IN THE SUPREME COURT OF FLORIDA

TERANCE G. VALENTINE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC20-1805
L.T. NO. 1988-CF-012996-A
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on direct appeal from the second trial will be referred to as "DR2 V__:___" followed by the volume and page number. The record on direct appeal from the third trial will be referred to as "DR3 V __:___" followed by the volume and page number. The instant successive postconviction proceedings will be referred to as "PCR:____" followed by the referenced page number.

STATEMENT REGARDING ORAL ARGUMENT

The State respectfully submits that oral argument is not necessary on this appeal. Argument will not materially aid the decisional process.

STANDARD OF REVIEW

A summary denial of a successive 3.851 postconviction motion is reviewed de novo. *Tompkins v. State*, 994 So. 2d 1072 (Fla. 2008). "Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing '[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.' " *Id.* at 1080-81.

STATEMENT OF THE CASE AND FACTS

Terance Valentine was initially tried in 1990 for the 1988 first-degree murder of Ferdinand Porche, the attempted first-degree murder of Livia Romero, and other related offenses**.** That trial resulted in a mistrial when the jury was unable to reach a verdict. Valentine was again placed on trial in 1990 and in the second trial convicted of the first-degree murder of Ferdinand Porche, the attempted first-degree murder of Livia Romero, and other related offenses, and sentenced to death. *Valentine v. State*, 616 So. 2d 971 (Fla. 1993). Following retrial due to a jury selection error, the same convictions and sentences were imposed. On appeal, the attempted murder conviction was vacated, but the other convictions and the death sentence were affirmed. *Valentine v. State*, 688 So. 2d 313 (Fla. 1996). Valentine sought certiorari review in the United States Supreme Court, and review was denied on October 6, 1997. *Valentine v. Florida*, 522 U.S. 830 (1997). This Court described the following facts in its initial opinion:

> Livia Romero married Terance Valentine while she was a teenager in Costa Rica and the couple emigrated to the United States in 1975, settled in New Orleans, and adopted a child. After seeking to divorce Valentine in 1986, Romero married Ferdinand Porche and the family moved

to Tampa, where they began receiving telephoned threats from Valentine. On September 9, 1988, Valentine armed himself, forced his way into the family's home, wounded Porche, drove both Romero and Porche to a remote area and shot them. Romero survived and immediately told police Valentine was her assailant.

Several weeks after being released from the hospital, Romero began receiving telephone calls from Valentine, which she taped using a telephone and recorder supplied by police. Valentine was eventually arrested and charged with armed burglary, kidnapping, grand theft, first-degree murder and attempted first-degree murder. His motion to suppress a conversation taped on November 7 was denied; an edited tape was played for the jury; and the court subsequently declared a mistrial after the jury was unable to reach a unanimous verdict.

The entire fifteen-minute tape was played for the jury on retrial. Additional evidence included Romero's testimony and that of Porche's neighbor, who testified that on September 9 he saw two men sitting in a faded red and white or red and gray Ford Bronco parked opposite his house between 1 and 3 p.m. Nancy Cioll, a friend of Valentine's and Romero's, testified that about two weeks after the killing, Valentine visited her driving a maroon, gray and black Ford Bronco. She said he confessed to the shootings, demonstrated how he had shot Romero, and said he had made a mistake leaving Romero alive. Valentine's alibi defense that he was in Costa Rica at the time of the shootings was disbelieved by the jury and he was convicted on all counts. During the penalty phase, Valentine represented himself and called his daughter and two friends to testify on his behalf.

Valentine, 616 So. 2d at 972.

At the 1994 penalty phase, Valentine waived the advisory jury

recommendation and presented his mitigation directly to the trial judge. *Id.,* 688 So. 2d at 315. The Honorable Diana Allen imposed a death sentence on September 30, 1994. She found four aggravating factors: prior violent felony conviction based on the attempted murder conviction; committed during a burglary/kidnapping; heinous, atrocious or cruel; and cold, calculated and premeditated. *Id.,* 688 So. 2d at 316 n.4. The court gave slight weight to the mitigating factors found, including Valentine's lack of prior violence, Valentine's work history and skills that could contribute to the prison system, Valentine's large family that will continue to love and support him, and Valentine's cooperation at his arrest and behavior as a model prisoner. *Id.,* 688 So. 2d at 316 n.5.

On or about May 10, 2001, Valentine filed a motion for postconviction relief. In Valentine's postconviction motion, among several other claims, he challenged his convictions based on his claim that his convictions could not stand where they were based on the victim being identified as "Livia Porche", and that the vehicle Valentine was convicted of stealing was marital property. *Valentine v. State*, 98 So. 3d 44, 50 (Fla. 2012). This Court affirmed the postconviction court's denial of these claims. *Id.*

On December 21, 2017, Valentine filed a successive motion for postconviction relief. In the motion, he asserted two claims for relief**:** (1) there was no corpus delicti for the offenses of grand theft auto, burglary, and one count of kidnapping as a result of the victim's name in the indictment not matching her name at trial; and (2) a claim of relief pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The Court affirmed the postconviction court's order denying the successive motion for postconviction relief. *Valentine v. State*, 296 So. 3d 375 (Fla. 2020).

On February 17, 2020, Valentine filed this second successive motion to vacate his judgment and sentence. (PCR:156-73). On October 13, 2020, the postconviction court entered its order denying the motion without an evidentiary hearing. (PCR:243-54). On October 28, 2020, Valentine filed his motion for rehearing, which the postconviction court denied on November 11, 2020. (PCR:259-60).

On December 9, 2020, Valentine filed his Notice of Appeal from which this appeal follows (PCR:261-62).

SUMMARY OF THE ARGUMENT

The postconviction court correctly denied without hearing Valentine's second successive motion to vacate and set aside his judgment of convictions and sentence of death. The motion is procedurally barred because the allegations in the motion do not qualify as newly discovered evidence, or if not barred, Valentine would not be entitled to relief on his *Brady/Giglio* claim.

The statements contained in the affidavit of Terry Spain upon which Valentine bases his motion are not new. Most of the statements were known at the time of Valentine's trial over three decades ago, and those that were not, could have been discovered well in excess of one year before the motion was filed. Nor is the untimeliness excused because his initial postconviction counsel failed to locate Spain and learn about his statements.

In addition, Terry Spain's new statements are likely inadmissible. But even if admissible and considered alongside the evidence of Valentine's guilt that was introduced at trial, they would not probably produce an acquittal because of the overwhelming evidence of his guilt introduced at trial. This evidence includes his victim wife surviving and identifying Valentine as the shooter, a

confession Valentine made to a trusted friend about how he shot and killed his estranged wife's "husband" and shot and almost killed her, taped phone calls in which his wife repeatedly identified his role in the shootings, his use of a motor vehicle that matched the description of one seen on the victims' street the day of the murder by the victims' neighbor, and Valentine later using cash and false names to purchase multiple airline tickets to travel to and from the United States and Costa Rica, where Valentine resided.

Even if one considers the statements by Spain previously known to Valentine and introduced at his first two trials -- that Spain saw about a half football field's distance away from where the victims were discovered a man Spain believed was white and who shot at him -- a jury verdict would still not probably be an acquittal because of the additional overwhelming evidence of Valentine's guilt.

The postconviction court also correctly concluded that even if the motion was not procedurally barred, Valentine is not entitled to relief based on either *Giglio* or *Brady*. Valentine made no allegation of false testimony being introduced into evidence to demonstrate a *Giglio* violation. In addition, there is no *Brady* violation because Valentine is not being held pursuant to a judgment or sentence from

the trial in which he claims one occurred and there is no allegation or indication that the State prevented Valentine from speaking to Spain since that first trial. Finally, the postconviction court correctly concluded that because of the strength of the evidence introduced at Valentine's trial, he is unable to demonstrate that the verdict would probably be different. Therefore, as a matter of law, Valentine is not entitled to any relief.

ARGUMENT

ISSUE I

THE POSTCONVICTION COURT CORRECTLY DENIED AN EVIDENTIARY HEARING ON VALENTINE'S SUCCESSIVE POSTCONVICTION MOTION BECAUSE THE MOTIONS, FILES, AND RECORDS CONCLUSIVELY SHOW THAT HE IS NOT ENTITLED TO ANY RELIEF.

Valentine posed his most recent challenge to his convictions with the filing of his Second Successive 3.851 Motion to Vacate and Set Aside the Judgment of Convictions and Sentence of Death. Florida Rule of Criminal Procedure 3.851 applies to all postconviction proceedings that commence after the appellate mandate affirming the death is issued in a capital case. Fla. R. Crim. P. 3.851(a). Valentine bases his present challenge on an affidavit provided by a witness in the case, Terry Spain, and contends that the statements contained in the affidavit are both newly discovered evidence and demonstrate violations of *Brady*[1] and *Giglio*[2].

The postconviction court held a case management hearing as required by Rule 3.851, which provides that within 30 days after the State files its answer to a successive motion for postconviction relief,

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

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

the trial court shall hold a case management conference at which the trial court shall hear argument on any purely legal claims not based on disputed facts and determine whether an evidentiary hearing should be held. *Fla. R. Crim. P.* 3.851(f)(5)(B).Subsequently, the court denied the motion without an evidentiary hearing. The court determined that one was not required because the motion, files, and records in the case conclusively show that the movant is entitled to no relief. Specifically, the court found Valentine's motion was procedurally barred because his allegations do not qualify as newly discovered evidence, and even if not barred, he would not be entitled to relief on his *Brady/Giglio* claim. (PCR:243-54).

A. VALENTINE FAILED TO COMPLY WITH THE RULE 3.851 REQUIREMENT THAT POSTCONVICTION MOTIONS BE FILED WITHIN ONE YEAR AFTER A JUDGMENT AND SENTENCE BECOME FINAL

For the purposes of Rule 3.851, a judgment is considered final either: (1) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida's decision affirming a judgment and sentence of death (90 days after the opinion becomes final), or (2) on the disposition of the petition for writ of certiorari by the United

States Supreme Court, if filed. *Fla. R. Crim. P.* 3.851(d)(1). In Valentine's case, the final judgment and sentence were entered in 1997 when the United States Supreme Court denied Valentine's petition for writ of certiorari. *Valentine v. Florida*, 522 U.S. 830 (1997).

Rule 3.851 requires, with few exceptions, that any motion to vacate judgment of conviction and sentence of death shall be filed by the defendant within one year after the judgment and sentence become final. *Fla. R. Crim. P.* 3.851(d)(1). Because Valentine filed his motion on February 17, 2020, over two decades after his judgment and sentence became final, the motion is untimely unless it meets one of the statutory exceptions provided for in Rule 3.851.

The Rule 3.851 exceptions which permit the filing or consideration of a motion beyond the one year deadline are limited to when a motion alleges either: (1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of diligence, (2) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or (3) postconviction counsel, through neglect,

failed to file the motion. *Fla. R. Crim. P.* 3.851(d)(2).

Valentine alleges in his motion that he meets the first exception. He states that the January 30, 2020 affidavit of witness Terry Spain constitutes newly discovered evidence and asserts that the facts could not have been discovered through due diligence, or alternatively, that "first-tier post-conviction counsel was ineffective for failing . . . at the [prior] evidentiary hearing . . . [to] locate and present the testimony of Terry Spain." (PCR:162-63).

1. The Affidavit Does Not Qualify as Newly Discovered Evidence

Valentine's contention is mistaken. In order to obtain a new trial based on a claim of newly discovered evidence, Valentine must show both (1) that the evidence was not known by him, his counsel, or the trial court at the time of the trial and could not have been known by the use of due diligence, and (2) it must be of such a nature that it would probably produce an acquittal on retrial. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998).

a. Virtually Nothing in the Affidavit Was Unknown at the Time of Valentine's Trial

Key to this Court understanding why the postconviction court correctly concluded that the facts in the affidavit fail to meet the

Jones standard is the Court recognizing that virtually none of the affidavit's contents were unknown at the time of Valentine's trial, although when one reads Valentine's motion and brief it may appear otherwise. In addition, the postconviction court found that what little in the affidavit was not known at the time of Valentine's trial, ultimately would not have affected the outcome of his trial.

Spain's observing an unknown man, perhaps a half football field's distance away from where the victims were discovered, and who Spain believes shot at him and who appeared to Spain to be white, is *not* new information. The police obtained this statement from Spain when they first interviewed him, and this statement to the police was introduced into evidence at both Valentine's first and second trials. Valentine acknowledges this in his brief and summarizes the testimony of Detective Jorge Fernandez discussing Spain informing him about the man he saw there. (Brief at 21).

The postconviction court accurately determined that the only information in Spain's affidavit that was unknown at the time of Valentine's third trial are the statements contained in paragraphs 17 and 18. In those paragraphs, Spain states that at the time of Valentine's first trial, the police arranged for him to remain on stand-

by alone at a hotel for a day, provided him meals and room service, paid him, he believes, $300.00 for his time, and then around 3:00 – 4:00 p.m. returned to inform him he could leave because Romero had testified to everything needed to prosecute Valentine. (PCR:205-07).

b. What Little was Unknown Could Have Been Discovered with Due Diligence

To the extent that the statements in paragraph 17 and 18 have any value, Valentine was required to file his motion within one year of the date these statements *became* discoverable. *See Jiminez v. State*, 997 So. 2d 1056 (Fla. 2008) ("To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable.") However, Valentine fails to allege why his trial counsel could not with due diligence locate and speak with Spain regarding his involvement in this case after either of Valentine's previous trials, as well as why it took postconviction counsel nearly three decades to do so.[3] *See White v. State*, 964 So. 2d

[3] "I have not spoken or been contacted by . . . anyone from a defense team about what I witnessed since I was in the hotel in 1990 other than when Ms. Fuentes spoke to me on February 18, 2019." (PCR:205-07).

1278, 1285 (Fla. 2007) (affirming trial court's denial of newly discovered evidence claim because defendant failed to allege why his proposed witness could not have been discovered by diligent efforts prior to trial). Obviously, Valentine's current counsel was able to do so as evidenced by the existence of Spain's affidavit.[4]

c. The New Evidence Would Not Probably Produce an Acquittal at Trial

Valentine argues that the affidavit establishes several "critical" facts, including "perhaps most notably that during the 1990 trial, he was secreted in a hotel by law enforcement who bought him meals and paid him $300." (Brief at 9). He contends that this "new information raises serious questions about the fundamental fairness of the investigation of this case and the judicial process used to convict and sentence [him] to death." (Brief at 24).

Clearly, the State does not agree with the characterization made by Valentine that Spain was "secreted" in a hotel during the first trial or that his having stayed there "raises serious questions about the

[4] This fact, in addition to his alternative argument that delay in doing so is the result of deficient representation by his initial postconviction counsel and should not bar his motion as untimely, contradict any claim that Spain could not be located with diligence and questioned about his involvement in this case.

fundamental fairness of the investigation of this case and the judicial process used to convict and sentence [him] to death." After all, Spain himself states in paragraph 17 of his affidavit: "They told me the trial had started and they wanted to make sure I was on stand-by to testify." (PCR:205-07). This is hardly the sinister behavior Valentine conjures up.

More to the point, however, is that the issue the motion brings before the Court is one concerning whether there exists newly discovered evidence, and if so, whether it would probably result in an acquittal had it been introduced at trial, and that is the issue on which the Court should focus.

i. Because the Statements Are Not Admissible They Could Not Affect the Verdict

Valentine's contention that Spain's whereabouts were concealed from Valentine's counsel during the first trial would have no affect on the outcome of the trial in this case because Spain's statements regarding his whereabouts during the first trial are inadmissible. *See Jones,* 709 So. 2d at 521 ("the trial court should initially consider whether the [new] evidence would have been admissible at trial or whether there would have been any evidentiary

bars to its admissibility").

Because Spain's statements do not tend to prove or disprove a material fact, they are irrelevant. *See* § 90.401, *Fla. Stat.* ("Relevant evidence is evidence tending to prove or disprove a material fact."). Spain's statement about his whereabouts at the time of the first trial neither tend to prove nor disprove any fact related to the elements of the crimes charged against Valentine. *See Castanon v. State*, 162 So. 3d 52, 54 (Fla. 4th DCA 2014) ("In determining relevance, we look to the elements of the crime charged and whether the evidence tends to prove or disprove a material fact.").

No matter how nefarious Valentine suggests are the circumstances surrounding Spain staying at a hotel and being paid some fee for his time while on witness stand-by for the first trial, he has not demonstrated any basis for admissible testimony regarding the statements.

ii. Because Spain's Testimony About the Other Person He Saw Was Not Introduced at His Trial, The Court Should Not Consider It

However, even if the Court is uncertain whether Spain's statements about his hotel stay could not have been previously discovered with diligence and may be admissible, his statements

about the other person he saw when he discovered Romero should not be considered alongside these statements in the Court's weighing whether a new trial probably would result in an acquittal.

In *Jones*, the Court pointed out that at a hearing, the trial judge "should consider all newly discovered evidence which would be admissible and determine whether such evidence, had it been introduced at the trial, would have probably resulted in an acquittal. In reaching this conclusion, the judge will necessarily have to 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) (emphasis added).

For all the discussion in his brief regarding the statement in Spain's affidavit about the other man he saw or that hearsay evidence regarding the testimony about it was introduced at his first and second trials, none of it was introduced in the trial in *this* case. Therefore, the only additional testimony that may *potentially* be considered in determining whether Valentine would probably be acquitted is Spain's testimony about staying at the hotel.

iii. The Evidence of Valentine's Guilt is Overwhelming

Of course, even if Spain's statements about the circumstances

surrounding him being at the hotel were introduced, it ultimately makes no difference because the evidence in the case overwhelmingly proves Valentine's guilt of the crimes.

Initially, Romero immediately informed the police who rescued her that her estranged husband, Valentine, was the individual who both killed Porche and kidnapped and shot her. Valentine's attempt to question the credibility of her identification of him as their assailant because she remains legally married to Valentine and the potential heir to his property is nothing short of outlandish.

Valentine's suggestion that Romero falsely identified Valentine as the killer due to such monetary considerations conveniently and completely ignores that Romero's identification of Valentine as the murderer is substantially corroborated by other evidence introduced at trial. This includes nothing less than his confession to a trusted friend, threatening phone calls he made to Romero that she recorded at the request of the police that include her identifying him as the killer, as well as the similarity between a motor vehicle he was using in New Orleans and one seen by his neighbor at the victims' home the day of the murder, and subsequent travel arrangements he made under false names that he paid for in cash.

Nancy Cioll testified that Valentine confessed to her about the shootings about two weeks after she learned of Porche's murder. Valentine showed up at the travel agency she owned with her mother in New Orleans. She spoke to him after her mother, Louise Soab, contacted her at her restaurant when Valentine arrived at the travel agency. After Cioll and Valentine were alone in the restaurant, he informed her that he shot both Porche and Romero and demonstrated to Cioll how he did it. She further testified that Valentine previously informed her that he was looking for his and Romero's daughter, Giovana, with whom Romero and Porche had left to go to New Orleans, and that when he found them, he was going to harm them. Finally, Cioll testified that when Valentine showed up that day, he arrived in a Ford Bronco. She described the Bronco as maroon, gray, and black. (DR2 V12:1355-63).

Cioll's description of the Bronco is similar to one provided by Romero's neighbor, James Dillon, of an unfamiliar Bronco he saw parked on their block between 1 and 3 p.m. the day of the murder. Dillon stated that three times that day he noticed a faded red and white Ford Bronco parked in either different locations or different directions. He noted that the white had faded and appeared gray. He

also noticed two men inside the vehicle. (DR2 V10:1071-74).

In addition, there were multiple threatening phone calls Valentine made to Romero after Porche's murder that the police instructed her to record that both corroborate his role as the murderer and his having been present to see items in her home and what she wore.

> "Livia?"
> "Yes.
> "How are you?
> "Here I am!
> "Yes, I know where you are. Look, remember what I told you?
> "I don't know, your said so much . . .
> " . . . and you told me to let you live, and for you not to do what you are doing, okay?
> "What am I doing?
> "What are you doing?
> "What are you doing . . . Okay . . .
> "Living! Terance, I'm not . . .
> "Ah?
> "I'm not alive because you allowed me to live . . . I'm alive because . . .
> "You are wrong, motherfucker . . . so what the hell you are talking about? You're tell . . . you are trying to tell me I couldn't kill you?
> "Terance . . .
> "Are you trying to tell me that?
> "I'm not saying you couldn't kill me . . . I'm just saying you didn't . . .

(DR2 V9:797-98).

Valentine repeatedly demanded that Romero make

arrangements to return their daughter to him and then threatened to kill Romero's family if she did not cooperate:

> "Well, okay, now let's talk about Giovana, what happens if she doesn't want to leave?
> "She will tell me.
> "And if she doesn't want to leave, what happens?
> "She will tell me.
> "All right. And what happened if she doesn't want to leave?
> "I will blow up your family.

(DR2 V9:823).

> "Listen, listen, if you . . . if Giovana doesn't want to go with you, are you going to kill my family?
> "Yes!

(DR2 V9:824)

> "Okay, I'm going to give it to you this way, and this is plain and straight . . . Either you keep me in contact with my daughter, or I keep burying your people.
> "Well . . . eh . . . can go ahead . . .
> "(VO).
> "And next week, and next week, before you leave from there and going to bury someone for you. I'm going to prove to you that I'm not playing around.
> "No, I know that, you already killed the best thing that ever happened to me . . .
> "(VO).
> "Now, now, I'm telling you, and what's more, it's not going to be a shooting, I'm going to make them pay really ugly, okay.
> "Okay.
> "What's more, I'm going to cut them open, so that you can see that with . . . with . . . you already know that I don't play around.

"(VO).

"No, I know that, I know you already killed the best thing that happened to me, so and you try to kill me, and you tried to leave my baby girl alone, and that you gonna go back to the house and get Giovana and leave the baby girl alone, I know all of that! So, I . . . all I'm telling you is . . . you . . . you . . . I'm not going to be in contact with my family. You are going to be doing all of that and is not gonna come to anything because you already killed the best thing that happened to me . . .

"(Laughter).

(DR2 V9:877-878).

"That's why I gave you a scare, so that you can see what is all about . . .

"(VO).

"Oh, that was a scare! That was just a scare!

(DR2 V9:879).

"Look, no matter what I tell you, I'm going to tell you this, you are the biggest coward I ever met, you have never been able to confront a man, every time you did you lost a fight, and when you ever had a man . . . you shot him in the back . . .

"(Laughter).

"That's the first thing you did to Ferd. Because you knew you wouldn't give him a chance.

"(Laughter).

". . . and you just did that, so that he, he wouldn't have a chance against you . . .

"(Laughter)

" . . . because if . . . you knew that if he would have had lit . . . a little bit of a chance, you would have been in jail now!

(DR2 V9:882).

" . . . you look like shit . . . I saw, I saw . . . and you had my furniture . . .

"Oh yes, yes . . .

". . . . (U) . . . . . and all you had was about half pint of booze.

"Yeah.

"And the clothes you had were the same fucking clothes I bought you . . . . . (U).

• • •

". . . . . (U) . . . . . also, you are driving the truck that you stole from . . . (U).

(DR2 V9:889).

In addition, in one of the taped conversations, Valentine confirmed how much trust he placed in Cioll, when he demanded that Romero turn their daughter, Giovanna, over to Cioll:

"Bullshit! If you believe you are going to set me up, that's, that's bullshit, okay, because she is going to go to Nancy . . . . . (U).

(DR2 V9:825).

BY MRS. COX: Now, during that phone conversation, he makes reference to your giving Giovana to Nancy. Do you know who he's talking about?

A. Yes.

Q. Who is he talking about?

MR. UNTERBERGER: I'll object, Your Honor, the basis for that. How does she know who he is talking about?

THE COURT: Overruled.

BY MRS. COX:

Q. Who is he talking about?

A. A common friend of hours. (sic)

Q. And what is her name?

A. Nancy Cioll.

Q. And where does she live?
A: New Orleans.

(DR2 V9:833).

Finally, Cioll's mother, Louise Soab, testified about Valentine using various false names to make, through the agency she and Cioll owned, subsequent travel arrangements to enter and leave the United States and leave and return to Costa Rica, picking up the tickets in person at the agency, and paying for them in cash. (DR2 V9:539-552).

d. Even if Spain's Statements About the Other Man He Saw Were Introduced, the Verdict Would Not Probably Be an Acquittal

Even should the Court conclude that Spain's testimony about the other man he saw should be evaluated for its impact on the trial verdict, the result would be no different because (1) there is no evidence that the unknown man is involved in the crimes, (2) if he was somehow involved, his involvement is not inconsistent with Valentine's involvement, and (3) there remains overwhelming evidence of Valentine's guilt based on the evidence presented above.

i. *The Man Seen by Spain May Not Be Involved in the Crimes and He Might Not be White*

One of the noteworthy things about Spain's affidavit is his

explanation why he went to the precise location in the pit area where he spotted Romero. According to paragraphs 2 and 4 of the affidavit, Spain states that he was going to practice motorcross at a field and explains: "I went to the pit area *where people would practice shooting* to let them know I was going to be riding my bike in the area." (PCR:205) (emphasis added). In addition, although he "heard two shots" he never states he saw this person shoot at him, holding a gun, or even holding anything. (PCR:205-07). Therefore, it is unclear whether the shots he *heard* fired and *believes* were fired at him were, in fact, intentionally fired at him or fired by the person he spotted.

In addition, although Spain identifies the man as white, his statement is far from conclusive. At the time, Spain was wearing all of his gear, including a helmet and goggles. In fact, he describes the goggles as "dark" and admits that the setting sun was in his face. He further mentions that the person he saw was *40-50 yards away.* (PCR:206) (although the hearsay testimony introduced in the second trial states Spain informed the detective that the man was *100 yards* away) (DR1 V8:1054-55).

Because it is unclear whether the person Spain spotted purposefully shot at Spain, there is serious reason to question

whether the man is in any way involved in the crimes. Furthermore, if he is involved, it is unclear whether he is white, and if so, whether that matters.

ii. Valentine Told Romero There Was a Second Man Helping Him Who She Never Saw and Whose Race is Unknown

Furthermore, even if one assumes that this unknown person is white *and* involved in the crimes, it certainly does not eliminate Valentine as the person who kidnapped and shot her and murdered Porche.

Valentine's contention that he cannot be involved in the crimes simply because Spain was shot at by an unknown white man 40-50 yards (or 100 yards) away from the location where Spain spotted Livia Romero, is nonsense. Merely because both he and the other individual observed by Romero prior to her being blindfolded, and only known as "John," could not be mistaken for white does not eliminate the possibility that a third man involved was.

Again, Valentine conveniently ignores facts that are in evidence in the case. Romero testified that Valentine informed her that he had *two* different men assisting him, although she never saw the second one. (DR2 V7:531-32). There is no testimony about this person's race,

where he was, or what he did. If indeed the person seen by Spain was involved in the shootings, his involvement is not inconsistent with Valentine's involvement.

Therefore, even if the jury heard testimony about a man seen by Spain, who the jury concluded was white and involved in the shootings, it is not probable that the testimony would have created a reasonable doubt in the minds of the jurors as to Valentine's guilt. At most, the evidence linking this other individual to the murder suggests that he might have participated in the shooting along with Valentine because this evidence does not weaken the case against Valentine so as to give rise to a reasonable doubt as to his culpability. *See Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996) ("Assuming arguendo that the jury would have believed these witnesses had they testified at trial, their testimony merely buttresses evidence presented at trial linking [an additional party] to the murder.").

2. Initial Postconviction Counsel's Alleged Ineffectiveness Does Not Excuse the Untimeliness of the Motion Because the Claim is Not Cognizable in State Court

Valentine additionally argues that the postconviction court wrongly rejected his alternative argument that the motion was timely

due to the ineffective assistance of his initial postconviction counsel. He states that in his initial postconviction hearing, his claim before the court involved trial counsel's ineffectiveness for failing to locate and present Spain's testimony. However, without explanation, his initial postconviction counsel failed to present Spain's testimony, and the only evidence presented at the hearing regarding Spain was Valentine's trial counsel's testimony that he, also without further explanation, was unable to locate Spain before trial. (Brief at 22-23).

However, the Court "has repeatedly held that claims of ineffective assistance of postconviction counsel are not cognizable" in state court. *Howell v. State*, 109 So. 3d 763, 774 (Fla. 2013); *See also Gore v. State,* 24 So. 3d 1, 16 (Fla. 2009); *Kokal v. State,* 901 So. 2d 766, 777 (Fla. 2005); *Foster v. State,* 810 So. 2d 910, 917 (Fla. 2002); *King v. State,* 808 So. 2d 1237, 1245 (Fla. 2002); *Waterhouse v. State,* 792 So. 2d 1176, 1193 (Fla. 2001); *Lambrix v. State,* 698 So. 2d 247, 248 (Fla.1996).

Valentine cites in his motion *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v Thaler*, 569 U.S. 413 (2013) for support of the proposition that the newly discovered evidence claim is timely despite the delay in its filing because the delay is due to the ineffectiveness

of his postconviction counsel. However, Valentine's reliance on these cases is misplaced.

Martinez created a limited equitable window allowing a petitioner in a *federal habeas corpus proceeding* to obtain review of ineffective assistance of *trial counsel claims* that would otherwise be defaulted. The limited scope of review provided for by *Martinez* is expressly limited to ineffective trial counsel claims, and defaulted claims directed at either postconviction or appellate counsel continue to be barred even from federal habeas review. *See e.g. Coleman v. Thompson*, 501 U.S. 722 (1991) and *Davila v. Davis*, 137 S. Ct. 2058 (2017).

As a result, this Court on multiple occasions has pointed out that *Martinez* does not apply to state court proceedings. *See Gore v. State,* 91 So. 3d 769, 777–78 (Fla.), *cert. denied***,** 566 U.S. 930 (2012) *("Martinez* is directed toward federal habeas proceedings and is designed and intended to address issues that arise in that context."); *Howell v. State*, 109 So. 3d 763, 773–774 (Fla. 2013) ("we have already rejected the claim that *Martinez* can be used in state proceedings"). *See also Jimenez v. State*, 153 So. 3d 906 (Fla. 2014). *citing Howell v. State,* 109 So. 3d 763, 774 (Fla. 2013); *Zakrzewski v.*

State, 147 So. 3d 531 (Fla. 2014) (affirming circuit court's summary denial of a successive motion for postconviction relief because "[n]either *Trevino v. Thaler,* 133 S. Ct. 1911 (2013), nor *Martinez v. Ryan,* 132 S. Ct. 1309 (2012), grants Florida criminal defendants the right to challenge successive state postconviction proceedings based upon a claim of ineffective assistance of initial collateral counsel.").

Therefore, any alleged deficiency by his postconviction counsel Valentine blames for his failure to bring this claim within one year of the time that with diligence it should have been discovered, does not excuse his failure to do so because such excuses are not cognizable in this state court proceeding.

B. VALENTINE HAS NEITHER A *GIGLIO* CLAIM NOR A *BRADY* CLAIM BECAUSE NO FALSE TESTIMONY WAS INTRODUCED AT TRIAL, NO EVIDENCE FAVORABLE TO THE DEFENSE WAS WITHHELD FROM HIM AND THERE IS NO REASONABLE PROBABILITY OF A DIFFERENT OUTCOME BASED ON THE "EVIDENCE" HE CLAIMS WAS WITHHELD

To establish a *Giglio* claim, a defendant must show (1) false testimony was introduced, (2) the prosecutor knew the testimony was false, and (3) the statement was material. *Guzman v. State*, 868 So. 2d 498, 505 (Fla. 2003). However, the basis for Valentine's alleged *Giglio* claim is a mystery because not only was there no false

testimony introduced at his trial, Valentine fails to even allege false testimony was introduced. As the postconviction court noted:

> Although the Court would ordinarily dismiss such allegations for Defendant to set forth a sufficient claim, the Court finds Defendant cannot do so in good faith here as his allegations do not involve false testimony against Defendant.

(PCR:252). *See Mordenti v. State*, 894 So. 2d 161, 175 (Fla. 2004) ("A *Giglio* claim is based on the prosecutor's knowing presentation at trial of false testimony against the defendant.").

Similarly, there is no legal basis for Valentine's claim that the State committed any *Brady* violation. To establish a *Brady* violation, a defendant must demonstrate (1) there was identifiable evidence which was favorable to the defense, (2) the State suppressed the identified evidence, either willfully or inadvertently; and (3) the defendant was prejudiced by the suppression of the evidence. *Merck v. State*, 260 So. 3d 184, 194 (Fla. 2018).

It appears from the discussion in Valentine's brief that he claims that the State withheld from him testimony regarding both what Spain witnessed at the pit and Spain's whereabouts at the time of his first trial.

As discussed above, evidence about the events Spain witnessed

were never withheld from Valentine. In fact, this evidence was actually introduced in both his first and second trials through the cross-examination of Detective Fernandez. Moreover, there is no evidence or allegation that the State prevented Valentine from locating Spain and calling him as a witness in the trial that is the subject of his present motion and appeal.

To the extent that Valentine claims the State "secreted" Spain away during the first trial, as Valentine characterizes Spain being kept at a hotel on standby for the trial, Valentine is not being held pursuant to judgment or sentence on his first trial, it is not material evidence in the case, and would not lead to a reasonable probability of a different outcome in his last trial.

Valentine complains that the State deprived him of calling Spain as a witness in his *first* trial. Even assuming for the sake of argument that were true, Valentine is not being held on a conviction that arose out of his first trial. Valentine is held pursuant to a conviction on his *third* trial.

Nor would the act of preventing Spain from testifying in the first trial, if true, be relevant evidence favorable to Valentine that the State withheld. As previously argued, evidence must be relevant to be

admissible, and relevancy is dependent on whether the evidence sought to be introduced makes proof of an element of the crime more or less likely. Even if one adopts Valentine's mischaracterization of Spain's standby status, the State's act of "secreting" him away in his first trial would not be admissible in his last trial because it does not make proof of any element of his crime more or less likely.

Finally, even if admissible, introduction of this "evidence" would not lead to a reasonable probability of a different outcome in this trial. Without repeating the details of the earlier discussion, the evidence strongly demonstrates Valentine's guilt in this case: the surviving victim immediately identified him as the shooter, he confessed to a trusted friend who also saw him using a car that matched the description of a car seen at the victims' home the day of the murder, and he obtained tickets for flights in and out of the United States and to and from Costa Rica under several false names and paid for them in cash.

Therefore, the postconviction court correctly concluded that "in the light of the strength of the evidence adduced at trial . . . [Valentine] has failed to demonstrate he was prejudiced." (PCR:253).

CONCLUSION

The State of Florida respectfully requests this Court affirm the lower court's Order Denying Second Successive 3.851 Motion to Vacate and Set Aside the Judgment of Convictions and Sentence of Death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of March, 2021, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of

electronic filing to the following: Marie-Louise Samuels Parmer and Maria DeLiberato, Parmer DeLiberato, P.A., Post Office Box 18988, Tampa, Florida 33679-8988, **marie@parmerdeliberato.com** and **maria@parmerdeliberato.com**

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CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style, and the word count is 7,092 words in compliance with Fla. R. App. P. 9.045.

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