to correct Mr. Purvis's testimony, the State enabled the sole eyewitness to

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[30](...continued)
a witness to commit perjury.

Moreover, since the modified composite sketch of the suspect was drawn almost three months after Purvis' hypnotic procedure, the modified composite sketch and any description of it were sufficiently attenuated from the hypnosis that there should be no doubt that this could and should have been admitted at the trial. *See People v. Gray,* 154 A.D.2d 478, 482 (NY 2d Dept. 1989))where a lineup identification of the defendant was held seven months after an eyewitness was hypnotized, the Court held that the testimony of the eyewitness about the lineup identification was sufficiently attenuated from the hypnosis that such testimony was properly admitted at the defendant's trial.

mislead the jury as to the appearance of the purported perpetrator he saw outside of Erie at the time of the crime so that the jury could believe that man's ethnicity matched that of Mr. Serrano. The State cannot meet its burden of establishing that this false and misleading testimony was harmless beyond a reasonable doubt. *See, e.g., Guzman*, 868 So.2d at 505.

THE FALSE TESTIMONY ABOUT THE PURPORTED PERPETRATOR'S ACTIONS

Prior to Purvis being hypnotized and prior to the trial, Purvis ***repeatedly*** and definitively told law enforcement officials during his October 11, 1999 videotaped interview that he saw the purported perpetrator standing outside Erie lighting a cigarette using a square silver "flip-top" Zippo-type lighter. (34 PCR 6261-6333) At Mr. Serrano's trial, however, the prosecutor deliberately led Purvis to give the following testimony during direct examination which directly conflicted with Mr. Purvis' pre-trial, pre-hypnosis statement:

> Q What was this person doing?
> A He was holding his hand, like this, ***like he was lighting a cigarette***.
> Q Did he have ahold [sic] of his coat at all?
> A No, sir, just like this, sort of like this.
> Q Did you ***actually see*** anything in his hands, or ***just his hands in front of his face***?
> A It ***could have*** been a lighter, sir.
> Q I understand that, ***but did you see it or just his hands***?
> A ***I didn't see it***.
> Q ***If I hold my hands like this, that's an action like I'm lighting something, but I don't have a lighter, right***?
> A ***Right***.

(T3381)(emphasis added)

During redirect examination of Mr. Purvis, the prosecutor questioned Mr. Purvis in a leading manner to again elicit from him the false testimony that he did not actually see a cigarette or lighter in the purported perpetrator's hand:

> BY MR. AGUERO:
> Q When Mr. Norgard was asking his questions you now recall, if I understand you correctly, rather than the person standing with the hands in front of their face, it is a person [sic] was standing with their coat sort of in front of their face?
> A Yes, sir, that's true.
> Q ***And, nonetheless, I want to ask you in the same fashion I did earlier on direct, and that is concerning the difference between what one might assume and what one actually sees. When you saw this person with his coat up, did you actually see a cigarette or lighter, or was the person just standing in a fashion that it is an assumption you made rather that what you saw***?
> A ***I think that would be an assumption.***
> Q ***So, when I'm standing here, that might be a logical assumption to make, even though what is in my hand is my pen***?
> A ***Correct.***

(T3403)(emphasis added)

The prosecutor was plainly motivated at the trial to elicit testimony from Purvis that he did not actually see the purported perpetrator lighting a cigarette because witnesses testified at the trial that, although Mr. Serrano smoked tobacco in pipes, he did not smoke cigarettes. (T4122, 4299-4300, 5767. This false testimony was material. Because Mr. Serrano did not smoke cigarettes, evidence that the sole eyewitness definitely saw the purported

perpetrator lighting a cigarette with a lighter that he described in detail would have been damaging to the State's case. The State cannot meet its burden of establishing that this false testimony from its sole eyewitness was harmless beyond a reasonable doubt. *Id.* The State's actions in deliberately eliciting this false testimony from the sole eyewitness plainly violated *Giglio* and deprived Mr. Serrano of the fair trial to which he was entitled.

Notably, the post-conviction court failed to rule on this claim. However, as mandated under Fla. R. Crim. Proc. 3.851(f)(5)(D), a court must set forth **detailed** finding of facts and conclusions of law with respect to **every claim presented by a defendant in postconviction**. Fla. R. Crim. Proc. 3.851(f)(5)(D). Where, as here, the court failed to comply with Fla. R. Crim. Proc. 3.851 this Court cannot undertake meaningful review of the trial court's decisions with respect to this claim and this case must be remanded to the trial court for further consideration of these matter. *See Mendoza v. State*, 964 So.2d 121, 129 (Fla. 2007).

XI. TRIAL COUNSEL WERE INEFFECTIVE IN (1)FAILING TO OBJECT TO INADMISSIBLE TESTIMONY OF PURVIS AND TO PURVIS' UNMODIFIED COMPOSITE SKETCH,(2) FAILING TO DEPOSE PURVIS OR OTHERWISE INVESTIGATE AND PREPARE FOR THE TRIAL TESTIMONY OF PURVIS, AND (3) FAILING TO CROSS-EXAMINE PURVIS ABOUT HIS MATERIAL PRE-TRIAL STATEMENTS IN VIOLATION OF MR. SERRANO'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS

Mr. Serrano's counsel were ineffective in failing to object to the admission of the previously described false testimony of Purvis that the unmodified composite sketch of the purported perpetrator

was his present recollection and to the admission of the unmodified composite sketch on the ground that, as previously explained, this testimony was false and misleading in violation of *Giglio* and its progeny. Prior to the trial, Mr. Serrano's counsel knew about 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 that sketch would have been excluded.[31] Furthermore, by failing to so object, trial counsel failed to preserve the meritorious *Giglio* issue for appellate review. 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[32].

In addition, Mr. Serrano's counsel were ineffective in failing to depose Purvis or otherwise investigate and prepare for the trial testimony of Purvis. It is undisputed that defense counsel knew that, when FDLE Agent Tommy Ray was deposed, he

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[31] 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

[32] *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)

testified that Purvis had "[d]escribed an individual that fit Nelson Serrano's description, [and] did a composite." (28 PCR 5118-5122) Despite being told by Agent Ray that Purvis' description of the purported perpetrator "fit Nelson Serrano's description," defense counsel did not interview Purvis, did not depose Purvis and did not obtain and listen to the tapes of Purvis' October 11, 1999 interview by law enforcement officials where he made material statements both *before* and during his hypnosis although counsel were aware of these tapes. (21 PCR 3890;22 PCR 4031;23 PCR 4132-33,4273-74[33]. These statements include Purvis' previously explained pre-hypnotic statements that the man he saw outside Erie was definitely lighting a cigarette and was possibly Asian. (34 PCR 6261-6333) This plainly was a deficient performance under *Strickland*. *See Rompilla*, 545 U.S. 374 (2005) ("The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.")

Mr. Serrano's counsel were also ineffective in failing to elicit the following facts from Purvis during cross-examination which Purvis recalled while hypnotized. These facts were admissible because Mr. Serrano had a constitutional right to present a complete defense:

[33] Mr. Serrano's counsel only deposed 16 of the 400 witnesses listed on the State's pretrial witness list. Approximately 70 witnesses testified at the trial. (EH465-66, 908)

The 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,

(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,[34] 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.[35]

Although this Court 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

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[34] As previously explained, Mr. Serrano was not a smoker.

[35] 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.

(1987), that States cannot have a per se rule that excludes hypnotically recalled testimony of a defendant who takes the stand. This Court 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 hypnotically refreshed statements made to experts by a defendant in preparation of a defense are admissible.

Furthermore, 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. *Chambers v. Mississippi*, 410 U.S. 284 (1973);*Davis v. Alaska*, 415 U.S. 308 (1974); *Holmes v. South Carolina*, 547 U.S. 319 (2006);*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).

Notably, the fact that Purvis recalled seeing a second man peeking out the front glass door or window of the Erie 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. And, 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.

Mr. Serrano's counsel claimed that they made a strategic decision to enhance Purvis' credibility so they did not present the above described facts at the trial. However, because counsel failed to interview Purvis, failed to depose Purvis and did not bother to listen to the tapes of Purvis' pre-hypnosis and hypnotic interview by law enforcement on October 11, 1999, counsel's claim that their omissions with respect to Purvis were the result of their "strategic decision" to enhance Purvis' credibility cannot justify these omissions. As previously explained, a reasonable strategic decision must be based on informed judgment. *See, e.g., Strickland*, 466 U.S. at 690-91 (1984); *Wiggins*, 539 U.S. at 521-22; *Sears*, 130 S.Ct. at 3265; *Shellito*, 121 So.3d at 453-56.

Furthermore, significant evidence could have been presented at the trial by Mr. Serrano's counsel that would have substantially helped Mr. Serrano's defense ***and not conflicted with his counsel's claimed strategic decision to enhance Purvis' credibility***. Indeed, if defense counsel had listened to the tapes of Purvis' October 11, 1999 interview, they would have discovered and been able to present to the jury the following ***pre-hypnosis*** statements made by Purvis that day:

First, as previously explained, during that interview prior to his hypnosis, Purvis stated that the purported perpetrator looked

like he could have been Asian.(34 PCR 6261-6333) Norgard conceded at the evidentiary hearing that, at the time of the trial, he was not aware that Purvis had informed law enforcement that the purported perpetrator he saw standing outside Erie Manufacturing was likely Asian. (21 PCR 3875) It is plainly for this reason that Norgard elicited from Purvis during cross-examination that the man he saw outside of Erie Manufacturing was Hispanic or Mediterranean of olive complexion, a fact that harmed Mr. Serrano's defense since he is Hispanic. (T3399)

Second, during that interview prior to his hypnosis, Mr. Purvis *repeatedly* told law enforcement officials that he was positive that he observed the purported perpetrator standing outside Erie lighting a cigarette using a square silver "flip-top" Zippo-type lighter. (34 PCR 6261-6333)

Third, during that interview prior to hypnosis, Purvis stated that, at the time of the crimes, when Purvis saw the purported perpetrator standing outside Erie, he did not see what the State purported to be Mr. Serrano's rental car in the parking lot of Erie Manufacturing.(34 PCR 6261-6333) Notably, Norgard conceded at the evidentiary hearing that he was unaware of this statement given by Purvis prior to his October 11, 1999 hypnosis. (22 PCR 3954-58) Norgard further conceded that the fact that the State's only eyewitness to see the purported perpetrator did not see Mr. Serrano's rental car in the Erie parking lot would have been

"significant evidence" for Mr. Serrano's defense. (22 PCR 3950,3953)

Accordingly, for all the foregoing reasons, Mr. Serrano's performance with respect to eyewitness Purvis' testimony was both deficient and prejudicial and, thus a new trial is warranted.

XII. TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO FILE A PRE-TRIAL MOTION REQUESTING STR DNA TESTING OF THE PLASTIC GLOVE PRESUMABLY LEFT BY THE PERPETRATOR OF THE CRIMES AND FOUND ON THE FLOOR UNDER DIANE PATISSO'S BODY AND A COMPARISON OF THE DNA PROFILE OBTAINED THEREFROM TO MR. SERRANO AND TO THE DNA PROFILES IN THE COMBINED DNA INDEX SYSTEM ("CODIS")IN VIOLATION OF MR. SERRANO'S SIX AND FOURTEENTH AMENDMENT RIGHTS[36]

This claim and the following three claims which are set forth in Mr. Serrano's "Third Amendment to Motion for Post-Conviction Relief" (11 PCR 2004-50) are related. Accordingly, they will all be discussed together below.

XIII. THE NEWLY DISCOVERED DNA EVIDENCE CREATES A REASONABLE DOUBT ABOUT MR. SERRANO'S GUILT. ACCORDINGLY, MR. SERRANO'S CONVICTION AND SENTENCE MUST BE VACATED IN ORDER TO PRESERVE HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW

XIV. THE NEWLY DISCOVERED DNA EVIDENCE MANDATES A NEW TRIAL BASED UPON MR. SERRANO'S ACTUAL INNOCENCE OF THE CRIMES FOR WHICH HE WAS WRONGFULLY CONVICTED AND SENTENCED TO DEATH IN ORDER TO PRESERVE HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW AND PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT

XV. TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO FILE A PRE-TRIAL MOTION REQUESTING STR DNA TESTING OF THE PLASTIC GLOVE PRESUMABLY LEFT BY THE PERPETRATOR OF THE CRIMES HEREIN AND FOUND ON THE FLOOR UNDER DIANE PATISSO'S BODY IN VIOLATION OF MR. SERRANO'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS

In support of Mr. Serrano's above stated DNA-related claims, he relies upon the arguments and authorities set forth in his Rule

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[36] Ground II, Subclaim 10

3.851 Motion at (3 PCR 391-92) and in his "Third Amendment to Motion for Post-Conviction Relief" as well as the testimony and exhibits admitted at the evidentiary hearing. As previously explained, during the course of the post-conviction proceedings in this matter, STR DNA testing was done by FDLE on the plastic glvoe and cigarette butts found at the crime scene. Subsequently, at the post-conviction hearing, the court heard testimony from DNA experts Theodore Yeshion (formerly at FDLE), Robyn Ragsdale (of FDLE) and Nancy Peterson, a forensic DNA expert called by Mr. Serrano. They testified about the STR DNA testing of the plastic disposable glove presumably left by the perpetrator of the crimes and found on the floor under Diane Patisso's body.[37]

In order to contradict the real DNA data, the State's experts attempted to opine them into insignificance. First, Yeshion testified that there was not enough DNA on the glove to render an opinion. Therefore, the evidence was inconclusive. However, Yeshion used the wrong analytic threshold. He thought 150 RFUs was the standard. Subsequently, Ragsdale testified that, for the Tampa FDLE lab, the analytical threshold was 50 RFUs. Ragsdale further testified that an expert re-analyzing another lab's findings must use their analytical thresholds. Thus, Yeshion's opinion, which

[37] Theodore Yeshion's testimony at the evidentiary hearing begins at 22 PCR 4074 and concludes at 22 PCR 4110. Dr. Ragdale's testimony at the hearing is at 20 PCR 3670-3742 and 24 PCR 4320-4632. Nancy Peterson's testimony at that hearing is at 20 PCR 3749 to 21 PCR 3833. Because of the complexity of DNA science, the full testimony of these witnesses is necessary to clearly understand Mr. Serrano's DNA arguments.

disclaimed and ignored any alleles between 50 and 150 RFUs was rendered inaccurate and irrelevant.

Ragsdale claimed that she could not exclude Mr. Serrano despite the lack of his DNA on the exhibit 171A fingers of the glove. However, this claim fails because it was based upon mere supposition. Ragsdale testified that there could have been many more people contributing to the DNA and claimed other possibilities to try to explain away the data. However, the only part that counts, the only part that is real and scientific, is the actual data described in the findings and on the charts. Everything else is just supposition and wishful thinking by the State to argue away the actual data. This Court should rely upon the data rather than on supposition.

Furthermore, even if this Court accepts that the state's expert could say that the data is inconclusive, this does not undercut the defense which had an expert – Nancy Peterson – who opined that Mr. Serrano is excluded. In addition, this opinion that Mr. Serrano is excluded is based upon the actual real data. Data that was found by the FDLE lab. Data that is accurate and incontrovertible. Data unveiled by the scientific process.

This is newly discovered evidence that, in this circumstantial case, "weakens the case against [Mr. Serrano] so as to give rise to a reasonable doubt as to his culpability," especially when combined with the other claims. *See Swafford v. State,* 125 So.3d 760, 767

(Fla. 2013) (citations omitted)[38] This Court has stated that "the probative power of DNA typing can be so great that it can outweigh all other evidence in a trial." *Hayes v. State,* 660 So.2d 257, 262 (Fla. 1995)

In addition, Mr. Serrano's counsel were ineffective in failing to request STR DNA testing of the disposable plastic glove prior to the trial when Mr. Serrano made an express and timely plea to counsel for such testing. At the evidentiary hearing, both Norgard and Mason testified that Mr. Serrano always maintained his innocence. (23 PCR 4154-55,4250) Mason even testified that he (Mason) did not doubt Mr. Serrano's innocence. (23 PCR 4261-62)

At the evidentiary hearing, Mr. Serrano proved that he asked his attorneys in a written letter to have DNA testing performed on the plastic glove found at the crime scene. (29 PCR 5235-37) Due to the circumstances surrounding the crime scene, the plastic glove almost certainly was worn by the murderer.[39] Yet, despite Mr. Serrano's written plea clearly instructing his attorneys to have DNA testing performed on the plastic glove, his attorneys ignored his wishes. Thus, the instant case is one where a defendant told

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[38] It also demonstrates Mr. Serrano's actual innocence.

[39] As clearly shown in the photographs of Diane Patisso and attested to by the crime scene officers, the glove was found ***underneath*** her and was not even visible until her body was removed. There is no other explanation for how the glove got there except that it was worn by the perpetrator. And, the presence of a major DNA profile from George Patisso on the glove logically leads to the conclusion that the perpetrator touched him. Notably, the State considered the glove to be highly probative evidence or it would not have subjected it to DNA testing prior to the trial.

his attorneys that he was innocent of capital murder charges, that he knew he was not wearing a plastic glove that was almost certainly worn by the murderer and that he could prove it if his attorneys would follow his instructions and have DNA testing performed on that glove. However, the attorneys simply ignored their client's wishes.

Under these circumstances, the attorney's conduct cannot be deemed reasonable under prevailing professional norms. This is not a matter of trial tactics where the lawyer is more skilled. There is no great expertise in deciding whether to do DNA testing when the client knows he never touched the object to be tested. The consequences are obvious. Accordingly, the client should make this decision.

"General agreement exists that the decisions as to guilty plea, jury trial, appeal, defendant's presence at trial and the defendant testifying are for the defendant." 3 Crim. Proc. § 11.6(a) (3d ed). A decision as to DNA testing is tantamount to a decision as to whether to plead guilty or go to trial. Both decisions are personal decisions that must be made by the client because they are both based on the client's self-knowledge of his guilt or innocence.

Furthermore, when counsel and a fully informed criminal defendant reach an absolute impasse as to ...tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." *State*

v. Ali, 407 S.E.2d 183, 189 (N.C. 1991) This rule of law stems from the fact that "[t]he attorney-client relationship rests on principles of agency, and not guardian and ward." *Id* at 189 (citations omitted) And, this rule of law plainly applies even more so to a client such as Mr. Serrano who maintains his innocence and makes a decision to have forensic testing that has the ability to prove it.

CONCLUSION

Each allegation of error provided sufficient grounds for reversal of Mr. Serrano's convictions. When viewed cumulatively, the errors deprived him of the ability to receive a fair trial.

For all of the foregoing reasons, this Court should reverse the post-conviction court and grant Mr. Serrano a new trial and a new penalty phase 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 29th day of July 2015 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, ESQ.