No._____

IN THE SUPREME COURT OF THE UNITED STATES

Nelson Ivan Serrano,
Petitioner

vs.

The State of Florida,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Index to Appendix

Supreme Court of Florida

No. SC15-258

NELSON SERRANO,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC15-2005

NELSON SERRANO,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[May 11, 2017]

PER CURIAM.

Nelson Serrano appeals the denial of his postconviction motion filed under Florida Rule of Criminal Procedure 3.851 and petitions this Court for a writ of

habeas corpus.[1] For the following reasons, we affirm the denial of his guilt phase postconviction claims, deny his habeas petition, but vacate his sentences, and remand for a new penalty phase.

I. BACKGROUND

In 2011, this Court affirmed Serrano's four convictions for first-degree murder and his four death sentences. Serrano v. State, 64 So. 3d 93 (Fla. 2011). This Court explained the background of the case and murders as follows:

> On May 17, 2001, Nelson Serrano was indicted under seal on four counts of first-degree murder for the deaths of George Gonsalves, Frank Dosso, Diane Patisso, and George Patisso. The murders occurred on December 3, 1997, at Erie Manufacturing and Garment Conveyor Systems in Bartow. George Gonsalves was one of Serrano's business partners. And Frank Dosso, Diane Patisso, and George Patisso were respectively the son, daughter, and son-in-law of Serrano's other business partner, Felice (Phil) Dosso. Serrano, a dual citizen of the United States and Ecuador, was arrested in Ecuador on August 31, 2002, and brought to the United States.
>
> At the guilt phase, which occurred in 2006, the State presented the following evidence. In the 1960s, Phil Dosso and George Gonsalves started a tool and die business, Erie Manufacturing Cooperative, in New York. Their business provided parts to support the garment industry. In the 1980s, Phil Dosso and George Gonsalves met Nelson Serrano, who was working for a New Jersey company selling slick rail systems for the garment industry. In the middle of the 1980s, the three men created a separate company, Garment Conveyor Systems. Serrano was responsible for designing, selling, and installing slick rail systems, while Dosso and Gonsalves built the parts.

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1. We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const. Because we are remanding for a new penalty phase, we do not address Serrano's penalty phase claims.

In the late 1980s, the partners moved the business to Bartow, Florida. At that time, they closed Erie Manufacturing Cooperative and transferred all the assets to Erie Manufacturing, Inc. As part of their oral agreement, Serrano bought into the Erie partnership and agreed to pay Phil Dosso and George Gonsalves $75,000 each. Therefore, all three men were equal partners in both Garment Conveyor Systems and Erie Manufacturing. Garment moved to Bartow as well. Serrano's son, Francisco Serrano, began working at the business soon after they relocated to Bartow, and Phil Dosso's son, Frank Dosso, began working there at a later date. Phil Dosso's son-in-law, George Patisso, was also an employee of the business.

By the early 1990s, the business was doing well. However, friction between the three partners had developed. Nelson Serrano had failed to pay the $75,000 to each of his partners. Further, there were disagreements about the distribution of assets and accusations that there were two sets of books. Then, in the summer of 1997, Phil Dosso and George Gonsalves fired Francisco Serrano. Also in the summer of 1997, Nelson Serrano opened a separate business checking account with a different bank and deposited two Erie checks totaling over $200,000. And Serrano instituted a civil suit against his partners. Ultimately, Serrano was removed as president by a vote of the other two partners, and the locks were changed on the building.

Numerous Erie employees testified to the strained relations between Serrano and the other two partners, particularly Serrano's dislike of Gonsalves. Serrano made statements indicating that he wished Gonsalves were deceased. Additionally, Phil Dosso testified to hearing Serrano state that he felt like killing Gonsalves.

On the evening of the murders, 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. George Gonsalves' car was the only car in the parking lot. Although George Patisso and Frank Dosso remained at Erie with Gonsalves, they did not have a car parked in front because George Patisso's wife, Diane Patisso, had plans to pick them up and take them to Frank Dosso's home for a family birthday party.

When family members began calling Frank Dosso and could not get an answer, Phil Dosso and his wife decided to drive to Erie. As Phil and Nicoletta Dosso 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, where he discovered the bodies of George Gonsalves, George Patisso, and Frank Dosso.

When the first law enforcement officers arrived at the scene at 7:36 p.m., there were only three cars parked in front of the entrance: Phil Dosso's car, Diane Patisso's car, and George Gonsalves' car. Inside Erie, law enforcement discovered twelve shell casings, eleven from a .22 and one from a .32. All of the victims had been shot in the head with .22 bullets, and Diane Patisso was also shot once with a .32 bullet. The three men were shot execution-style. While neither murder weapon was ever located, the State introduced evidence that Serrano possessed and owned multiple .22 and .32 caliber firearms.

In the office containing the three male victims, officers discovered a blue vinyl chair with shoe impressions on the seat. Directly above the chair, a ceiling tile had been dislodged. Although this office was Frank Dosso's office at the time of the murders, it had been Nelson Serrano's office when he worked at Erie. David Catalan testified that on one occasion, he saw Serrano in his office with a gun. Serrano was standing on a chair, moving a ceiling tile, and taking papers out of the ceiling. Further, Erie employee Velma Ellis testified that the blue chair in Frank Dosso's office was never used and always remained under a desk in the office and that there were papers and a box piled on top of the chair's seat. Ellis testified that the chair was in its usual position under the desk when she left work on December 3, 1997, at 5 p.m. Crime analysts tested the shoe impressions on the dusty seat of the blue vinyl chair and found that the class characteristics and wear pattern were consistent with a pair of shoes Serrano owned and later loaned to a nephew.

The State's theory at trial was that Serrano kept a .32 caliber firearm hidden in the ceiling of his office. Once he was ousted from the company and the locks were changed he was unable to retrieve the gun until the night of the murders. After Serrano had shot the three male victims in his former office and was leaving the scene, Diane Patisso entered the building and was shot with both a .22 and the retrieved .32. An FDLE agent testified that Serrano told the agent that he would hide a gun in the ceiling of his office when he was out of town on business. However, Serrano's fingerprints and DNA were not discovered at the crime scene.

When officers first discovered the four victims at Erie, their investigation immediately focused on Serrano. As soon as Serrano

returned to his home from a business trip to Atlanta on December 4, 1997, detectives requested that he come to the police station for an interview. At the police station, Serrano told law enforcement about his problems with his partners and explained to the detective that he had learned of the murders the previous evening when he had called his wife from his Atlanta hotel.

During his interview with law enforcement, Serrano detailed his business trip itinerary, which included leaving Lakeland early on the morning of December 2, flying from Orlando to Washington, D.C., and, on the evening of December 2, flying from Washington to Atlanta. Serrano indicated that he remained in Atlanta until December 4, 1997. When asked by the detective what he thought may have happened at Erie, Serrano replied that "somebody is getting even; somebody they cheated, and George is capable of that." Thereafter, the detective took Serrano's taped statement, which was played for the jury. During his taped statement, Serrano stated that maybe Diane Patisso "walked in the middle of something."

Officers traveled to Atlanta to investigate Serrano's alibi and met with Larry Heflin of Astechnologies regarding his business meeting with Serrano. Heflin testified that he met Serrano in Atlanta on December 3 at about 9:45 a.m., and the meeting lasted approximately one hour. Investigators also obtained the La Quinta Inn airport hotel's surveillance videotapes. The video showed Serrano in the Atlanta hotel lobby at 12:19 p.m. on December 3. Ten hours later, at 10:17 p.m., Serrano was again seen on the video, entering the hotel lobby from the outside, wearing the same sweater and jacket as earlier in the afternoon.

Alvaro Penaherrera, Serrano's nephew, testified that on two separate occasions Serrano asked Penaherrera to rent a car for him so that Serrano's wife would not find out about the rentals. On October 29, 1997, Serrano drove Penaherrera to the Orlando airport, where Penaherrera picked up a rental car. Penaherrera then drove the car and left it at a nearby valet lot. Thereafter, Serrano drove Penaherrera back to his apartment. Penaherrera had no further contact with the rental car and did not know who returned it on October 31, 1997, at 7:30 p.m.

Around Thanksgiving 1997, Serrano again asked Penaherrera to rent a car for him under Penaherrera's name because Serrano had a girlfriend from Brazil coming into town. On November 23, 1997, Penaherrera made a telephone reservation for a rental car for

December 3, 1997. On December 3, 1997, at 7:53 a.m., Serrano called Penaherrera from Atlanta and asked him to call to confirm the rental car reservation. Serrano called Penaherrera back at 8:06 a.m. to verify that the rental car would be ready. Penaherrera then drove to Orlando's airport and parked his car in the parking garage, rented the car from the terminal dealership, and drove the rental car back to the Orlando airport parking garage, where he left it as his uncle requested. Later that day, Serrano called Penaherrera, and Penaherrera told Serrano where the car was located and where the keys were hidden.

As on the previous occasion in October, Penaherrera did not expect to have any further involvement with the rental car after he left it at the Orlando airport parking garage on December 3. However, Serrano called Penaherrera the next day, December 4, to tell Penaherrera that the rental car was in Tampa, not Orlando, and that Penaherrera needed to drive to Tampa and return the car there. Serrano told Penaherrera if he went to Tampa and returned the car, Serrano would pay off Penaherrera's credit card bill and Penaherrera could pay him back without interest. Penaherrera agreed to this arrangement and returned the rental car in Tampa at 2:10 p.m. on December 4, 1997. Gustavo Concha, Serrano's friend and Penaherrera's godfather, subsequently paid Penaherrera's Visa bill.

Penaherrera next saw Serrano when he was visiting relatives in Ecuador for Christmas of 1997. Serrano informed Penaherrera of the murders at Erie and told Penaherrera that he could not say anything about the rental cars because it would jeopardize his marriage and the police would frame him for the murders.

In June 2000, Penaherrera, his girlfriend, and his brother were subpoenaed to testify before the grand jury. The three spent the night at Serrano's house the night before their testimony. That night Serrano asked Penaherrera to tell the grand jury that he had rented the car for a friend with whom he had subsequently lost contact. Serrano also gave Penaherrera and his brother suits and dress shoes to wear to court. The pair of shoes that Serrano gave Penaherrera were seized by law enforcement, and subsequent testing indicated that the right shoe was consistent with the impression on the seat of the blue chair at the murder scene.

Also in June 2000, Penaherrera spoke for the first time with law enforcement regarding the December 1997 rental car transaction. And after his testimony and discussions with law enforcement, Penaherrera returned home to Orlando, where Serrano contacted him to find out

what information he had given to the grand jury and law enforcement. After Penaherrera testified before the grand jury, Serrano sold his home, car, and other assets and moved to Ecuador.

The State introduced evidence regarding Serrano's air travel for his December 1997 business trip. As explained previously, Serrano flew from Orlando to Washington, D.C., and then to Atlanta, on December 2, 1997. However, contrary to his statements to law enforcement, the State also introduced evidence that Serrano traveled back to Florida on the day of the murders using two aliases. The State theorized that on the day of the murders Serrano flew from Atlanta to Orlando under the name Juan Agacio. Serrano then drove the car rented by Penaherrera on December 3 from the Orlando airport to Bartow, where he killed the four victims. Thereafter, he immediately drove the rental car to the Tampa airport, where he departed on a flight back to Atlanta using the alias John White.

To support its theory and timeline of Serrano's activities on the day of the murders, the State introduced the videotape evidence demonstrating that Serrano was in the La Quinta Inn's lobby in Atlanta shortly after noon on December 3, 1997. According to Serrano, he returned to his hotel room for the next ten hours because he was suffering from a migraine headache. However, the State introduced evidence that at 1:36 p.m. on December 3 a passenger calling himself Juan Agacio boarded Delta flight 1807 in Atlanta, scheduled to depart at 1:41 p.m. for Orlando. At 3:05 p.m., the passenger purporting to be Juan Agacio arrived in Orlando on flight 1807, and at 3:49 p.m., the rental car that Penaherrera had rented exited the Orlando parking garage.

Serrano's fingerprint was located on the parking garage ticket, indicating that Serrano departed from the Orlando airport garage at 3:49 p.m. on December 3, 1997. And Serrano has a son, who was named Juan Carlos Serrano at birth and whose mother's maiden name is Gladys Agacio. Additionally, the round-trip ticket for the Atlanta–to–Orlando flight of the passenger flying under the name Juan Agacio was purchased with cash at the Orlando airport on November 23, 1997, which is the same date that Penaherrera reserved the rental car for December 3, 1997. The State also introduced evidence that Serrano's vehicle left the Orlando airport's parking garage about twenty minutes after the passenger traveling under the name Juan Agacio purchased his ticket. The return portion of the flight was never used.

At approximately 5:30 p.m. on December 3, 1997, a person was seen standing off the side of the road near Erie's building. When John Purvis left work on December 3, 1997, he noticed the man wearing a suit standing in the grassy area with no car in the vicinity. The man was holding his coat and hands in front of his face as if he were lighting a cigarette. Both Alvaro Penaherrera and Maureen Serrano testified that Serrano smoked, but they did not testify that he specifically smoked cigarettes. Purvis described the man, and law enforcement made a composite sketch that was shown to the jury.

Approximately two hours after the murders, at 7:28 p.m., the passenger flying under the name John White arrived at Tampa International Airport and checked into Delta Airlines for flight 1272 to Atlanta. Similar to the purchasing process for the ticket in the name of Juan Agacio, the purchaser paid for a round-trip ticket at Tampa International Airport on November 23, 1997, and never used the return portion of the ticket. Flight 1272 was scheduled to arrive in Atlanta at 9:41 p.m.

At 10:17 p.m., Serrano was observed in Atlanta on videotape walking into the La Quinta Inn airport hotel lobby from the outside, wearing the same clothes he had been wearing ten hours earlier. After being observed in the hotel lobby, Serrano used his cell phone to call various individuals, including his wife. The next morning he made multiple calls to Alvaro Penaherrera telling him he had to return the rental car that was now located at Tampa airport.

Furthermore, the State presented evidence that the car rented by Penaherrera on December 3 had been driven 139 miles. The distance from the Orlando airport to Erie is eighty miles, and the distance from Erie to the Tampa airport is fifty miles, totaling 130 miles.

While incarcerated awaiting trial, Serrano spoke to fellow inmate and "jailhouse lawyer," Leslie Todd Jones, about his case. Serrano denied any involvement in the murders, telling Jones that he believed a mafia hitman may have committed the murders, or alternatively, that Frank Dosso wanted to take over the business from George Gonsalves. The main theory Serrano described involved a hitman Serrano knew only as John, who was owed a substantial amount of money by the Dosso and Gonsalves families. Serrano explained to Jones that he and the hitman drove to the airports in Tampa and Orlando and that John purchased tickets under the names of Todd White and Juan Agacio. Serrano told Jones that the hitman had planned to approach the business partners on Halloween night,

but it was raining and the business was closed. Serrano also told Jones about his fingerprint being found on a parking ticket in Orlando, but Serrano claimed that an FDLE agent had planted his fingerprint.

After law enforcement learned about the Halloween incident from inmate Jones, they began investigating and discovered almost an identical pattern of travel as the travel surrounding the December 3, 1997, murders. Serrano once again was traveling on a business trip from Orlando to Charlotte from October 30 to November 2, 1997. And as previously discussed, on October 29, Serrano took Alvaro Penaherrera to the Orlando airport, where Penaherrera rented a car for Serrano and left it at a nearby valet lot. The next morning, October 30, 1997, Serrano flew from Orlando to Charlotte with his flight arriving in Charlotte at 8:34 a.m. The following day, Halloween, someone traveling under the name Juan Agacio took a flight departing from Charlotte at 1:40 p.m. and arriving in Orlando at 3:07 p.m. At 7:30 p.m., a passenger identified as John White was scheduled to depart on a flight from Tampa to Charlotte.

During the guilt phase, the defense maintained that Serrano had been in an Atlanta hotel room with a migraine at the time of the murders. The defense emphasized that no forensic evidence linked Serrano to the scene of the crimes. The defense also pointed out that there was evidence of robbery at the scene as several offices were in disarray, Frank Dosso's Rolex watch was missing, and George Patisso's gold chain was missing. However, the jury returned a verdict finding Serrano guilty on four counts of first-degree murder.

At the penalty phase, the State presented victim impact statements, and the parties stipulated that Serrano was fifty-nine years of age at the time of the murders and that Serrano had no prior criminal history. The defense presented evidence that Serrano never received any disciplinary reports while incarcerated awaiting trial. The jury recommended a sentence of death by a vote of nine to three for each of the four murder counts.

At the Spencer hearing, Serrano presented numerous witnesses, some of whom testified by videotape from Ecuador. Then, on June 26, 2007, the trial court sentenced Serrano to death for each of the four murders.

Id. at 98-103 (footnote omitted).[2]

On direct appeal, this Court affirmed Serrano's convictions and sentences, rejecting the nine issues raised by Serrano and finding the death sentences proportionate.[3]

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2. "The trial court found the following aggravators in regards to all four murders: (1) the murders were committed in a cold, calculated, and premeditated manner (great weight); and (2) Serrano was convicted of other capital felonies (the contemporaneous murders) (great weight). The trial court also found that the murder of Diane Patisso was committed for the purpose of avoiding arrest (great weight). Additionally, the trial court found the following mitigators: (1) Serrano had no significant history of prior criminal activity (great weight); (2) Serrano was in his late fifties at the time of the crimes (some moderate weight); (3) Serrano performed well in school (moderate weight); (4) Serrano has a good social history (moderate weight); (5) Serrano had no history of drug or alcohol abuse (some weight); (6) Serrano was a successful Hispanic immigrant (moderate weight); (7) Serrano displayed positive behavior during his pretrial incarceration (some weight); (8) Serrano displayed positive behavior during his court appearances (some weight); (9) Serrano expressed remorse regarding the death of Diane Patisso (slight weight); (10) Serrano had a good employment history (some weight); (11) Serrano was a good husband (some weight); (12) he was a good father (some weight); (13) Serrano was positively involved in his religion (some weight); and (14) he had a significant history of good works (moderate weight)." Serrano, 64 So. 3d at 103.

3. Serrano raised the following on direct appeal: "(1) whether the circumstantial evidence is sufficient to support his convictions; (2) whether Serrano's statements to FDLE Agent Tommy Ray were admissible; (3) whether the trial court properly denied Serrano's motions to dismiss the indictment and divest itself of jurisdiction; (4) whether the prosecutor engaged in misconduct that entitles Serrano to relief; (5) whether the trial court properly denied Serrano's motion for a change of venue; (6) whether the testimony of the State's bloodstain pattern expert was admissible; (7) whether the State improperly cross-examined Serrano's character witnesses about collateral crimes at the Spencer hearing; (8) whether the

Thereafter, Serrano filed a motion for postconviction relief and several amendments. During postconviction proceedings, Serrano obtained STR DNA testing of a plastic glove discovered at the crime scene under Diane Patisso's body as well as STR DNA testing of two cigarette butts located in Erie's parking lot. Serrano also obtained a postconviction order requiring fingerprint comparisons of several unknown fingerprints discovered at the crime scene, but the postconviction claim relating to the fingerprints was withdrawn after Serrano's fingerprint was subsequently identified on a piece of paper that had been discovered near one of the victim's body.

After holding an evidentiary hearing in May 2014, the trial court denied Serrano's motion for postconviction relief. This appeal and habeas petition followed.

I. ANALYSIS

A. Letters

Serrano alleges that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose a cover letter accompanying the United States' extradition request, which indicated that the death penalty would not be sought if Serrano were extradited from Ecuador, and by failing to disclose a letter received

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avoid arrest aggravator was properly submitted to the jury and found by the trial court; and (9) whether Serrano's death sentence is constitutional." Id. at 104.

by the state attorney from the Ecuadorian Consul, which expressed Ecuador's displeasure with the potential imposition of the death penalty. However, we affirm the denial of this claim.

"Under Brady, the State must disclose to the defense knowledge of material exculpatory or impeachment evidence." Jones v. State, 998 So. 2d 573, 579 (Fla. 2008). As this Court has explained,

> [t]o demonstrate a Brady violation the defendant must prove that (1) the evidence is favorable to him, either because it is exculpatory or because it is impeaching; (2) the State willfully or inadvertently suppressed it; and (3) that the suppression resulted in prejudice. Evidence is prejudicial or material under Brady if there is a reasonable probability that had the evidence been disclosed, the result of the trial would have been different. United States v. Bagley, 473 U.S. 667, 678 (1985). Thus, the critical question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Strickler v. Greene, 527 U.S. 263, 290 (1999) (quoting Kyles[v. Whitley, 514 U.S. 419, 435 (1995)]).

Id. at 579-80. "Questions of whether evidence is exculpatory or impeaching and whether the State suppressed evidence are questions of fact, and the trial court's determinations of such questions will not be disturbed if they are supported by competent, substantial evidence." Taylor v. State, 62 So. 3d 1101, 1114 (Fla. 2011). For Brady claims, "the defendant ultimately carries the burden of establishing a prima facie case based upon a legally valid claim." Id. at 1115.

Here, Serrano failed to demonstrate that the extradition packet cover letter and the Ecuadorian Consul's letter constitute Brady material. The promise that the

death penalty would not be sought if Ecuador extradited Serrano, which Ecuador did not do, is not favorable to Serrano as exculpatory or impeachment evidence. The Ecuadorian Consul's letter expressing Ecuador's opposition to the death penalty also does not constitute exculpatory or impeachment evidence. As such, Serrano's Brady claim is without merit. See Hurst v. State, 18 So. 3d 975, 1003 (Fla. 2009) ("The State's failure to disclose the notes regarding Hess is not a Brady violation because the notes are not exculpatory or impeaching and do not provide any basis to undermine our confidence in the verdict.").

B. Closing Argument

Next, Serrano claims that trial counsel was ineffective for failing to object to portions of the State's closing argument in the guilt phase, namely the State's description of Serrano as diabolical and a liar, the State's comments that allegedly shifted the burden of proof, and the State's discussion of the presumption of innocence. However, because Serrano failed to establish prejudice, this Court affirms the denial of relief.

Following the United State Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), this Court has explained that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be

> demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Bolin v. State, 41 So. 3d 151, 155 (Fla. 2010) (quoting Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986)).

Regarding the deficiency prong of Strickland, there is a strong presumption that trial counsel's performance was not ineffective. Strickland, 466 U.S. at 690. Moreover, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. Further, the defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). And counsel cannot be deemed ineffective for failing to make a meritless argument. Melendez v. State, 612 So. 2d 1366, 1369 (Fla. 1992), abrogated on other grounds by Deren v. State, 985 So. 2d 1087 (Fla. 2008).

"Regarding the prejudice prong of Strickland, the defendant must show that there is a reasonable probability that, 'absent the [deficient performance], the factfinder would have [had] a reasonable doubt respecting guilt.' " Dennis v. State, 109 So. 3d 680, 690 (Fla. 2012) (quoting Strickland, 466 U.S. at 695). "A

reasonable probability is a 'probability sufficient to undermine confidence in the outcome.' " Id. (quoting Strickland, 466 U.S. at 694).

"Because both prongs of Strickland present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the trial court's factual findings that are supported by competent, substantial evidence, but reviewing the trial court's legal conclusions de novo." Dennis, 109 So. 3d at 690.

On direct appeal, "Serrano allege[d] that the State improperly called Serrano diabolical and a liar during closing arguments." Serrano, 64 So. 3d at 111. Serrano also alleged on direct appeal "that the State improperly shifted the burden of proof by stating the following during closing arguments: (1) 'You can't come up with any other theory that fits that anybody else would have done it;' (2) 'He talks about this being a professional hit. There is no evidence. There is no evidence that these crimes are any kind of professional hit.' " Id. This Court rejected both claims, explaining that they were not preserved for appellate review by contemporaneous objections. Id. Additionally, with both claims, this Court concluded that, if there was error, the error did not constitute fundamental error. Id. Therefore, "[b]ecause [Serrano] could not show the comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the Strickland test." Chandler v.

State, 848 So. 2d 1031, 1046 (Fla. 2003); see also Thompson v. State, 759 So. 2d 650, 664 (Fla. 2000) ("Because none of these prosecutorial comments would have constituted reversible error had they been objected to at trial, we affirm the trial court ruling summarily denying this claim.").

Regarding the State's discussion of the presumption of innocence during closing argument, Serrano also cannot demonstrate prejudice. Even if the State's brief discussion was erroneous, the jury was properly instructed about the presumption of innocence by the trial judge. And the trial judge instructed the jury that it must follow the law as set out in the jury instructions. Moreover, as the postconviction court explained in its order denying relief, the State's comments when read in their entirety appear to be an attempt to argue that the State had met its burden of proof in the case through the presentation of evidence. Cf. Taylor v. State, 62 So. 3d at 1113 (concluding that comments "the presumption of innocence does not leave the defendant until evidence has been presented that wipes away that presumption" and that "[t]here is no longer a presumption of innocence as evidence has been presented" were not improper but were an attempt to state the belief that the State satisfied the burden of proof). As a result, there is not a reasonable probability of a different result. In other words, our confidence in the outcome is not undermined.

Accordingly, we affirm the denial of this claim.

C. Travel Timeline

Serrano also asserts that trial counsel was ineffective in failing to investigate and present evidence calling into question the State's timeline for Serrano's travel between Atlanta, Orlando, Bartow, Tampa, and back to Atlanta on the day of the murders. However, we affirm the postconviction court's denial of this claim.

First, Serrano has failed to demonstrate deficiency. Trial counsel Norgard testified at the postconviction evidentiary hearing that he closely reviewed the alleged travel timeline and that, after considering his personal experiences traveling in these locations as well as comparing the timeline with others' personal experiences, he believed the timeline was tight, but "doable." And trial counsel strenuously argued to the jury at trial that the State's timeline was very improbable, if not impossible. Serrano has not demonstrated that this investigation and strategy regarding the travel timeline was unreasonable. See generally Atkins v. Dugger, 541 So. 2d 1165, 1166 (Fla. 1989) ("One tactic available to counsel is to present expert testimony. However, it is by no means the only tactic, nor is it required.").

Second, Serrano has failed to demonstrate prejudice. During the postconviction proceedings, Serrano never introduced any evidence indicating that a more complete investigation into the timeline or hiring an individual to reenact the timeline would have changed Serrano's defense at trial or would have further called the State's timeline into question. Cf. Conahan v. State, 118 So. 3d 718,

727-28 (Fla. 2013) (holding that the defendant could not establish prejudice for trial counsel's failure to hire an expert when the expert's testimony would not have changed the nature of the State's evidence). Thus, Serrano has failed to establish a reasonable probability of a different result. In other words, our confidence in the outcome is not undermined.

Accordingly, this Court affirms the denial of this claim.

D. Law Enforcement Testimony

Serrano next claims that trial counsel was ineffective for failing to object to law enforcement's testimony during the guilt phase and the prosecutor's comment during opening statement that the police did not believe the crime was motivated by robbery. However, this Court affirms the denial of relief.

First, the admission of this testimony and the prosecutor's comment about the testimony were not improper. Evidence of a defendant's motive and testimony about the course of law enforcement's investigation are admissible. See generally Craig v. State, 510 So. 2d 857, 863 (Fla. 1987) ("While evidence of motive is not necessary to a conviction, when it is available and would help the jury to understand the other evidence presented, it should not be kept from them merely because it reveals the commission of crimes not charged."); Kearse v. State, 662 So. 2d 677, 684 (Fla. 1995) ("We find no error in the admission of Tedder's testimony regarding the transmissions to dispatch or the tape of those

transmissions. The State did not offer this evidence to prove the truth of the matter asserted, but rather to establish the sequence of events and to explain why the police investigation focused on Kearse as the perpetrator."). And trial counsel cannot be deemed deficient for failing to make a meritless objection.

Moreover, even if there was any error, Serrano could not demonstrate prejudice. The jury heard evidence that Serrano himself told law enforcement that he did not believe the murders were motivated by robbery. Further, trial counsel was not prevented from arguing that robbery might have been the motive based upon the evidence presented by the State that two victims were missing a watch and necklace respectively and that the crime scene was discovered in disarray. Thus, there is no reasonable probability of a different result had trial counsel objected. In other words, our confidence in the outcome is not undermined.

Accordingly, we affirm the denial of this claim.

E. Shoe Size

Additionally, Serrano argues that trial counsel was ineffective for failing to present evidence of Serrano's shoe size. However, we affirm the denial of relief.

Serrano has failed to demonstrate deficiency. At the evidentiary hearing, trial counsel testified that he decided to not present evidence of Serrano's shoe size in order for the defense to retain first and last closing argument. Trial counsel stated that he believed the State's presentation of the size 8½ shoes obtained from

Serrano would suffice. Trial counsel's decision was not "outside the broad range of reasonably competent performance under prevailing professional standards." Bolin, 41 So. 3d at 155 (quoting Maxwell, 490 So. 2d at 932).

Furthermore, Serrano has failed to demonstrate prejudice. The investigator hired by postconviction counsel to measure Serrano's feet determined that Serrano wore a size 9 shoe in October 2013. And, while evidence was presented at trial that the shoe Serrano loaned his nephew Alvaro Penaherrera, which was consistent with the shoeprint discovered at the crime scene, is a size 7, evidence was also presented at trial that Serrano loaned his other nephew size 8½ shoes in a different style. See Serrano, 64 So. 3d at 101. Moreover, the State's podiatrist testified at the evidentiary hearing that an individual's shoe size often increases as an individual ages, and the murders in this case took place nearly 16 years before Serrano's feet were sized during postconviction proceedings. Also, the State presented evidence at the evidentiary hearing that the size 7 DeRizzo shoes loaned to Penaherrera that matched the print at the crime scene were almost the exact same size as the size 8½ Bostonian Florentine shoes that Serrano loaned to his other nephew. In fact, the size 7 shoes were only .1 centimeters shorter than the 8½ shoes. Thus, there is no reasonable probability of a different result had trial counsel introduced evidence of Serrano's shoe size. In other words, our confidence in the outcome is not undermined.

Accordingly, we affirm the denial of this claim.

F. Giglio Claim Regarding John Purvis

Serrano claims that the State, in violation of Giglio v. United States, 405 U.S. 150 (1972), presented false testimony from John Purvis regarding the individual Purvis witnessed standing outside Erie near the time of the murders. However, we affirm the denial of this claim.

"To 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." Guzman v. State, 868 So. 2d 498, 505 (Fla. 2003). "Under Giglio, once a defendant has established that the prosecutor knowingly presented false testimony at trial, the State bears the burden to show that the false evidence was not material." Id. at 507.

Here, there is competent, substantial evidence to support the postconviction court's factual finding that John Purvis' testimony was not false. See Davis v. State, 136 So. 3d 1169, 1186-87 (Fla. 2014) ("[T]he postconviction court concluded that Williams' deposition testimony was ambiguous and thus did not demonstrate that her trial testimony was false. The postconviction court did not err in denying relief. The postconviction court's factual conclusion that Williams' testimony was not false is supported by competent, substantial evidence."). John Purvis' testimony at trial in 2006 was relatively consistent with his pre-hypnosis

statements to law enforcement in 1999.[4] He testified at trial that the man he saw outside Erie was holding his hands "like he was lighting a cigarette." And, in 1999, Purvis stated that the individual "had pulled his coat up like this and was lighting a cigarette in the wind." Further, both at trial and in his statement to law enforcement in 1999, Purvis described the individual as non-Caucasian and possibly Hispanic with black hair even though Purvis also included the possibility in his statement in 1999 that the non-Caucasian individual might be Hispanic or Asian. However, the slight differences and ambiguities in Purvis' descriptions appear to be the result of the same witness giving multiple statements describing the same thing over time. Serrano has failed to demonstrate that the State presented false testimony.

Additionally, Serrano failed to present any testimony during postconviction proceedings to show the falsity of Purvis' testimony at trial that the pre-hypnosis composite sketch introduced at trial "resemble[d] the person best you could describe it for this artist that you saw outside Erie Manufacturing that day."

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4. Testimony regarding post-hypnosis statements is inadmissible. See Stokes v. State, 548 So. 2d 188, 196 (Fla. 1989) ("[T]estimony of a witness who has undergone hypnosis for the purpose of refreshing his or her memory of the events at issue is inadmissible as to all additional facts relating to those events from the time of the hypnotic session forward. A witness who has been hypnotized may testify to statements made before the hypnotic session, if they are properly recorded.").

Serrano's argument is based on the assumption that Purvis' second, post-hypnotic composite sketch must be a more reliable reflection of his recollection at trial than the pre-hypnotic composite sketch, but that assumption is not necessarily true. As this Court has explained, "although some experts profess the belief that hypnotically refreshed testimony is reliable, many more experts have arrived at the opposite conclusion." Stokes v. State, 548 So. 2d 188, 194 (Fla. 1989) (footnote omitted) (ruling that additional hypnotically refreshed testimony is inadmissible).

Accordingly, this Court affirms the denial of this Giglio claim.

G. Ineffective Assistance of Counsel Claim Regarding John Purvis

Next, Serrano alleges that trial counsel was ineffective for failing to object to John Purvis' allegedly false testimony that was presented in violation of Giglio. Serrano also claims that trial counsel was ineffective for failing to depose Purvis, for failing to cross-examine him regarding his pre-hypnosis description of the man he saw outside as being non-Caucasian and possibly Asian or Hispanic and lighting a cigarette, and for failing to seek the admission of Purvis' post-hypnotic statements and composite sketch. However, because Serrano failed to demonstrate deficiency, we affirm the postconviction court's denial of relief.

First, as explained previously, John Purvis' testimony describing the man he saw outside Erie was not false testimony in violation of Giglio. Therefore, trial

counsel cannot be deficient for failing to raise a meritless objection based on Giglio.

Second, Serrano failed to establish that trial counsel was deficient for failing to seek the admission of Purvis' hypnotically refreshed statements and composite sketch. In Stokes, 548 So. 2d at 196, this Court held that "the testimony of a witness who has undergone hypnosis for the purpose of refreshing his or her memory of the events at issue is inadmissible as to all additional facts relating to those events from the time of the hypnotic session forward." However, this Court explained that "[a] witness who has been hypnotized may testify to statements made before the hypnotic session, if they are properly recorded." Id.

Serrano argues that Purvis' hypnotically refreshed statements fall under an exception outlined in the United States Supreme Court's decision in Rock v. Arkansas, 483 U.S. 44 (1987). However, Rock involved hypnotically refreshed statements in the context of a criminal defendant's constitutional right to testify in his or her own defense. Since Purvis was a State witness, not the defendant, Rock is inapplicable here. Consequently, because Purvis' hypnotically refreshed statements and the post-hypnosis composite sketch were inadmissible, trial counsel cannot be deemed deficient for failing to present it. See Owen v. State, 986 So. 2d 534, 546 (Fla. 2008) ("Trial counsel cannot be deemed ineffective for failing to present inadmissible evidence.").

Third, Serrano failed to demonstrate that trial counsel was deficient for failing to depose Purvis and cross-examine him regarding alleged discrepancies in his descriptions of the individual he saw the night of the murders. At the evidentiary hearing, trial counsel explained that he did not want to diminish Purvis' testimony or undermine his credibility because Purvis' description of the individual being 25 to 30 years old was favorable to the defense's case. Serrano was significantly older than the man Purvis described, and trial counsel "were arguing that Mr. Purvis saw somebody other than Mr. Serrano out there[. W]e were trying to convince the jury that he saw who was the killer." Trial counsel's strategic decision was reasonable, and Serrano has failed to demonstrate deficiency under Strickland.

Accordingly, this Court affirms the denial of relief.

H. DNA Testing

Further, Serrano alleges postconviction STR DNA testing results warrant a new trial and that trial counsel was ineffective for failing to seek STR DNA testing. However, we affirm the denial of both claims.

"This Court has previously held that for a conviction to be set aside based on a claim of newly discovered evidence, the defendant must meet two requirements[:]"

> First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the

> defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) ("Jones II"). Newly discovered evidence satisfies the second prong of the Jones II test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." Id. at 526 (quoting Jones v. State, 678 So. 2d 309, 315 (Fla. 1996)). In determining whether the newly discovered evidence compels a new trial, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." Jones v. State, 591 So. 2d 911, 916 (Fla. 1991) ("Jones I").

Spann v. State, 91 So. 3d 812, 815-16 (Fla. 2012). Moreover, this Court has explained that "[w]hen the trial court rules on a newly discovered evidence claim after an evidentiary hearing, we accept the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence if based upon competent, substantial evidence." Waterhouse v. State, 82 So. 3d 84, 101 (Fla. 2012) (quoting Hitchcock v. State, 991 So. 2d 337, 349 (Fla. 2008)).

Here, the second prong of the newly discovered evidence standard is not satisfied. At the evidentiary hearing, all three DNA witnesses testified that Serrano could neither be included nor excluded from the DNA located in the palm of the plastic glove discovered under Diane Patisso's body. And while one of the witnesses testified that Serrano could be excluded as a contributor to the mixture of approximately three people on the glove fingers, the other two experts disagreed. The other two experts, one of whom was even called by Serrano, testified that

there was not enough information using STR technology to either exclude or include Serrano as having contributed to the mixture. All three explained that victim George Patisso was the major contributor to the mixture on the glove fingers. Considering this evidence as well as the evidence presented at trial, it is clear that the inconclusive STR DNA evidence would not probably produce an acquittal on retrial because it does not give rise to a reasonable doubt as to Serrano's culpability.

Additionally, Serrano failed to establish that trial counsel was ineffective for failing to seek this STR DNA testing. At the evidentiary hearing, trial counsel explained that the State had no DNA evidence linking Serrano to the crime scene, and he did not want to risk the possibility of establishing such a link with a defense request for additional DNA testing. Instead, trial counsel chose to stress to the jury that there was no physical evidence demonstrating that Serrano was at Erie the night of the murders. This decision was reasonable and not "outside the broad range of reasonably competent performance under prevailing professional standards." Bolin, 41 So. 3d at 155 (quoting Maxwell, 490 So. 2d at 932). Consequently, Serrano did not establish deficiency.

Serrano also failed to demonstrate prejudice. There is not a reasonable probability of a different result if trial counsel had presented the inconclusive STR DNA testing of the plastic glove. Three experts agreed that the further DNA

testing of the palm of the glove found under one of the four victims could not exclude Serrano, and two of three experts agreed that further DNA testing of the glove fingers could not exclude Serrano. In other words, our confidence in the outcome is not undermined.

Accordingly, this Court affirms the denial of these newly discovered evidence and ineffective assistance of counsel claims.

I. Motion For New Trial

In his habeas petition, Serrano alleges that appellate counsel was ineffective for failing to assert trial counsel's ineffectiveness on the record for not including a challenge to the sufficiency of the evidence in Serrano's motion for a new trial after the jury's verdict. However, we deny relief.

Claims of ineffective assistance of appellate counsel are appropriately presented in a petition for a writ of habeas corpus. Valle v. Moore, 837 So. 2d 905, 907 (Fla. 2002); Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000). The standard of review for claims of ineffective assistance of appellate counsel mirrors the Strickland standard for ineffective assistance of trial counsel. Valle, 837 So. 2d at 907. In order to grant habeas relief on ineffectiveness of appellate counsel, this Court must determine

> first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the

> appellate process to such a degree as to undermine confidence in the correctness of the result.

Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986) (citing Johnson v. Wainwright, 463 So. 2d 207, 209 (Fla. 1985)).

Additionally, appellate counsel cannot be deemed ineffective for failing to raise meritless issues or issues that were not properly raised in the trial court and are not fundamental error. Valle, 837 So. 2d at 908. "In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue." Id. (citing Jones v. Barnes, 463 U.S. 745, 751-53 (1983); Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990).

In Reed v. State, 875 So. 2d 415, 439 (Fla. 2004), this Court denied a similar habeas claim regarding trial counsel's alleged ineffectiveness for the failure to file a motion for new trial or other motion "challenging the legal sufficiency of the State's case." In Reed, this Court first explained that "[t]o the extent that Reed claims his trial counsel rendered ineffective assistance of counsel, this issue is improperly raised in a petition for writ of habeas corpus." Id. at 439-40. Then, this Court in Reed noted that "trial counsel moved for directed judgment of acquittal at the conclusion of the State's case-in-chief." Id. at 440. Finally, this Court in Reed explained that, because this Court found the evidence sufficient on

direct appeal, it would not have found any merit to a claim challenging sufficiency if one had been raised by appellate counsel. Id.

Likewise, trial counsel here moved for a directed verdict after the State's case-in-chief, and, on direct appeal, this Court concluded that the circumstantial evidence was sufficient to support Serrano's four convictions for first-degree murder. Serrano, 64 So. 3d at 104-05. The end result of this Court's sufficiency analysis would not have been any different. Accordingly, appellate counsel cannot be deemed ineffective for failing to raise this meritless issue.

J. Polygraph Evidence

In his next habeas claim, Serrano asserts that appellate counsel was ineffective for failing to challenge the trial court's ruling regarding the admissibility of polygraph examinations. Prior to trial, trial counsel moved to introduce evidence of polygraphs given to three State witnesses, namely Alvara Penaherrera, Gustavo Concha, and David Catalan. After holding a hearing under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), the trial court denied the motion.

This Court has repeatedly explained that polygraph evidence is generally inadmissible in Florida. See Duest v. State, 12 So. 3d 734, 746 (Fla. 2009); Walsh v. State, 418 So. 2d 1000, 1002 (Fla. 1982) ("[P]olygraph evidence is inadmissible in an adversary proceeding in this state."). And, in Gosciminski v. State, 132 So.

3d 678, 701-04 (Fla. 2013), after reviewing the evidence presented at the Frye hearing, this Court affirmed the trial court's ruling that polygraphs are not generally accepted in the scientific community and are, therefore, inadmissible.

Accordingly, appellate counsel cannot be deemed deficient for failing to raise a meritless claim regarding the admissibility of polygraph evidence. We deny this habeas claim.

K. Firearms

Serrano also alleges that appellate counsel was ineffective for failing to more directly argue on direct appeal that evidence of Serrano's gun collection was inadmissible at trial. However, because Serrano cannot demonstrate prejudice, we deny this habeas claim.

In the direct appeal, appellate counsel raised a variation of this claim, which this Court rejected. Specifically, as part of Serrano's claim that prosecutorial misconduct required reversal, appellate counsel alleged "that the State improperly elicited evidence that Serrano owned multiple guns for the purpose of implying that since Serrano owned a lot of guns, he must have been the killer in this case." Serrano, 64 So. 3d at 110. This Court explained that, "[a]lthough general ownership of guns does not provide evidence that one committed a murder, the evidence introduced in this case demonstrated that Serrano was familiar with and owned the caliber of firearms used to commit these murders." Id. at 110-11.

Importantly, this Court also stated that, "even if the admission of this gun evidence were considered error, the error would be harmless beyond a reasonable doubt." Id. at 111.

Because this Court determined that any error in admitting the gun evidence was harmless, Serrano cannot demonstrate prejudice under Strickland. See Cox v. State, 966 So. 2d 337, 347 (2007) ("The harmless error test as articulated by this Court requires the State 'as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.' State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). Thus, in concluding that the prosecutor's misstatements of the law during voir dire constituted harmless error, we held that there was no reasonable probability that these misstatements contributed to Cox's conviction. See id. Therefore, regardless of whether counsel was deficient for failing to object to improper statements by the prosecution, Cox cannot demonstrate prejudice under the second prong of Strickland.").

Accordingly, we deny relief.

L. Hurst

Finally, we consider whether Serrano is entitled to relief after the United States Supreme Court issued its decision in Hurst v. Florida, 136 S. Ct. 616 (2016).

Because the jury recommended the death penalty on all four counts by a vote of nine to three, we conclude that Serrano's death sentences violate Hurst. See Kopsho v. State, 209 So. 3d 568, 569-70 (Fla. 2017). We must then consider whether the Hurst error was harmless beyond a reasonable doubt:

> The harmless error test, as set forth in Chapman[v. California, 386 U.S. 18 (1967),] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

Hurst v. State, 202 So. 3d 40, 68 (Fla. 2016) (quoting DiGuilio, 491 So. 2d at 1138), petition for cert. filed, No. 16-998 (U.S. Feb. 13, 2017).

Because the jury in this case recommended death on all four counts by a vote of nine to three, "we cannot determine that the jury unanimously found that the aggravators outweighed the mitigation." Kopsho, 209 So. 3d at 570. "We can only determine that the jury did not unanimously recommend . . . sentence[s] of death." Id. Therefore, because we cannot say that there is no possibility that the error did not contribute to the sentences, the error in Serrano's sentencing was not harmless beyond a reasonable doubt.

Accordingly, we vacate the death sentences and remand for a new penalty phase. See Hurst, 202 So. 3d at 69.

III. CONCLUSION

For the foregoing reasons, we affirm the denial of Serrano's postconviction guilt phase claims, deny his habeas petition, vacate his death sentences, and remand for a new penalty phase.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
POLSTON, J., concurs in part and dissents in part with an opinion, in which CANADY and LAWSON, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

POLSTON, J., concurring in part and dissenting in part.

I concur with the majority's decision except its vacating of the death sentences pursuant to Hurst.

CANADY and LAWSON, JJ., concur.

An Appeal from the Circuit Court in and for Polk County,
Donald G. Jacobsen, Chief Judge - Case No. 532001CF003262A0XXXX
And an Original Proceeding – Habeas Corpus

Robert S. Friedman, Capital Collateral Regional Counsel, Northern Region, Tallahassee, Florida; and Louis G. Carres, Special Assistant Capital Collateral Regional Counsel, Northern Region, West Palm Beach, Florida,

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for Appellee/Respondent

Supreme Court of Florida

THURSDAY, AUGUST 31, 2017

CASE NOS.: SC15-258 & SC15-2005
Lower Tribunal No(s).:
532001CF003262A0XXXX

NELSON SERRANO	vs.	STATE OF FLORIDA
NELSON SERRANO	vs.	JULIE L. JONES, ETC.
Appellant/Petitioner		Appellee/Respondent

Appellant/Petitioner's Motion for Rehearing is hereby denied.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

STEPHEN D. AKE
ROBERT S. FRIEDMAN
HON. STACY M. BUTTERFIELD, CLERK
HON. DONALD G. JACOBSEN, CHIEF JUDGE
VICTORIA AVALON
LOUIS G. CARRES

64 So.3d 93
Nelson SERRANO, Appellant,
v.
STATE of Florida, Appellee.
No. SC07–1434.
Supreme Court of Florida.
March 17, 2011.Rehearing Denied June 13, 2011.

[64 So.3d 98]

Marcia J. Silvers, Miami, FL, for Appellant.Pamela J. Bondi, Attorney General, Tallahassee, FL, and Stephen D. Ake, Assistant Attorney General, Tampa, FL, for Appellee.**PER CURIAM.**

Nelson Serrano appeals his convictions for first-degree murder and sentences of death.[1] For the reasons stated below, we affirm.

BACKGROUND

On May 17, 2001, Nelson Serrano was indicted under seal on four counts of first-degree murder for the deaths of George Gonsalves, Frank Dosso, Diane Patisso, and George Patisso. The murders occurred on December 3, 1997, at Erie Manufacturing and Garment Conveyor Systems in Bartow. George Gonsalves was one of Serrano's business partners. And Frank Dosso, Diane Patisso, and George Patisso were respectively the son, daughter, and son-in-law of Serrano's other business partner, Felice (Phil) Dosso. Serrano, a dual citizen of the United States and Ecuador, was arrested in Ecuador on August 31, 2002, and brought to the United States.

At the guilt phase, which occurred in 2006, the State presented the following evidence. In the 1960s, Phil Dosso and George Gonsalves started a tool and die business, Erie Manufacturing Cooperative, in New York. Their business provided parts to support the garment industry. In the 1980s, Phil Dosso and George Gonsalves met Nelson Serrano, who was working for a New Jersey company selling slick rail systems for the garment industry. In the middle of the 1980s, the three men created a separate company, Garment Conveyor Systems. Serrano was responsible for designing, selling, and installing slick rail systems, while Dosso and Gonsalves built the parts.

In the late 1980s, the partners moved the business to Bartow, Florida. At that time, they closed Erie Manufacturing Cooperative and transferred all the assets to Erie Manufacturing, Inc. As part of their oral agreement, Serrano bought into the Erie partnership and agreed to pay Phil Dosso and George Gonsalves $75,000 each. Therefore, all three men were equal partners in both Garment Conveyor Systems and Erie Manufacturing. Garment moved to Bartow as well. Serrano's son, Francisco Serrano, began working at the business soon after they relocated to Bartow, and Phil Dosso's son, Frank Dosso, began working there at a later date. Phil Dosso's son-in-law, George Patisso, was also an employee of the business.

By the early 1990s, the business was doing well. However, friction between the three partners had developed. Nelson Serrano had failed to pay the $75,000 to each of his partners. Further, there were disagreements about the distribution of assets and accusations that there were two sets of books. Then, in the summer of 1997, Phil Dosso and George Gonsalves fired Francisco Serrano. Also in the summer

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of 1997, Nelson Serrano opened a separate business checking account with a different bank and deposited two Erie checks totaling over $200,000. And Serrano instituted a civil suit against his partners. Ultimately, Serrano was removed as president by a vote of the other two partners, and the locks were changed on the building.

Numerous Erie employees testified to the strained relations between Serrano and the other

two partners, particularly Serrano's dislike of Gonsalves. Serrano made statements indicating that he wished Gonsalves were deceased. Additionally, Phil Dosso testified to hearing Serrano state that he felt like killing Gonsalves.

On the evening of the murders, 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. George Gonsalves' car was the only car in the parking lot. Although George Patisso and Frank Dosso remained at Erie with Gonsalves, they did not have a car parked in front because George Patisso's wife, Diane Patisso, had plans to pick them up and take them to Frank Dosso's home for a family birthday party.

When family members began calling Frank Dosso and could not get an answer, Phil Dosso and his wife decided to drive to Erie. As Phil and Nicoletta Dosso 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, where he discovered the bodies of George Gonsalves, George Patisso, and Frank Dosso.

When the first law enforcement officers arrived at the scene at 7:36 p.m., there were only three cars parked in front of the entrance: Phil Dosso's car, Diane Patisso's car, and George Gonsalves' car. Inside Erie, law enforcement discovered twelve shell casings, eleven from a .22 and one from a .32. All of the victims had been shot in the head with .22 bullets, and Diane Patisso was also shot once with a .32 bullet. The three men were shot execution-style. While neither murder weapon was ever located, the State introduced evidence that Serrano possessed and owned multiple .22 and .32 caliber firearms.

In the office containing the three male victims, officers discovered a blue vinyl chair with shoe impressions on the seat. Directly above the chair, a ceiling tile had been dislodged. Although this office was Frank Dosso's office at the time of the murders, it had been Nelson Serrano's office when he worked at Erie. David Catalan testified that on one occasion, he saw Serrano in his office with a gun. Serrano was standing on a chair, moving a ceiling tile, and taking papers out of the ceiling. Further, Erie employee Velma Ellis testified that the blue chair in Frank Dosso's office was never used and always remained under a desk in the office and that there were papers and a box piled on top of the chair's seat. Ellis testified that the chair was in its usual position under the desk when she left work on December 3, 1997, at 5 p.m. Crime analysts tested the shoe impressions on the dusty seat of the blue vinyl chair and found that the class characteristics and wear pattern were consistent with a pair of shoes Serrano owned and later loaned to a nephew.

The State's theory at trial was that Serrano kept a .32 caliber firearm hidden in the ceiling of his office. Once he was ousted from the company and the locks were changed he was unable to retrieve the gun until the night of the murders. After Serrano had shot the three male victims in his former office and was leaving the scene, Diane Patisso entered the building

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and was shot with both a .22 and the retrieved .32. An FDLE agent testified that Serrano told the agent that he would hide a gun in the ceiling of his office when he was out of town on business. However, Serrano's fingerprints and DNA were not discovered at the crime scene.

When officers first discovered the four victims at Erie, their investigation immediately focused on Serrano. As soon as Serrano returned to his home from a business trip to Atlanta on December 4, 1997, detectives requested that he come to the police station for an interview. At the police station, Serrano told law enforcement about his problems with his partners and explained to the detective that he had learned of the murders the previous evening when he had called his wife from his Atlanta hotel.

During his interview with law enforcement, Serrano detailed his business trip itinerary,

which included leaving Lakeland early on the morning of December 2, flying from Orlando to Washington, D.C., and, on the evening of December 2, flying from Washington to Atlanta. Serrano indicated that he remained in Atlanta until December 4, 1997. When asked by the detective what he thought may have happened at Erie, Serrano replied that "somebody is getting even; somebody they cheated, and George is capable of that." Thereafter, the detective took Serrano's taped statement, which was played for the jury. During his taped statement, Serrano stated that maybe Diane Patisso "walked in the middle of something."

Officers traveled to Atlanta to investigate Serrano's alibi and met with Larry Heflin of Astechnologies regarding his business meeting with Serrano. Heflin testified that he met Serrano in Atlanta on December 3 at about 9:45 a.m., and the meeting lasted approximately one hour. Investigators also obtained the La Quinta Inn airport hotel's surveillance videotapes. The video showed Serrano in the Atlanta hotel lobby at 12:19 p.m. on December 3. Ten hours later, at 10:17 p.m., Serrano was again seen on the video, entering the hotel lobby from the outside, wearing the same sweater and jacket as earlier in the afternoon.

Alvaro Penaherrera, Serrano's nephew, testified that on two separate occasions Serrano asked Penaherrera to rent a car for him so that Serrano's wife would not find out about the rentals. On October 29, 1997, Serrano drove Penaherrera to the Orlando airport, where Penaherrera picked up a rental car. Penaherrera then drove the car and left it at a nearby valet lot. Thereafter, Serrano drove Penaherrera back to his apartment. Penaherrera had no further contact with the rental car and did not know who returned it on October 31, 1997, at 7:30 p.m.

Around Thanksgiving 1997, Serrano again asked Penaherrera to rent a car for him under Penaherrera's name because Serrano had a girlfriend from Brazil coming into town. On November 23, 1997, Penaherrera made a telephone reservation for a rental car for December 3, 1997. On December 3, 1997, at 7:53 a.m., Serrano called Penaherrera from Atlanta and asked him to call to confirm the rental car reservation. Serrano called Penaherrera back at 8:06 a.m. to verify that the rental car would be ready. Penaherrera then drove to Orlando's airport and parked his car in the parking garage, rented the car from the terminal dealership, and drove the rental car back to the Orlando airport parking garage, where he left it as his uncle requested. Later that day, Serrano called Penaherrera, and Penaherrera told Serrano where the car was located and where the keys were hidden.

As on the previous occasion in October, Penaherrera did not expect to have any

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further involvement with the rental car after he left it at the Orlando airport parking garage on December 3. However, Serrano called Penaherrera the next day, December 4, to tell Penaherrera that the rental car was in Tampa, not Orlando, and that Penaherrera needed to drive to Tampa and return the car there. Serrano told Penaherrera if he went to Tampa and returned the car, Serrano would pay off Penaherrera's credit card bill and Penaherrera could pay him back without interest. Penaherrera agreed to this arrangement and returned the rental car in Tampa at 2:10 p.m. on December 4, 1997. Gustavo Concha, Serrano's friend and Penaherrera's godfather, subsequently paid Penaherrera's Visa bill.

Penaherrera next saw Serrano when he was visiting relatives in Ecuador for Christmas of 1997. Serrano informed Penaherrera of the murders at Erie and told Penaherrera that he could not say anything about the rental cars because it would jeopardize his marriage and the police would frame him for the murders.

In June 2000, Penaherrera, his girlfriend, and his brother were subpoenaed to testify before the grand jury. The three spent the night at Serrano's house the night before their testimony. That night Serrano asked Penaherrera to tell the grand jury that he had rented the car

for a friend with whom he had subsequently lost contact. Serrano also gave Penaherrera and his brother suits and dress shoes to wear to court. The pair of shoes that Serrano gave Penaherrera were seized by law enforcement, and subsequent testing indicated that the right shoe was consistent with the impression on the seat of the blue chair at the murder scene.

Also in June 2000, Penaherrera spoke for the first time with law enforcement regarding the December 1997 rental car transaction. And after his testimony and discussions with law enforcement, Penaherrera returned home to Orlando, where Serrano contacted him to find out what information he had given to the grand jury and law enforcement. After Penaherrera testified before the grand jury, Serrano sold his home, car, and other assets and moved to Ecuador.

The State introduced evidence regarding Serrano's air travel for his December 1997 business trip. As explained previously, Serrano flew from Orlando to Washington, D.C., and then to Atlanta, on December 2, 1997. However, contrary to his statements to law enforcement, the State also introduced evidence that Serrano traveled back to Florida on the day of the murders using two aliases. The State theorized that on the day of the murders Serrano flew from Atlanta to Orlando under the name Juan Agacio. Serrano then drove the car rented by Penaherrera on December 3 from the Orlando airport to Bartow, where he killed the four victims. Thereafter, he immediately drove the rental car to the Tampa airport, where he departed on a flight back to Atlanta using the alias John White.

To support its theory and timeline of Serrano's activities on the day of the murders, the State introduced the videotape evidence demonstrating that Serrano was in the La Quinta Inn's lobby in Atlanta shortly after noon on December 3, 1997. According to Serrano, he returned to his hotel room for the next ten hours because he was suffering from a migraine headache. However, the State introduced evidence that at 1:36 p.m. on December 3 a passenger calling himself Juan Agacio boarded Delta flight 1807 in Atlanta, scheduled to depart at 1:41 p.m. for Orlando. At 3:05 p.m., the passenger purporting to be Juan Agacio arrived in Orlando on flight 1807, and at 3:49 p.m., the rental

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car that Penaherrera had rented exited the Orlando parking garage.

Serrano's fingerprint was located on the parking garage ticket, indicating that Serrano departed from the Orlando airport garage at 3:49 p.m. on December 3, 1997. And Serrano has a son, who was named Juan Carlos Serrano at birth and whose mother's maiden name is Gladys Agacio. Additionally, the round-trip ticket for the Atlanta–to–Orlando flight of the passenger flying under the name Juan Agacio was purchased with cash at the Orlando airport on November 23, 1997, which is the same date that Penaherrera reserved the rental car for December 3, 1997. The State also introduced evidence that Serrano's vehicle left the Orlando airport's parking garage about twenty minutes after the passenger traveling under the name Juan Agacio purchased his ticket. The return portion of the flight was never used.

At approximately 5:30 p.m. on December 3, 1997, a person was seen standing off the side of the road near Erie's building. When John Purvis left work on December 3, 1997, he noticed the man wearing a suit standing in the grassy area with no car in the vicinity. The man was holding his coat and hands in front of his face as if he were lighting a cigarette. Both Alvaro Penaherrera and Maureen Serrano testified that Serrano smoked, but they did not testify that he specifically smoked cigarettes. Purvis described the man, and law enforcement made a composite sketch that was shown to the jury.

Approximately two hours after the murders, at 7:28 p.m., the passenger flying under the name John White arrived at Tampa International Airport and checked into Delta Airlines for flight 1272 to Atlanta. Similar to the purchasing

process for the ticket in the name of Juan Agacio, the purchaser paid for a round-trip ticket at Tampa International Airport on November 23, 1997, and never used the return portion of the ticket. Flight 1272 was scheduled to arrive in Atlanta at 9:41 p.m.

At 10:17 p.m., Serrano was observed in Atlanta on videotape walking into the La Quinta Inn airport hotel lobby from the outside, wearing the same clothes he had been wearing ten hours earlier. After being observed in the hotel lobby, Serrano used his cell phone to call various individuals, including his wife. The next morning he made multiple calls to Alvaro Penaherrera telling him he had to return the rental car that was now located at Tampa airport.

Furthermore, the State presented evidence that the car rented by Penaherrera on December 3 had been driven 139 miles. The distance from the Orlando airport to Erie is eighty miles, and the distance from Erie to the Tampa airport is fifty miles, totaling 130 miles.

While incarcerated awaiting trial, Serrano spoke to fellow inmate and "jailhouse lawyer," Leslie Todd Jones, about his case. Serrano denied any involvement in the murders, telling Jones that he believed a mafia hitman may have committed the murders, or alternatively, that Frank Dosso wanted to take over the business from George Gonsalves. The main theory Serrano described involved a hitman Serrano knew only as John, who was owed a substantial amount of money by the Dosso and Gonsalves families. Serrano explained to Jones that he and the hitman drove to the airports in Tampa and Orlando and that John purchased tickets under the names of Todd White and Juan Agacio. Serrano told Jones that the hitman had planned to approach the business partners on Halloween night, but it was raining and the business was closed. Serrano also told Jones about his fingerprint being found on a parking ticket in Orlando, but Serrano claimed that an FDLE agent had planted his fingerprint.

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After law enforcement learned about the Halloween incident from inmate Jones, they began investigating and discovered almost an identical pattern of travel as the travel surrounding the December 3, 1997, murders. Serrano once again was traveling on a business trip from Orlando to Charlotte from October 30 to November 2, 1997. And as previously discussed, on October 29, Serrano took Alvaro Penaherrera to the Orlando airport, where Penaherrera rented a car for Serrano and left it at a nearby valet lot. The next morning, October 30, 1997, Serrano flew from Orlando to Charlotte with his flight arriving in Charlotte at 8:34 a.m. The following day, Halloween, someone traveling under the name Juan Agacio took a flight departing from Charlotte at 1:40 p.m. and arriving in Orlando at 3:07 p.m. At 7:30 p.m., a passenger identified as John White was scheduled to depart on a flight from Tampa to Charlotte.

During the guilt phase, the defense maintained that Serrano had been in an Atlanta hotel room with a migraine at the time of the murders. The defense emphasized that no forensic evidence linked Serrano to the scene of the crimes. The defense also pointed out that there was evidence of robbery at the scene as several offices were in disarray, Frank Dosso's Rolex watch was missing, and George Patisso's gold chain was missing. However, the jury returned a verdict finding Serrano guilty on four counts of first-degree murder.

At the penalty phase, the State presented victim impact statements, and the parties stipulated that Serrano was fifty-nine years of age at the time of the murders and that Serrano had no prior criminal history. The defense presented evidence that Serrano never received any disciplinary reports while incarcerated awaiting trial. The jury recommended a sentence of death by a vote of nine to three for each of the four murder counts.

At the *Spencer*[2] hearing, Serrano presented numerous witnesses, some of whom testified by videotape from Ecuador. Then, on June 26, 2007, the trial court sentenced Serrano to death

for each of the four murders. The trial court found the following aggravators in regards to all four murders: (1) the murders were committed in a cold, calculated, and premeditated manner (great weight); and (2) Serrano was convicted of other capital felonies (the contemporaneous murders) (great weight). The trial court also found that the murder of Diane Patisso was committed for the purpose of avoiding arrest (great weight). Additionally, the trial court found the following mitigators: (1) Serrano had no significant history of prior criminal activity (great weight); (2) Serrano was in his late fifties at the time of the crimes (some moderate weight); (3) Serrano performed well in school (moderate weight); (4) Serrano has a good social history (moderate weight); (5) Serrano had no history of drug or alcohol abuse (some weight); (6) Serrano was a successful Hispanic immigrant (moderate weight); (7) Serrano displayed positive behavior during his pretrial incarceration (some weight); (8) Serrano displayed positive behavior during his court appearances (some weight); (9) Serrano expressed remorse regarding the death of Diane Patisso (slight weight); (10) Serrano had a good employment history (some weight); (11) Serrano was a good husband (some weight); (12) he was a good father (some weight); (13) Serrano was positively involved in his religion (some weight); and (14) he had a significant history of good works (moderate weight).

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ISSUES ON APPEAL

Serrano raises nine issues on appeal: (1) whether the circumstantial evidence is sufficient to support his convictions; (2) whether Serrano's statements to FDLE Agent Tommy Ray were admissible; (3) whether the trial court properly denied Serrano's motions to dismiss the indictment and divest itself of jurisdiction; (4) whether the prosecutor engaged in misconduct that entitles Serrano to relief; (5) whether the trial court properly denied Serrano's motion for a change of venue; (6) whether the testimony of the State's bloodstain pattern expert was admissible; (7) whether the State improperly cross-examined Serrano's character witnesses about collateral crimes at the *Spencer* hearing; (8) whether the avoid arrest aggravator was properly submitted to the jury and found by the trial court; and (9) whether Serrano's death sentence is constitutional. We also review whether Serrano's death sentences are proportionate. However, as explained below, none of these issues warrants relief.

(1) Sufficiency of Evidence

Serrano argues that the trial court should have granted his motion for judgment of acquittal in this circumstantial evidence case. We disagree.

"In reviewing a motion for judgment of acquittal, a de novo standard of review applies." *Reynolds v. State*, 934 So.2d 1128, 1145 (Fla.2006) (citing *Pagan v. State*, 830 So.2d 792, 803 (Fla.2002)). "[C]ourts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law." *Id.* (quoting *Lynch v. State*, 293 So.2d 44, 45 (Fla.1974)). "However, 'where a conviction is based wholly upon circumstantial evidence, a special standard of review applies.' " *Id.* (quoting *Darling v. State*, 808 So.2d 145, 155 (Fla.2002)).

"[A] motion for judgment of acquittal should be granted in a case based wholly upon circumstantial evidence if the [S]tate fails to present evidence from which the jury could exclude every reasonable hypothesis except that of guilt." *Id.* at 1146. However, "[t]he [S]tate is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events." *Darling*, 808 So.2d at 156 (quoting *State v. Law*, 559 So.2d 187, 189 (Fla.1989)). "Once the State meets this threshold burden, it becomes the jury's duty to determine 'whether the evidence fails to exclude all reasonable hypotheses of innocence ..., and where there is substantial, competent evidence to

support the jury verdict, [the Court] will not reverse.' " *Reynolds,* 934 So.2d at 1146 (quoting *Law,* 559 So.2d at 188).

In this case, Serrano's hypothesis of innocence was that he was in his hotel room in Atlanta suffering from a migraine when the murders took place. But the State introduced competent evidence that is inconsistent with Serrano's alibi. Most significantly, the State produced fingerprint evidence placing Serrano at the airport in Orlando during the time he claims he was in Atlanta. His fingerprint was discovered on a parking ticket, indicating that Serrano departed from the Orlando airport at 3:49 p.m on December 3, 1997.

Because the State met its burden of rebutting Serrano's alibi hypothesis, it became the jury's duty to determine whether the evidence failed to exclude all reasonable hypotheses of innocence. *See Reynolds,* 934 So.2d at 1146. And there is competent substantial evidence to support

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the jury's determination in this case. *See id.*

First, the State introduced circumstantial evidence of an elaborate plan to establish an alibi, a plan Serrano developed and began to implement ahead of time. Using Serrano's travel itinerary, the travel itineraries of the person flying under the names of Juan Agacio and John White, and Alvaro Penaherrera's car rentals, the State demonstrated that on the day of the murders Serrano flew from Atlanta to Orlando under the name Juan Agacio, drove the car rented by Penaherrera to Bartow, and then drove the car to Tampa, where he flew back to Atlanta as John White. Then, once he returned to Atlanta and was visible on his hotel's surveillance system, Serrano began using his cell phone.

Second, the State introduced circumstantial evidence to place Serrano at Erie at the time of the murders. Specifically, the State presented evidence of a dislodged ceiling tile in Serrano's former office, testimony that Serrano would hide items in the ceiling by dislodging a ceiling tile in his office, and testimony that a shoe impression on a chair below the dislodged ceiling tile was consistent with a shoe that Serrano owned. The State also introduced a composite sketch of a male seen outside the crime scene near the time of the murders. The jury was able to view the composite sketch and compare it to Serrano's appearance on the day of the murders as depicted in the Atlanta hotel's surveillance video. Finally, the State presented evidence regarding Serrano's statements to police the day after the murders. The jury heard Serrano's taped interview with police from the day after the murders where Serrano stated that Diane Patisso must have "walked in the middle of something," a fact that had not been released to the public.

Furthermore, there is evidence that Serrano had motive to kill Gonsalves, namely testimony regarding business problems between the partners and testimony that Serrano had expressed animosity towards Gonsalves and had even stated that he wished Gonsalves were deceased. There is also evidence that Serrano had access to the caliber of firearms used to shoot the victims.

Given this competent substantial evidence supporting an inference of guilt to the exclusion of all other inferences, we conclude that the evidence is sufficient to support Serrano's convictions. The trial court properly denied Serrano's motion for judgment of acquittal.

(2) Statements to Florida Department of Law Enforcement (FDLE) Agent

Next, Serrano argues that the trial court erred in denying his motion to suppress the statements he made to FDLE Agent Ray while traveling from Ecuador to the United States. After Serrano was placed on an airplane with Agent Ray to travel to Florida, he was read his *Miranda* rights. The FDLE agent then asked Serrano if he wished to make a statement. Serrano responded that he did not wish to say anything "at this time." Less than two hours later, Serrano asked the FDLE agent how much they had paid the police in Ecuador to capture

him. After answering that they had not paid the Ecuadorian police anything, the FDLE agent began asking Serrano questions. Agent Ray did not readvise Serrano of his rights or obtain a waiver. This conversation lasted approximately thirty minutes. Eventually, Serrano told the FDLE agent that the agent was starting to talk business and that he did not want to talk business. The questioning stopped at that point.

Agent Ray testified that Serrano stated the following during their conversation on

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the plane: (1) Serrano did not 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 nothing but a liar, a swindler, and a thief"; (4) Frank Dosso was connected to the mafia, and the murders were the result of Frank Dosso hiring a hitman that he had never met before; (5) Penaherrera had rented a car on December 3, 1997, for Serrano's Brazilian girlfriend; (6) Serrano was not in Florida on the date of the murders; (7) he had a son named Juan Carlos; and (8) when he worked at Erie he would hide his .357 revolver in the ceiling of his office or behind his computer.

As this Court has explained,

[a]ppellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues.

Welch v. State, 992 So.2d 206, 214 (Fla.2008) (quoting *Connor v. State,* 803 So.2d 598, 608 (Fla.2001)).

When faced with a defendant who was advised of his rights, initially exercised his right to remain silent, and then initiated a conversation with law enforcement and eventually confessed, this Court in *Welch,* 992 So.2d at 214, generally stated the following:

In *Miranda,* the United States Supreme Court determined that the Fifth and Fourteenth Amendments' prohibition against self-incrimination requires advising a prospective defendant that he has the right to remain silent and also the right to the presence of counsel. 384 U.S. at 479, 86 S.Ct. 1602; *Edwards v. Arizona,* 451 U.S. 477, 481–82, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). After being advised of his rights, if an accused indicates that he wishes to remain silent, "the interrogation must cease." *Miranda,* 384 U.S. at 474, 86 S.Ct. 1602; *see also Edwards,* 451 U.S. at 482, 101 S.Ct. 1880.

Then, when determining the admissibility of the defendant's confession, this Court applied the standard enunciated by the United States Supreme Court in *Oregon v. Bradshaw,* 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983).

In this case, we do not determine whether the admission of Serrano's statements to Agent Ray was erroneous under *Bradshaw,* because any possible error here was harmless. The evidence was generally cumulative of other evidence presented. For example, an Erie employee testified to seeing Serrano with a gun in his office while Serrano was standing on a chair removing something from the ceiling. A bank employee testified to the fact that Serrano had opened a separate checking account to deposit Erie funds. Additionally, a fellow inmate testified that Serrano had told him that the murders may have been the result of a mafia hitman or the result of Frank Dosso wanting to take over the business. And Penaherrera testified that he rented the car for Serrano and that Serrano stated that he needed the car for his Brazilian girlfriend. Basically, the only statement that was not cumulative of other evidence was Serrano's statement that he did not return to the United States for the hearing in his civil case because it was a trick. However, there is no reasonable possibility that this statement about the civil hearing affected the verdicts in

this case. Therefore, Serrano is not entitled to relief.

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(3) Jurisdiction

Serrano argues that the trial court lacked jurisdiction because he claims he was illegally kidnapped from Ecuador to stand trial in Florida in violation of the extradition treaty between the United States and Ecuador and in violation of the Ecuadorian Constitution. Serrano also claims that the actions of FDLE in bringing Serrano to Florida were so outrageous that the due process clauses of the U.S. and Florida Constitutions required the trial court to divest itself of jurisdiction. In support of this argument, Serrano's brief quotes his motion in the trial court as well as a report of the Inter–American Commission on Human Rights of the Organization of American States, which was attached to that motion. The quoted motion alleges that FDLE agents "collaborated with Ecuadorian Police to seek the deportation of Mr. Serrano from Ecuador. Such action was illegal because the Defendant was also an Ecuadorian Citizen and not subject to lawful deportation." The quoted motion also claims that Serrano "was arrested with no other process, in Ecuador. He was physically restrained, thrown into an animal cage, held incommunicado and the next day surreptitiously flown to the State of Florida." Serrano's brief states that he was physically abused and suffered bruises and abrasions.

At an evidentiary hearing, Agent Ray testified that Ecuadorian national police officers captured Serrano in Ecuador. Then, after Serrano was deported, the Ecuadorian police turned Serrano over to FDLE. Agent Ray also testified that Serrano was never housed in an animal cage but instead was housed in an office complex located at a police canine unit. Additionally, an ombudsman from Ecuador testified that he had concluded that Serrano held dual citizenship and, therefore, was improperly deported from Ecuador following a hearing before an Ecuadorian official.

We affirm the trial court's denial of Serrano's motion to divest jurisdiction and dismiss the indictment. In *United States v. Alvarez–Machain,* 504 U.S. 655, 657, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992), the United States Supreme Court held that "a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, [does not] thereby acquire[ ] a defense to the jurisdiction of this country's courts." Specifically, *Alvarez–Machain* involved a citizen and resident of Mexico who was forcibly kidnapped at the behest of DEA agents to stand trial in the United States. *Id.* And *Alvarez–Machain* cited and relied upon *Frisbie v. Collins,* 342 U.S. 519, 522, 72 S.Ct. 509, 96 L.Ed. 541 (1952), a case which involved a U.S. citizen defendant who had been kidnapped in Chicago by Michigan officers to stand trial in Michigan. In *Frisbie,* the United States Supreme Court upheld the defendant's conviction against claims alleging violations of the due process clause and the federal kidnapping statute. *Frisbie,* 342 U.S. at 522–23, 72 S.Ct. 509. In doing so, the United States Supreme Court stated the following:

This Court has never departed from the rule announced in *Ker v. Illinois,* 119 U.S. 436, 444 [7 S.Ct. 225, 30 L.Ed. 421 (1886)], that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural

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safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

Id. at 522, 72 S.Ct. 509 (footnote omitted).

The Second Circuit Court of Appeals in *United States v. Toscanino,* 500 F.2d 267 (2d Cir.1974), recognized an exception to the *Ker–Frisbie* doctrine in some cases of extreme government misconduct. In *Toscanino,* 500 F.2d at 268, the defendant alleged "the court acquired jurisdiction over him unlawfully through the conduct of American agents who kidnapped him in Uruguay, used illegal electronic surveillance, tortured him [in Brazil for seventeen days,] and abducted him to the United States for the purpose of prosecuting him here." However, even if there is an exception to the *Ker–Frisbie* doctrine,[3] there are no allegations in this case of misconduct similar to the level of misconduct present in *Toscanino.*

Accordingly, we conclude that Serrano's claim that the trial court lacked jurisdiction over him because he was illegally deported from Ecuador is without merit.

(4) Prosecutorial Misconduct

Serrano also argues that the impact of the following prosecutorial misconduct requires reversal of his convictions and sentences: (a) commenting on Serrano's right to remain silent, (b) vouching for the credibility of State witnesses, (c) eliciting testimony to demonstrate lack of remorse, (d) eliciting testimony to demonstrate bad character, (e) labeling Serrano as diabolical and a liar, and (f) improperly shifting the burden of proof. However, we conclude that relief is not warranted.

(a) Right to Remain Silent

"A defendant has the constitutional right to decline to testify against himself in a criminal proceeding." *Rodriguez v. State,* 753 So.2d 29, 37 (Fla.2000). Therefore, this Court has explained that "any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." *Id.* (quoting *State v. Marshall,* 476 So.2d 150, 153 (Fla.1985)). "However, it is well settled that such erroneous comments do not require an automatic reversal." *Id.* at 39. Furthermore, a trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. *See id.* "[A] motion for mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial." *Salazar v. State,* 991 So.2d 364, 372 (Fla.2008) (quoting *England v. State,* 940 So.2d 389, 401–02 (Fla.2006)).

Serrano contends that the State improperly commented on his right to remain silent three times. First, the State asked FDLE Agent Ray, "Did Mr. Serrano appear before the Polk County Grand Jury?" Immediately after this question, Serrano's counsel objected and moved for a mistrial. The trial court sustained the objection, but denied the mistrial. However, because the trial court sustained the objection before

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the agent had answered the question, the jury never heard that Serrano did not appear before the grand jury. And the trial court instructed the jury to disregard the prosecutor's question. Thus, any error was not so prejudicial so as to deny Serrano a fair trial. Consequently, the trial court did not abuse its discretion in denying Serrano's motion for a mistrial.

Serrano also argues the State improperly commented on Serrano's right to remain silent during opening arguments when the prosecutor stated that Serrano "had to come up with a story to tell a jury about how his fingerprint got on that ticket." The trial court overruled Serrano's objection and denied his motion for mistrial. The trial court did not abuse its discretion in making these ruling as the prosecutor explained that fellow inmate Leslie Todd Jones would testify at trial that Serrano told him that he needed to come up with a way to explain the fingerprint evidence and Leslie Todd Jones in fact testified that Serrano claimed that FDLE planted the fingerprint evidence. Furthermore, any possible error in allowing this statement was harmless given that it could not have affected the verdicts. *See Rodriguez,* 753 So.2d at 38 (stating that the proper standard of review for an overruled objection is a harmless error standard).

In addition, Serrano contends that the State improperly commented on his right to remain silent when the prosecutor stated during opening statements that the day after the murders was "Mr. Serrano's opportunity to tell the police what happened at Erie Manufacturing." After this statement, the trial court sustained Serrano's objection, but denied his motion for mistrial. The trial court did not abuse its discretion in denying Serrano's mistrial motion because, factually speaking, Serrano's first opportunity to speak to the police was the day after the murders when he voluntarily went to the police station upon his return from Atlanta. Moreover, at the close of evidence, the trial judge instructed the jury that Serrano had the absolute right to remain silent.

(b) Vouching for Credibility of Witnesses

It is improper for the State to place the government's prestige behind a witness or to indicate that information not presented to the jury supports a witness's testimony. *Spann v. State*, 985 So.2d 1059, 1067 (Fla.2008).

Serrano alleges that the State improperly vouched for the credibility of its witness when it asked Erie employee David Catalan the following: "And did I tell you the most important thing to do was to tell the truth?" David Catalan responded, "Yes, sir." Thereafter, defense counsel objected and moved for a mistrial. The trial court sustained the objection, denied the mistrial, and gave a curative instruction. While improper, this question and answer was not so prejudicial as to vitiate the entire trial, particularly since the trial judge gave a curative instruction. Specifically, the trial judge informed the jury that "it is improper for a lawyer to vouch for the credibility of a witness." Therefore, the trial court did not abuse its discretion in denying Serrano's motion for mistrial.

Next, Serrano contends that the State improperly bolstered the testimony of inmate Leslie Todd Jones by eliciting from him that, if he was untruthful, his probation would be revoked. The trial court sustained Serrano's objection, but denied his motion for mistrial. The trial court did not abuse its discretion in denying the mistrial motion. First, the State asked the question on redirect after Serrano impeached Jones regarding his plea

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agreement. Moreover, the trial court instructed the jury that they had to decide for themselves whether Jones was telling the truth. Specifically, the trial court told the jury, "And in regard to this witness, it [is] your job, it is you who are to decide who is telling the truth." Under these circumstances, a mistrial was not needed.

(c) Lack of Remorse

This Court has explained that it is improper for a prosecutor to ask a witness in a capital case if the defendant exhibits a lack of remorse. *See Randolph v. State*, 562 So.2d 331, 337–38 (Fla.1990).

Serrano alleges that the State improperly elicited that Serrano lacked remorse by asking Detective Parker if Serrano cried when he was interviewed the day after the murders. Detective Parker responded, "No." However, the trial court sustained Serrano's objection, denied Serrano's motion for mistrial, and instructed the jury to disregard the question and answer. Particularly given the curative instruction, this question and answer were not so prejudicial as to vitiate the entire trial. Additionally, while the prosecutor in this case asked if Serrano cried, he did not argue to the jury that Serrano lacked remorse for these murders. *Cf. Robinson v. State*, 520 So.2d 1 (Fla.1988). Therefore, the trial judge did not abuse its discretion in denying the motion for mistrial.

(d) Bad Character

Section 90.404(1), Florida Statutes (2005), provides that generally "[e]vidence of a person's character or a trait of character is inadmissible to prove action in conformity with it on a particular occasion." *See also Young v. State*, 141 Fla. 529, 195 So. 569, 569 (1939) ("[A] defendant's character may not be assailed by the State in a

criminal prosecution unless good character of the accused has first been introduced."). Moreover, section 90.404(2), Florida Statutes, explains that "[s]imilar fact evidence of other crimes, wrongs, or acts ... is inadmissible when the evidence is relevant solely to prove bad character or propensity."

Serrano contends that the State improperly made comments and elicited evidence for the sole purpose of demonstrating Serrano's bad character. First, Serrano points to the prosecutor's statement during opening argument that Serrano decided to "take some money owed to the two corporations and open up his own bank account" and that the banker at the new bank "knows something ain't right. You can't open corporate accounts by yourself." Defense counsel objected and moved for a mistrial. The trial court sustained the objection, denied the mistrial motion, and instructed the jury to disregard these comments. However, the State was not making this argument for the sake of demonstrating Serrano's alleged bad character. Instead, the State was making this argument, and later elicited testimony consistent with these statements, for the relevant purpose of establishing that Serrano had a motive to kill his business partner because there were disagreements about the distribution of company assets and income. Furthermore, these comments are not so prejudicial as to vitiate the entire trial, particularly since the trial judge instructed the jury to disregard them.

In addition, Serrano argues that the State improperly elicited evidence that Serrano owned multiple guns for the purpose of implying that since Serrano owned a lot of guns, he must have been the killer in this case. Although general ownership of guns does not provide evidence that one committed a murder, the evidence introduced in this case demonstrated that

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Serrano was familiar with and owned the caliber of firearms used to commit these murders. Moreover, even if the admission of this gun evidence were considered error, the error would be harmless beyond a reasonable doubt. *See Jones v. Moore*, 794 So.2d 579, 585 (Fla.2001) (upholding admission of photos of defendant with guns that were similar to guns used in the murder and concluding that even if the admission of the photos were considered to be error, it was harmless error).

Serrano also argues that the State elicited bad character evidence based upon inmate Jones' comment that he and Serrano met when they were both housed in Q Dorm, which is protective custody. Jones explained that protective custody is a section where people accused of murder and sex crimes are housed. The trial court sustained Serrano's objection to this protective custody comment, denied his motion for mistrial, and instructed the jury to disregard it. However, as the trial court noted, the jury was aware that Serrano was accused of murder. Consequently, any prejudice from Jones' comment did not deprive Serrano of a fair trial.

(e) Diabolical Liar

Serrano alleges that the State improperly called Serrano diabolical and a liar during closing arguments. This Court has stated that closing arguments "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." *King v. State*, 623 So.2d 486, 488 (Fla.1993) (quoting *Bertolotti v. State*, 476 So.2d 130, 134 (Fla.1985)). And in *Gore v. State*, 719 So.2d 1197, 1201 (Fla.1998), this Court stated that "[i]t is clearly improper for the prosecutor to engage in vituperative or pejorative characterizations of a defendant or witness." However, because Serrano failed to contemporaneously object, this claim is not preserved for appellate review. *See Sims v. State*, 681 So.2d 1112, 1116–17 (Fla.1996) (concluding that claim based on State's reference to defendant as a liar was not properly before the appellate court without an objection). Moreover, if there was error, it does not rise to the level of fundamental error.

(f) Shifting Burden of Proof

Serrano argues that the State improperly shifted the burden of proof by stating the following during closing arguments: (1) "You can't come up with any other theory that fits that anybody else would have done it"; (2) "He talks about this being a professional hit. There is no evidence. There is no evidence that these crimes are any kind of professional hit." However, like Serrano's liar claim, this claim is not preserved for appellate review because defense counsel failed to contemporaneously object. It also does not rise to the level of fundamental error as it does not "reach[ ] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Archer v. State*, 934 So.2d 1187, 1205 (Fla.2006) (quoting *Kilgore v. State*, 688 So.2d 895, 898 (Fla.1997)).

Given the above, we deny Serrano's claim that the cumulative impact of the prosecutorial misconduct in this case warrants reversal.

(5) Change of Venue

Serrano contends that the trial court abused its discretion when denying Serrano's motion for a change of venue because of the publicity surrounding this case. We affirm the trial court's denial of the motion.

In *Henyard v. State*, 689 So.2d 239, 245 (Fla.1996), this Court stated the

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following when upholding a trial court's ruling denying a motion for change of venue based upon pretrial publicity:

In *McCaskill v. State*, 344 So.2d 1276, 1278 (Fla.1977), we adopted the test set forth in *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), and *Kelley v. State*, 212 So.2d 27 (Fla. 2d DCA 1968), for determining whether to grant a change of venue:

Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.

[344 So.2d at] 1278 (quoting *Kelley*, 212 So.2d at 28). *See also Pietri v. State*, 644 So.2d 1347 (Fla.1994), cert. denied, 515 U.S. 1147, 115 S.Ct. 2588, 132 L.Ed.2d 836 (1995). In *Manning v. State*, 378 So.2d 274 (Fla.1980), we further explained:

An application for change of venue is addressed to the sound discretion of the trial court, but the defendant has the burden of ... showing that the setting of the trial is inherently prejudicial because of the general atmosphere and state of mind of the inhabitants in the community. A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result. The trial court may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process, or may withhold making the determination until an attempt is made to obtain impartial jurors to try the cause.

Id. at 276 (citation omitted). Ordinarily, absent an extreme or unusual situation, the need to change venue should not be determined until an attempt is made to select a jury.

Similar to the prospective jurors in *Henyard*, the prospective jurors in this case were questioned extensively during voir dire about their "exposure to the pretrial publicity surrounding the case." *Henyard*, 689 So.2d at 245–46. These voir dire proceedings indicate that a large number of the venire had never heard any of the details of the case. And a number of potential jurors who were familiar with the case were struck for cause. The other jurors who had heard something about the case stated that they could be fair and impartial or that they had not formed an opinion and would

base any opinion on the evidence presented. *See id.; see also Rolling v. State*, 695 So.2d 278, 285 (Fla.1997) ("[I]f prospective jurors can assure the court during voir dire that they are impartial despite their extrinsic knowledge, they are qualified to serve on the jury, and a change of venue is not necessary."). Therefore, the record here "demonstrates that the members of [Serrano's] venire did not possess such prejudice or extensive knowledge of the case as to require a change of venue." *Henyard*, 689 So.2d at 246.

Accordingly, the trial court did not abuse its discretion in denying Serrano's change of venue motion.

(6) Bloodstain Pattern Expert

Serrano claims that his constitutional right to confront the witnesses against him was violated when the State's

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bloodstain pattern expert testified based upon tape measurements taken by another law enforcement officer. As this Court has explained, "testimonial hearsay that is introduced against a defendant violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior meaningful opportunity to cross-examine that witness." *State v. Johnson*, 982 So.2d 672, 675 (Fla.2008) (citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). However, here, the officer who took the tape measurements at issue testified at trial and was actually cross-examined by defense counsel. Therefore, Serrano's claim that he was denied the opportunity to confront this witness is without merit.

(7) Cross–Examination of Character Witnesses

During the *Spencer* hearing, several character witnesses testified for the defense. On cross-examination, the prosecution attempted to impeach these witnesses by inquiring as to whether their opinion of Serrano's character would change if they knew he had molested his fifteen-year-old daughter. Serrano's daughter had filed a police report about the incident, but Serrano had never actually been charged with a crime.

In *Poole v. State*, 997 So.2d 382, 393 (Fla.2008), this Court explained that "the State cannot introduce inadmissible nonstatutory aggravation under the guise of impeachment." *See also Hitchcock v. State*, 673 So.2d 859, 861 (Fla.1996) ("[T]he State is not permitted to present evidence of a defendant's criminal history, which constitutes inadmissible nonstatutory aggravation, under the pretense that it is being admitted for some other purpose."). Nevertheless, we deny this claim because any error was harmless beyond a reasonable doubt as there is no reasonable possibility that Serrano was prejudiced by the prosecution's questioning. *See generally Eaglin v. State*, 19 So.3d 935 (Fla.2009).

Serrano contends that these cross-examinations took place in front of the jury, that they were a guise for introducing testimony of an unverified collateral crime, and therefore the cross-examinations were unduly prejudicial to him because they affected the jury's weighing whether to recommend a sentence of death. However, the cross-examinations of Maria Serrano, Alfredo Luna, and Serrano's son took place during the *Spencer* hearing, not during the penalty phase. Because the jury was not present at the *Spencer* hearing, there is no possibility that this questioning affected the jury's decision whether to recommend sentencing Serrano to death.

Furthermore, it is clear from the trial court's sentencing order that the trial judge was not influenced by the prosecution's line of questioning. Nothing regarding any prior bad acts is even alluded to in the sentencing order. To the contrary, in the trial court's sentencing order, the trial court found that Serrano had no prior criminal history, that he had a good social history, and that he was a good husband and a good father. The trial court would not have stated that Serrano "was a good father in that he loved and cared for his children and they for

him" if it had been influenced by the line of questioning put forth by the prosecution.

Accordingly, any error was harmless beyond a reasonable doubt.

(8) Avoid Arrest Aggravator

Serrano contends that the trial court erred when finding the avoid arrest aggravating circumstance with regard to the murder of Diane Patisso. We disagree.

"[I]t is not this Court's function to reweigh the evidence to determine

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whether the State proved each aggravating circumstance beyond a reasonable doubt—that is the trial court's job." *Willacy v. State*, 696 So.2d 693, 695 (Fla.1997). Rather, "[i]n reviewing an aggravating factor challenged on appeal, this Court's task 'is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance, and, if so, whether competent substantial evidence supports its finding.' " *Hernandez v. State*, 4 So.3d 642, 667 (Fla.2009) (quoting *Douglas v. State*, 878 So.2d 1246, 1260–61 (Fla.2004)). In order to establish the avoid arrest aggravator "where the victim is not a law enforcement officer, the State must show beyond a reasonable doubt that the sole or dominant motive for the murder was the elimination of a witness." *Id.* at 667 (quoting *Connor v. State*, 803 So.2d 598, 610 (Fla.2001)). "In such cases, proof of the intent to avoid arrest or detection must be very strong." *Id.* (citing *Riley v. State*, 366 So.2d 19, 22 (Fla.1978)).

"[T]his Court has approved the finding [of the avoid arrest aggravator] based on circumstantial evidence, without any direct statements by the defendant indicating a motive to eliminate witnesses." *Id.* at 667 (citing *Swafford v. State*, 533 So.2d 270, 276 (Fla.1988)). "[E]ven without direct evidence of the offender's thought processes, the arrest avoidance aggravator can be supported by circumstantial evidence through inference from the facts shown." *Id.* (quoting *Swafford*, 533 So.2d at 276 n. 6). Circumstantial evidence generally relied upon to prove this aggravator includes "whether the victim knew and could identify the killer and 'whether the defendant used gloves, wore a mask, or made incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant.' " *Id.* (quoting *Farina v. State*, 801 So.2d 44, 54 (Fla.2001)).

Here, although it is circumstantial, competent substantial evidence in the record supports that the murder of Diane Patisso was committed to avoid arrest. First, according to the statement Serrano gave to law enforcement, Diane Patisso was personally known to Serrano. Therefore, Diane Patisso would have been able to identify him as the person who killed George Gonsalves, Frank Dosso, and George Patisso. Second, Serrano made comments to detectives indicating that Diane Patisso probably walked into the middle of something. In other words, Serrano speculated that Diane Patisso was not the target of the crime, but rather a witness who had to be eliminated. Third, the record does not indicate that Diane Patisso offered any resistance or that she was in any position to pose a threat to Serrano. Therefore, it was not necessary for Serrano to kill Diane Patisso in order to complete his crime. Instead, the only possible motive for killing Diane Patisso was to avoid arrest. Indeed, the circumstances of this crime indicate an elaborate plan to commit a capital crime and avoid being caught. Therefore, we conclude that the trial court did not err in finding the avoid arrest aggravator.

(9) Constitutional Claims

In order to preserve the issues, Serrano submitted various constitutional claims regarding his death sentences. However, this Court has repeatedly rejected arguments that Florida's capital sentencing scheme is unconstitutional. *See, e.g., Bottoson v. Moore*, 833 So.2d 693 (Fla.2002); *King v. Moore*, 831 So.2d 143 (Fla.2002). In fact, this Court need

not even address Serrano's *Ring*[4] claims because the trial

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court found the aggravating circumstance of prior violent felony for the contemporaneous murders. *See Doorbal v. State,* 837 So.2d 940, 963 (Fla.2003).

Additionally, this Court has repeatedly upheld the constitutionality of Florida's lethal injection procedures. *See Power v. State,* 992 So.2d 218, 221 (Fla.2008); *Sexton v. State,* 997 So.2d 1073, 1089 (Fla.2008); *Henyard v. State,* 992 So.2d 120, 130 (Fla.2008); *Woodel v. State,* 985 So.2d 524, 533–534 (Fla.2008); *Tompkins v. State,* 994 So.2d 1072, 1081 (Fla.2008); *Lightbourne v. McCollum,* 969 So.2d 326, 353 (Fla.2007); *Schwab v. State,* 969 So.2d 318, 325 (Fla.2007). And this Court has previously rejected challenges to this Court's proportionality review. *See Hunter v. State,* 8 So.3d 1052, 1073 (Fla.2008). This Court has also rejected the claim that the jury instructions unconstitutionally shift the burden of proof. *See Schoenwetter v. State,* 931 So.2d 857, 876–77 (Fla.2006).

Accordingly, we reject Serrano's constitutional arguments that were submitted for preservation purposes.

(10) Proportionality

This Court performs a proportionality analysis in death cases to prevent the imposition of unusual punishments under the constitution. *See Tillman v. State,* 591 So.2d 167, 169 (Fla.1991). "The death penalty is reserved 'for the most aggravated and unmitigated of most serious crimes.' " *Clark v. State,* 609 So.2d 513, 516 (Fla.1992) (quoting *State v. Dixon,* 283 So.2d 1, 7 (Fla.1973)). "Proportionality review is not simply a comparison between the number of aggravating and mitigating circumstances." *Blake v. State,* 972 So.2d 839, 846 (Fla.2007) (quoting *Connor,* 803 So.2d at 612). Instead, in deciding whether death is a proportionate penalty, the Court considers the totality of the circumstances of the case and compares the case with other capital cases. *See Urbin v. State,* 714 So.2d 411, 417 (Fla.1998).

Here, Serrano was convicted of killing multiple people in a premeditated, execution-style manner. Following the *Spencer* hearing, the trial court concluded that the aggravating circumstances of cold, calculated, and premeditated (CCP) and prior capital felony applied to all four murders and that the additional aggravating circumstance of avoid arrest applied to the murder of Diane Patisso. The trial court also found the following statutory mitigating factors: (1) Serrano had no significant history of prior violent activity (great weight); and (2) his age (fifty-nine) at the time of the crime (moderate weight). In addition, the trial court considered thirteen nonstatutory mitigating factors, giving each of them slight to moderate weight.

This Court has found the death penalty proportionate in cases where the totality of the circumstances is similar to the totality of the circumstances here. *See, e.g., Wright v. State,* 19 So.3d 277 (Fla.2009) (death sentence proportionate where victims were shot execution-style and aggravating circumstances included previous conviction of another capital felony, CCP, and avoid arrest and the statutory mitigating circumstances were that the offense was committed under extreme mental or emotional disturbance, impaired capacity to appreciate the criminality of conduct or conform conduct to the requirements of the law and defendant's age at the time of the crime; and the trial court found nine nonstatutory mitigating factors); *Taylor v. State,* 937 So.2d 590 (Fla.2006) (death sentence proportionate where the aggravating circumstances were that defendant was on felony probation at the time of the crime, had committed a prior violent felony, and committed the murder for pecuniary gain and the trial court considered thirteen nonstatutory mitigating circumstances

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such as employment history, substance abuse, and childhood abuse); *Lynch v. State,* 841 So.2d 362 (Fla.2003) (death sentence proportionate for double murders where the aggravating factors were CCP for one of the victims, heinous, atrocious, or cruel (HAC) for the other victim, prior violent felony, and commission in the course of another felony and the trial court considered mitigating circumstances of mental disturbance, remorse, substance abuse, and childhood abuse); *Pagan v. State,* 830 So.2d 792 (Fla.2002) (death sentence proportionate where prior violent felony, commission in the course of armed robbery, and CCP aggravators applied and one statutory and several nonstatutory mitigating circumstances existed); *Morton v. State,* 789 So.2d 324 (Fla.2001) (death sentence proportionate for double murder with commission during robbery, avoid arrest, and CCP aggravators for both murders and HAC and prior felony conviction for second murder and where trial court considered mitigating circumstances of defendant's age, lack of prior criminal history, cooperation with police, and difficult family history). Accordingly, we conclude that the death penalty is proportionate here.

CONCLUSION

For the foregoing reasons, we affirm Serrano's convictions for first-degree murder and his sentences of death.

It is so ordered.

CANADY, C.J., and LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

Notes:

[1.] We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

FN2. *Spencer v. State,* 615 So.2d 688 (Fla.1993).

[3.] The Eleventh Circuit Court of Appeals has "refused to recognize ... the second circuit's exception to the *Ker–Frisbie* doctrine in cases of extreme governmental misconduct." *United States v. Matta,* 937 F.2d 567, 568 (11th Cir.1991) (footnotes omitted) (rejecting defendant's claim that court lacked jurisdiction because he was illegally kidnapped from Honduras and tortured before transport to the United States). Moreover, other circuits have expressed doubts regarding the validity of the Second Circuit's exception in light of subsequent decisions by the United States Supreme Court. *See, e.g., United States v. Best,* 304 F.3d 308, 313 (3d Cir.2002); *United States v. Matta–Ballesteros,* 71 F.3d 754, 763 (9th Cir.1995); *United States v. Mitchell,* 957 F.2d 465, 470 (7th Cir.1992); *United States v. Postal,* 589 F.2d 862, 874 n. 17 (5th Cir.1979).

FN4. *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-258

NELSON SERRANO,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.
_____/

PETITION FOR WRIT OF HABEAS CORPUS

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RELIEF SOUGHT ON THIS ISSUE

The Court should find that this issue deserved a full plenary review after full briefing by respective counsel. A belated direct appellate review is warranted because admissibility of the polygraph results was an important issue to a fair outcome of Petitioner's trial. The Court should grant a belated appeal to consider the issue in the same full manner it would have if counsel not failed to raise the issue on direct appeal.

ISSUE III

COUNSEL WAS INEFFECTIVE IN FAILING TO ARGUE THE UNCONSTITUTIONALITY OF FLORIDA'S SENTENCING PROCESS THAT PERMITS A MAJORITY OF A JURY TO "RECOMMEND" A SENTENCE OF DEATH, NOT REQUIRING EITHER UNANIMITY OR A SUPER-MAJORITY OF AT LEAST 10 OF 12 JURORS AND THAT IT FAILS TO REQUIRE ANY REVIEWABLE JURY FINDINGS OF FACT.

On direct appeal Petitioner's counsel adopted the process suggested by the Court in Sireci v. State, 773 So. 2d 34, 41 fn 14 (Fla. 2000), which was an appeal from denial of post-conviction relief, as a way to preserve issues on direct appeal concerning the constitutional validity of Florida's capital sentencing procedure and laws. Believing previously rejected issues may detract from potentially meritorious arguments, the Court said: "Accordingly, we take this opportunity to suggest that issues which are being raised solely for purposes of preserving an

error should be so designated. We will consider the issues preserved for review in the event of a change in the law if counsel so indicates by grouping these claims under an appropriately entitled heading and providing a description of the substance." Ibid.

Whether Florida's capital sentencing scheme is unconstitutional in not requiring a unanimous vote of a jury to recommend the death penalty, and whether a jury must make findings of fact to support an enhanced punishment, are issues now pending in the United States Supreme Court, on grant of certiorari, in Hurst v. Florida, SC14-7505, oral argument held October 13, 2015. The question is whether Florida's death penalty procedure violates the Sixth or Eighth Amendment in light of the decision in Ring v. Arizona, 536 U. S. 584 (2002). In the present case the trial court specifically gave the jury's 9-3 death recommendation "great weight" in deciding what sentences to impose: "This Court gives great weight to the recommendations of the jury and reweighs the evidence to determine whether or not the State proved each aggravating circumstance beyond a reasonable doubt." R 2509. The jury does not report its findings in a verdict so review by a trial court of what the jury found is impossible, and in this case the jury's 9-3 death recommendation was supported by only three-fourths of the jurors.

The aggravating circumstances that permit a sentence of death are elements

of the enhanced sentence. No matter what they are called by a state's sentencing law they serve a purpose as elements of a greater punishment. Ring v. Arizona, supra, 536 U. S. at 610, Justice Scalia, concurring.

If the issue had been argued on direct appeal it is probable that Petitioner's case would remain in the "pipeline" where the decision in Hurst v. Florida, would automatically be applied to his case because his case. An issue that is simply noted for preservation may be deemed waived if it is not fully argued in an effort to actually persuade the Court of the correctness of the position taken. United States v. Cooper, 654 F. 3d 1104, 1128 (10th Cir. 2011)(It is well-settled that arguments inadequately briefed in the opening brief are waived."). Preservation for federal review may require more than noting that a claim of constitutional error has been rejected in prior cases. The Court said in Engle v. Issac, 456 U. S. 107, 130, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982): "If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid."

Counsel for Petitioner did not present any specific arguments or new considerations of *why* the Court's prior decisions were inapplicable to this case or that the constitutional validity of the procedure under Florida's capital punishment

statute should be reconsidered. Cf. Gosciminski v. State, 132 So. 3d 678, 715 (Fla. 2014)(appellant "does not present any new arguments in challenging the constitutionality of Florida's death-penalty statute"). Counsel was ineffective for failing to argue that a majority of 9 of 12 jurors is inadequate and cannot constitute a "recommendation" of death and be given great weight by a trial court in deciding to impose a death sentence. The Court was not afforded argument on whether Florida's procedure is unconstitutional for lack of specific jury findings as well as its lack of a unanimous, or even a near unanimous, verdict. A decision in Petitioner's case of the issue of constitutionality of the statue as applied to Petitioner was completely pretermitted by counsel's failure to argue the issue.

This Court's holding that the decision in Ring does not apply when one of the aggravating factors is conviction of a prior violent felony, Jordan v. State, 40 Fla. L. Weekly S536a (Fla. October 8, 2015), should also have been argued to be constitutionally invalid where the convictions were for offenses that were committed at the same time, convictions obtained at the same time, and which were sentenced at the same time. There was nothing "prior" about Petitioner's convictions. There was no prior criminal conduct, because he had no other criminal convictions. R 2512. It is inconsistent for a trial court to consider his lack of criminal history as a statutory mitigating factor while, at the same time, considering an aggravating circumstance of a prior felony to support imposition of

a death sentence. This alone would invalidate the Court's decision that Ring in inapplicable to cases in which there is a prior conviction for a violent felony as applied in this case.

RELIEF REQUESTED ON THIS ISSUE

The Court should enter an order staying the imposition of the death penalty in this case pending a final determination of the constitutional validity of Florida's statutory system in Hurst v. Florida, supra. The decision in Hurst will directly apply where a jury recommended sentences of death by a vote of nine to three and made no findings of fact that could be considered by the sentencing court or reviewed by this Court on direct appeal. The Petition should be granted if the decision in Hurst invalidates the procedure by which the sentence was imposed.

ISSUE IV

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THE PRESERVED ISSUE OF INTRODUCTION OF FIREARMS UNRELATED TO THE CHARGES WHICH DEPRIVED PETITIONER OF ADVOCACY ON HIS BEHALF ON THIS MERITORIOUS ISSUE BEFORE THE COURT.

SUMMARY OF THE ISSUE

The issue of admission into evidence of seven unrelated firearms that were found in Petitioner's residence four months after the crimes was raised in the trial court by timely objections. But, the issue was not raised on direct appeal.

omission in this case on this issue is the failure to afford this Court a full adversarial proceeding on a potentially dispositive issue. Due to the Court's disposition without counsel's participation on the issue on the merits and as to prejudice, an the appropriate remedy in this circumstance to order a belated appeal so that the issue may be fully and properly briefed and argued with citations and a complete discussion of applicable caselaw so that this Court may review the issue sitting as independent and impartial arbiter and forum. Only a new appeal limited to this issue will afford Petitioner his right to have this Court consider arguments of his counsel fully briefed and argued as would have occurred if Petitioner had received effective assistance of counsel on this issue on direct appeal, and for the Court upon consideration of the issue to decide whether an abuse of discretion by the trial court requires a new trial. Petitioner believes a new trial is required.

CONCLUSION

WHEREFORE, it is respectfully requested that the Court grant the petition and order such further proceedings as appropriate to each issue raised.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by electronic service to Stephen D. Ake, Esq., Assistant Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607-7013 by email service at: stephen.ake@myfloridalegal.com and capapp@myfloridalegal.com, and to counsel for petitioner on direct-appeal and post-conviction relief Marcia J. Silvers, Esq., 770 S. Dixie Highway, Suite 113, Coral Gables, FL 33146 at: marcia@marciasilvers.com, and by U. S. Mail to Nelson Serrano, DOC # 129232, Union Correctional Institution, 7819 N. W. 228th Street, Raiford, FL32026, this 2nd day of November 2015.

/s/ Louis G. Carres
Attorney

CERTIFICATE OF FONT COMPLIANCE

Counsel hereby certifies that this Petition has been prepared with New Times Roman 14-point font.

/s/ Louis G. Carres
Attorney

IN THE SUPREME COURT OF FLORIDA

CASE Nos.: SC15-258 & SC15-2005

NELSON SERRANO,
Appellant,
v. **SC15-258**
STATE OF FLORIDA,
Appellee.

_____

NELSON SERRANO,
Petitioner,
v. **SC-15-2005**
JULIE L. JONES, etc.
Respondent.
_____/

MOTION FOR REHEARING

The appellant, Nelson Serrano, by undersigned counsel respectfully moves for rehearing pursuant to Rule 9.330, Fla. R. App. P., based on points of law and fact in the opinion of the appellant/petitioner the court has overlooked or misapprehended in its combined decision in the above-styled cases issued May 11, 2017. For clarity the issues raised for rehearing are presented in the order addressed in the opinion.

A. Letters

The Court mistook the purpose for which the letters would be supportive of

Mr. Serrano requests the Court to reconsider its decision and direct that a belated appeal be granted for the Court to determine the issue on a clean slate after arguments of counsel concerning the admissibility issue and whether any error was harmful and whether a new trial is required.

L. Hurst

The Court should reconsider its relief under Hurst. A new penalty proceeding would violate Mr. Serrano's constitutional protection from double jeopardy and collateral estoppel by allowing the prosecution a second attempt to convince a jury to authorize imposition of the death penalty. A properly empaneled trial jury failed to make a unanimous finding find the death penalty should be imposed. Regardless of the lack of any specific findings of aggravating factors, the ultimate decision of the trial jury as to whether the death penalty should be imposed is the same as would be retried before another jury. The jury's recommendation was a finding that the prosecution failed to convince the jurors as a whole that death was an appropriate punishment.

Under Hurst v. Florida, 136 U. S. 616 (2016), the Court determined the error was not harmless, and according to that determination the Court must impose the sentence remaining without affording the state another attempt to place Mr. Serrano's life in a second jeopardy. The state caused the error requiring the sentence to be vacated. The state, as the party committing the error, should not

benefit by another bite at the apple when it was the state's decision to not require or seek a constitutionally proper verdict at the first trial. A new penalty proceeding would be inadequate relief and would violate Mr. Serrano's Fifth Amendment and Fourteenth Amendment rights to not be twice placed in jeopardy and to due process of law. Multiple attempts to obtain a jury's approval of a death sentence after failing at a first trial would be to place the state in a position of undue weight with the state's near unlimited resources contrasted to an individual defendant's. Multiple attempts to gain an favorable verdict should not be allowed. Moreover, the state's need for such multiple attempts to obtain a verdict in its favor would be contrary to accepting the jury's response as a reliable indicator of the acceptance of the death penalty generally or of its use in this particular case.

Conclusion

Wherefore, based on the above it is respectfully submitted that rehearing should be granted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion for Rehearing has been furnished by electronic service to Stephen D. Ake, Esq., Assistant Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607-7013 by email service at: stephen.ake@myfloridalegal.com and capapp@myfloridalegal.com, and by U. S. Mail to Nelson Serrano, DOC # 129232, Union Correctional Institution, 7819 N. W. 228th Street, Raiford, FL32026, this 26th day of May 2017.

/s/ Louis G. Carres
Attorney