IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1434

LOWER COURT NO. CF01-03262A-XX

NELSON SERRANO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.
_____/

**APPEAL FROM THE CIRCUIT COURT**
**IN AND FOR POLK COUNTY**
**STATE OF FLORIDA**

# REPLY BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

The Appellant, Mr. Serrano, will respond to Issues I to VII of the Answer Brief. He will also continue to rely upon the arguments and citations in the Initial Brief for these seven and the remaining issues. Citations to the record on appeal will remain consistent with the Initial Brief.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE WAS COMPLETELY CIRCUMSTANTIAL AND FAILED TO PROVE IDENTITY.

The standard of review of the sufficiency of the evidence as described by the State omits an important point of law: Where, as in this case, a conviction is based wholly upon circumstantial evidence, that evidence must lead "to *a reasonable and moral certainty* that the accused and no one else committed the offense charged. It is not sufficient that the facts create a strong probability of and be consistent with guilt. They must be inconsistent with innocence." *Lindsey v. State*, 14 So.3d 211, 215 (Fla. 2009)(emphasis added; citations omitted). "Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, is not sufficient to sustain conviction." *Id.* (citations omitted). Although the State proved that George

Gonsalves, Frank Dosso and George and Diane Patisso were killed, the State did not prove to a reasonable and moral certainty that Mr. Serrano was the perpetrator of those crimes. Indeed, there was not a scintilla of objective evidence that placed Mr. Serrano at the crime scene.[1]

There was plenty of evidence that the motive for the shootings was robbery. *See* Initial Brief, pages 13-14. A detective in this case testified that he interviewed an Erie/Garment employee about possible suspects in this case and she told him about two Hispanic men. Defense counsel questioned the detective about the fact that this employee told him that these men came to Erie/Garment on the day of the murders seeking employment and their behavior was weird. (T3815-16, 6229-30) The detective further testified that a man who worked near Erie/Garment reported that he saw an African-American male and a blue vehicle at Erie/Garment at the time of the murders and heard a gunshot. (T3811-13) The detective additionally testified that, several times on the day of the murders, a Ford Thunderbird driven by a man who was 30 to 35 years old drove slowly past Erie and a police officer tried to stop the vehicle but it got away. (T3814)

Phil Dosso claimed that Mr. Serrano never paid him or Gonsalves the $75,000 he orally agreed to pay them in the mid-80's and this caused friction

[1] Mr. Serrano has extensively described the evidence in his Initial Brief, pages 2-31, 36-40 and, to the extent that the State's Answer Brief conflicts with

between the partners. However, in reality, this amount of money was incidental compared to the large revenues that Mr. Serrano brought into Erie/Garment and the salaries the partners earned. *See* Initial Brief, pages 5-6.

Although Mr. Serrano may have had arguments with Gonsalves, he (Gonsalves) frequently got into arguments with lots of Erie/Garment employees because Gonsalves was obnoxious and often spoke to many people in a mean manner. (T4228-30) According to Phil Dosso, sometime around 1995 or 1996, Mr. Serrano told Gonsalves that he gets so mad at him that he feels like killing him. However, Dosso and Gonsalves obviously did not view this statement as a serious threat because they continued to work with Mr. Serrano as their partner and the President of Garment *for at least one year afterwards*. (T3530)

With respect to the rental car rented by Alvaro Penaherrera on the day of the murders, Agent Ray testified that Mr. Serrano told him on the plane that he never drove it and it was rented for and driven by his girlfriend, Anna Gillian. (T5899-5900) Notably, Penaherrera testified that, in 1997, Mr. Serrano asked him to rent a car for him on two occasions because his girlfriend was coming to Orlando to visit him and his credit card statements came to his house and he did not want his wife to question him about it. (T4884-89, 5714-17) Penaherrera also testified that he had heard from his family that Mr. Serrano was a "womanizer" who was

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that description, we submit that Mr. Serrano's description is the most accurate.

"always cheating" on his wife. (T5800-01) Law enforcement officers conducted a thorough forensic search of both of those rental cars and did not find a scintilla of evidence linking Mr. Serrano to the murders. (T5863, 5925, 5928-29)

In many other respects, Penaherrera's trial testimony about the rental cars differed from his pre-trial testimony. Penaherrera admitted that he was afraid of being prosecuted in this case since the police had accused him of being involved in the murders, he lied under oath and to the police at least eight to ten times about this case and he knew that there was a big reward in this case for information leading to the arrest and convictions of the perpetrators. (T5775-78, 5783-89, 5806, 5817-23, 5841, 5945)

It was the State's theory that Mr. Serrano purchased the December 3, 1997 round trip plane tickets of Juan Agacio and John White. However, this was just a theory. Notably, Mr. Serrano would have had to have driven to the Tampa International Airport to purchase John White's Delta Airlines ticket on November 23, 1997 at 3:18 p.m. and then driven all the way to the Orlando International Airport to purchase Juan Agacio's Delta Airlines ticket at 5:13 p.m. that same day when both tickets could have been purchased at the same airport. (T5029-42, 5057-58, EV748-52, 773-77) That simply makes no sense.[2]

[2] It is also important to note that the State's witness who testified about how long it took for her to drive from Erie/Garment to the Tampa International

The State notes that the prosecution introduced photographs found in a search of Mr. Serrano's residence indicating that two passport-sized photographs had been removed from a strip of photographs. This proves nothing because Mr. Serrano had two lawfully issued passports, an American and an Ecuadorian passport. (T5927)

Significantly, the State ignores material *exculpatory* facts concerning the fingerprint on the December 3, 1997 Orlando parking garage ticket that "coincidentally" matched Mr. Serrano's right index finger, the same finger for the fingerprint on the November 23, 1997 Orlando parking garage ticket. These facts are set forth in detail in Mr. Serrano's Initial Brief at 27-28 and were cogently explained by defense counsel during closing argument. (T6090-94, 6233-37)

It was undisputed that Mr. Serrano was a gun collector whose hobby was target shooting. (T4205-06, 4214, 4645-49) During the investigation of the

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Airport conceded that she did not drive this distance during rush hour, as Mr. Serrano would have had to have done, and that Tampa has a two-hour rush hour. (T4839)

The State asserts that "a current Google internet search of [the address for La Quinta - Atlanta Airport hotel] reveals that the hotel is now an Econo Lodge and is advertised as being exactly one mile from the airport." State's Brief at 18 n.18. This assertion is improper and must be disregarded because it relies upon matters outside the record on appeal herein. However, if the Court relies on it, we note that a current internet search utilizing Google maps with directions from ATL (the Atlanta airport) to 4874 Old National Hwy, College Park, GA 30337 (the hotel address) shows that the highway route, which is the easiest route to the hotel, is 4.6 miles and a second route is 3.1 miles. The State is relying on the advertised

murders, law enforcement officers seized firearms from Mr. Serrano's gun collection and firearms permits from Mr. Serrano's house but ultimately determined through testing and research that *none of them were linked in any way to the murders*. Indeed, there was nothing incriminating found in Mr. Serrano's house. (T5113-38, 5148, 5926)

It makes no sense that Mr. Serrano would forget to pack something as valuable as a firearm when he left Erie/Garment and, six months later, after shooting three people in his former office, he would stand on a chair to get it from the ceiling without leaving even a trace of blood evidence on the chair, especially when several police officers testified that there was so much blood in that office that it was very difficult to avoid coming into contact with it. (T2903, 3017-18) Furthermore, both David Catalan and a computer technician for Erie/Garment's computers testified that Mr. Serrano kept a *revolver* in a box in his office but the guns used to commit the murders were semi-automatic guns - not revolvers. (T4074-75, 5133-34, 5937-38) It was undisputed that the class characteristics of the shoe found on the chair could be consistent with as many as 100 million or more shoes. (T5303)

The State argues that Mr. Serrano moved to Ecuador because he was concerned about being prosecuted in this case. However, Mr. Serrano never fled.

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distance of the hotel from the airport at www.hotelplanner.com.

Mr. Serrano traveled to Ecuador, where he has family, six times after the murders and always returned to his home in Lakeland. In August 2000, almost three years after the murders, Mr. Serrano retired to Ecuador. (T4114, 4180, 4300-01, 5930, 5936) The lead investigator, FDLE Agent Tommy Ray conceded that Mr. Serrano retired to Ecuador and did not flee. Indeed, he even wrote that in a report. (T 5930, 5936)

The State notes that Mr. Serrano did not use his cell phone during the time that the prosecution alleged he committed the crimes. However, he told the police that, at that time, he was resting in his hotel room because he had a severe migraine. Significantly, a hotel's computer that keeps records of guests' phone calls was not working that day so Mr. Serrano may have made outgoing calls using the hotel phone that day and those calls would not have been recorded by the hotel. (T4622-23)

The State's assertion that "a person matching Appellant's description was seen standing off the side of the road near Erie's building" is false. *See* Answer Brief at 16. Purvis never identified Mr. Serrano as the person he saw or testified that Mr. Serrano matched the description of the person he saw. Furthermore, Purvis's description of the man he saw does not match Mr. Serrano who was 59-years-old at the time - definitely not the "young person" between the ages of 25

and 30 that was described by Purvis. (T 3400, 3422-23) Moreover, Purvis saw this man between 5:50 and 6:15 p.m. which was *after* the murders occurred.

In short, for all of the foregoing reasons and those stated in Mr. Serrano's Initial Brief, it is pure speculation that Mr. Serrano killed George Gonsalves, Frank Dosso, and George and Diane Patisso. A conviction may not be based on guesswork, no matter how educated the guess or how strong the suspicion may be. *See e.g.*, *Frank v. State*, 163 So. 233, 121 Fla. 53, 55-56 (Fla. 1935).

## II. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS MR. SERRANO'S STATEMENT. THE ADMISSION OF THIS STATEMENT VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS' PROHIBITION AGAINST SELF-INCRIMINATION.

Mr. Serrano's statement to a law enforcement agent while in custody should have been suppressed for two reasons. First, an off-hand question to the agent which occurred after Mr. Serrano had invoked his *Miranda* rights did not evince a willingness and a desire for a generalized discussion about the crimes charged herein.[3] Second, the State failed to meet its heavy burden of proving that this off-hand question posed after Mr. Serrano had invoked his *Miranda* rights, coupled with the immediate interrogation by the police without any renewed warnings that followed, established that Mr. Serrano voluntarily, knowingly and intelligently waived those rights.

The State claims that this issue is not controlled by *Oregon v. Bradshaw,* 462 U.S. 1039 (1983) because *Bradshaw* involved a suspect's invocation of his right to *counsel* and this case involves Mr. Serrano's invocation of his right to silence. This claim fails. The State has not cited a single case that holds that *Bradshaw* only applies to cases involving an invocation of a defendant's right to

[3] *Miranda v. Arizona,* 384 U.S. 436 (1966).

counsel. Furthermore, this Court and other courts have held that *Bradshaw* is applicable to cases involving an invocation of a defendant's right to silence.

More specifically, in *Welch v. State*, 992 So.2d 206 (Fla. 2008), after the police read the defendant his *Miranda* rights, he invoked his right to *silence* by stating that he did not wish to talk anymore. Subsequently, the defendant initiated further conversation with the police which he later contended should have been suppressed. This Court held that the issue of whether suppression is required where a defendant has invoked his right to *silence* and then initiated further conversation is controlled by *Bradshaw*. *Welch*, 992 So.2d at 215 (finding confession "admissible under *Bradshaw*").

Furthermore, in *Christopher v. State*, 824 F.2d 836, 844 (11th Cir. 1987), the Eleventh Circuit squarely confronted the question of whether *Bradshaw* applies to cases involving a defendant's invocation of his right to silence and answered that question in the affirmative. There, the Eleventh Circuit acknowledged that *Bradshaw* is a right to counsel case. The Eleventh Circuit, however, expressly held that the two-step test of *Bradshaw* governs the admissibility of statements made after a suspect has invoked his right to *silence* but later initiates a conversation which involves questioning by the police.

In evaluating the admissibility of Mr. Serrano's statements, both the State and the lower court have erroneously relied on the "totality of the circumstances"

test set forth in *Globe v. State*, 877 So.2d 663 (Fla. 2004) and *State v. Pitts*, 936 So.2d 1111 (Fla. 2d DCA 2006) rather than applying the correct two-step *Bradshaw* test. Indeed, the State ignores that *Globe's* "totality of the circumstances" test only applies where the *police* - not the accused - reinitiate the dialogue. *E.g., State v. Hunt*, 14 So.3d 1035 (Fla. 2d DCA 2009). Where, as here, an accused has invoked his *Miranda* rights and the *accused* then asks a law enforcement agent a question, the trial court must follow the two-step *Bradshaw* test. *Id*; *Bradshaw, supra*; *Welch, supra*.

The State asserts that Mr. Serrano reinitiated contact with Agent Ray as if this fact alone makes the subsequent dialogue admissible. However, an accused's re-initiation of contact with police alone does not make a dialogue that follows admissible. *E.g., Bradshaw*, 462 U.S. at 1045. Rather, it is well-established that such a re-initiation of contact with police must evince a "willingness and a desire for a generalized discussion about the investigation" in order for any subsequent discussion to be admissible. *Bradshaw*, 462 U.S. at 1045-46. *Accord Welch*, 992 So.2d at 214 (2008).

The State ignores that, at the time that Mr. Serrano was arrested by Ecuadorian police and placed on the airplane between Agent Ray and another agent, he was being deported - not extradited - after having just been arrested by the Ecuadorian police the previous day. (T4370, 4384, 4738-39) Mr. Serrano's

off-hand question, "How much did you pay the Ecuadorian police to do this to me?" posed on the plane just after the off-duty Ecuadorian police had arrested and forcibly removed him without following the usual extradition procedures was a natural, if not inevitable, query which would occur to one in his situation. The question did not refer to the crimes charged herein and did not evince a willingness and a desire to discuss his case in depth after having previously invoked his *Miranda* rights.

The State has not cited any case where such a question or any similar type of question was held to have evinced a willingness and a desire for a generalized discussion about the criminal investigation. Mr. Serrano's question is similar to the natural off-hand questions which were held not to evince a willingness and a desire for a generalized discussion about the investigation by the Courts in *People v. Sims*, 5 Cal.4th 405, 441-44 (Cal. 1993), *United States v. Montgomery*, 714 F.2d 201 (1st Cir. 1983) and *People v. Olivera*, 647 N.E.2d 926 (1995), all of which were cited in Mr. Serrano's initial brief but were ignored by the State. In *Sims*, 5 Cal.4th at 444, where a defendant invoked his *Miranda* rights but then asked a question relating to extradition, the Court noted:

> If, after a suspect has refused to waive his or her right to have counsel present during questioning, a limited inquiry such as that made by defendant regarding extradition were deemed to open the door to interrogation, the opportunities for officers to avoid the constraint of the *Miranda* rules will be great.

Furthermore, the prosecution failed to meet its heavy burden of proving that he voluntarily, knowingly and intelligently waived his *Miranda* rights. In addressing this issue, the State asserts that, after Mr. Serrano invoked his *Miranda* rights and asked the limited question about how much money was paid to the off-duty Ecuadorian police to remove him from Ecuador without following extradition procedures, Mr. Serrano then "talked freely to Officer Ray...." Answer Brief at 54. However, this is a misstatement of what occurred.

In fact, the totality of the circumstances reveals (1) a defendant who refused to waive his *Miranda* rights; (2) after sitting in custody on a plane between two agents for an hour and a half, he asked an agent how much he paid the Ecuadorian police to forcibly remove him from Ecuador; (3) the agent said that the Ecuadorian police were paid nothing; (4) the agent then *immediately* initiated questioning by asking Mr. Serrano if he had been planning on attending the civil hearing on the lawsuit between Mr. Serrano and the other Erie/Garment partners that was set in the United States 18 days from then, a question that was non-responsive to Mr. Serrano's limited inquiry, served no legitimate purpose incident to his arrest or custody and which the agent should have known was likely to lead to an incriminating response because, if he answered "no," Mr. Serrano would appear to be willing to jeopardize his position in that lawsuit rather than come to the United

States where he might be arrested in this case; (5) this immediate initiation of questioning by the agent was not preceded by the agent re-advising Mr. Serrano of his *Miranda* rights or making any attempt whatsoever to ensure that Mr. Serrano wanted to waive those rights, even though Mr. Serrano plainly had invoked those rights; (6) after asking Mr. Serrano about his plans about attending the hearing, the agent then continued to interrogate Mr. Serrano and next asked him why he had deposited two Garment checks totaling about $247,000.00 into a new bank account rather than depositing them into Garment's established bank account, a question that plainly was designed to elicit incriminating information pertaining to this case since Mr. Serrano at one point was arrested in connection with the deposit of those two checks although those charges were later nolle prosed (T2636-85); (7) thereafter Mr. Serrano and Agent Ray "engaged in a conversation of [Ray] asking him questions [that related to this criminal case] for quite some period of time" (T1349), at least 30 minutes (T1342) Thus, although Mr. Serrano had invoked his *Miranda* rights, Agent Ray immediately seized upon Mr. Serrano's off-hand question as an "open Sesame" to interrogate him for 30 minutes with questions he knew were reasonably likely to elicit an incriminating response without renewing *Miranda* warnings or making any effort to determine that Mr. Serrano wanted to waive his *Miranda* rights.

The State offers no case law to support its contention that these circumstances prove that Mr. Serrano voluntarily, knowingly and intelligently waived his *Miranda* rights. Furthermore, the State ignores the cases cited in Appellant's Initial Brief, pages 48-49, which show that, where this issue has been considered and courts have held that a valid waiver of invoked *Miranda* rights occurred, courts have consistently relied upon the fact that there was either a re-advisement of *Miranda* rights or something said or done by the police to clarify that the defendant understood and sought to waive his rights before the police began the second interview.

The admission of Mr. Serrano's statements was not harmless error. During closing arguments, the prosecution argued at the trial that Mr. Serrano must have taken a .22 caliber gun to Erie/Garment and, since a .22 caliber gun can only hold eleven bullets and eleven .22 shell casings were found at the crime scene, he must have shot all eleven .22 caliber bullets and then unexpectedly had to use a .32 caliber gun that he had retrieved from the ceiling to shoot Diane Patisso. (T6151-54)[4] In arguing this theory, the prosecutor *twice* pointed out that Mr. Serrano told Agent Ray on the plane that he kept a gun in the ceiling of his office and explained to the jury that this statement by Mr. Serrano is the reason why the State presented

[4] Diane Patisso was shot with one .22 caliber bullet and one .32 caliber bullet.

evidence that the ceiling tile was slightly displaced with a chair underneath it. (T6150, 6169)

The State asserts that Mr. Serrano's statement to Agent Ray about keeping a gun in the ceiling was "cumulative" to the testimony of David Catalan. However, Catalan did not testify that Mr. Serrano kept a gun in the ceiling. Catalan only testified that he saw Mr. Serrano taking *papers* out of the ceiling - not a handgun. (T3221-25)

Notably, during the prosecutor's closing argument, he also argued that Mr. Serrano made an inconsistent statement because he told Alvaro Penaherrera that the rental car was for a Brazilian girlfriend but he told Agent Ray on the plane that the rental car was for a different girlfriend named Anna Gillian. The prosecutor further argued that Nelson Serrano must have been lying to Agent Ray about a girlfriend named Anna Gillian because he told Agent Ray that he had no way of contacting Anna Gillian. (T6166) In addition, the prosecutor mocked Mr. Serrano's statement to Agent Ray on the plane that he had a theory that Frank Dosso was connected to the Mafia and had hired a hit man to kill Gonzalves without meeting the hit man in person. (T6165-66)

Obviously the trial prosecutor must disagree with the Attorney General's dismissal of Mr. Serrano's statements to Agent Ray as being harmless when admitted, for otherwise the prosecutor could have agreed to the exclusion of those

statements and would not have relied on them so heavily during his closing argument. This is plainly not a case in which it can be said that the erroneously admitted statements of Mr. Serrano did not "contribute to his convictions." *See Rigterink v. State*, 2 So.3d 221, 255 (Fla. 2009)(quoting *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla. 1986)).

## III. THE CONVICTIONS AND DEATH SENTENCE OF MR. SERRANO VIOLATE HIS RIGHTS TO DUE PROCESS UNDER THE FEDERAL AND STATE CONSTITUTIONS BECAUSE FLORIDA LAW ENFORCEMENT OFFICIALS COMMITTED OUTRAGEOUS ACTS AND VIOLATED AN EXTRADITION TREATY WHEN THEY KIDNAPED HIM IN ECUADOR AND FORCIBLY BROUGHT HIM TO THE UNITED STATES.

The State contends that Mr. Serrano's motion to dismiss the indictment and divest the trial court of jurisdiction was untimely filed. But, it is well-established that "[l]ack of jurisdiction can be raised at any time." *Harrell v. State*, 721 So.2d 1185 (Fla. 5th DCA 1998), review dismissed, 728 So.2d 205 (Fla. 1998). *See also e.g., State v. Billie*, 497 So.2d 889, 890 (Fla. 2d DCA 1986); *Booker v. State*, 497 So.2d 957 (Fla. 1st DCA 1986); *Winter v. State*, 781 So.2d 1111, 1113 (Fla. 1st DCA 2001).

Contrary to the State's assertions, the record on appeal as cited in Mr. Serrano's Initial Brief, pages 52-65, affirmatively shows the following facts:

Agent Ray personally bribed *off-duty* Ecuadorian national police officers to take Mr. Serrano off the streets without notice and at gunpoint, hold him completely incommunicado without even the ability to speak to his attorney and keep him locked in an animal cage until he was flown to the United States the next day. As a result of the actions of American law enforcement officials, the Ecuadorian police chief who ordered Mr. Serrano's removal was falsely told that

Mr. Serrano was solely a United States citizen although he was also a citizen of Ecuador, a fact which would have precluded his forcible removal from Ecuador. Mr. Serrano had no hearing before a judicial authority, he had no lawyer, he had no notice, and was treated in a despicable and inhumane manner including being kept overnight in an animal cage. Mr. Serrano was physically abused and suffered bruises and abrasions. The Inter-American Commission on Human Rights of the Organization of American States, and the Ecuadorian Ombudsman who was *officially* directed by an Ecuadorian Congressional Resolution to conduct his investigation into the manner in which Mr. Serrano was removed from Ecuador found that Mr. Serrano was illegally seized, unlawfully deported in violation of the Extradition Treaty and his human rights were violated.[5] As a result of these illegal and unconstitutional actions by American law enforcement officials, Mr. Serrano was sentenced to death in this case, an act which would *never* have occurred if he had been tried in Ecuador where the death penalty is illegal.

The State does not deny that the United States-Ecuador Extradition Treaty is the *sole* means by which the United States is able to secure the presence of a fugitive, that this Treaty was not complied with in this case and that it prohibits the extradition of an Ecuadorian citizen such as Mr. Serrano to face the death penalty.

[5] In addition, the Attorney General of Ecuador officially condemned the illegal kidnaping of Mr. Serrano.

The State also does not deny that, under *United States v. Rauscheri*, 119 U.S. 407 (1886), *The Paguette Habana*, 175 U.S. 677 (1900), *Asakura v. Seattle*, 265 U.S. 332 (1924), and *Cook v. United States*, 288 U.S. 102, 111-118 (1933) discussed in Appellant's Initial Brief at 62-63, where the United States has agreed to limit its authority by Treaty, a violation of such a Treaty is the same as a violation of the Supreme Law of this land and may be set up as a defense to prosecution with the same effect as if such right was secured by an Act of Congress. Instead, the State argues in a nonsensical fashion that, although the United States agreed to limit its authority by entering into this Extradition Treaty and that Treaty states explicitly that it is the *sole* means by which the United States is able to secure the presence of a fugitive, the removal of Mr. Serrano to the United States without complying with this Treaty is not dispositive because the Extradition Treaty was not complied with. Accordingly, for all the foregoing reasons and those set forth in Mr. Serrano's Initial Brief, Mr. Serrano's convictions and sentence must be reversed and this case must be remanded with directions to dismiss the Indictment and return Mr. Serrano to Ecuador.

## IV. THE CUMULATIVE IMPACT OF THE PROSECUTOR'S REPEATED ACTS OF MISCONDUCT REQUIRES REVERSAL OF MR. SERRANO'S CONVICTIONS AND SENTENCE.

### The Prosecutor Improperly Commented On Mr. Serrano's Federal And State Right To Remain Silent.

The prosecutor elicited from Agent Ray that others who were suspects in this case (Francisco Serrano and Alvaro Penaherrera) repeatedly testified before the Grand Jury. The prosecutor then immediately asked Ray if Mr. Serrano had appeared before the Grand Jury. The State contends that, because the prosecutor's question about whether Mr. Serrano had appeared before the Grand Jury drew a defense objection and was not answered, it did not implicate Mr. Serrano's right to remain silent. However, the prosecutor's conduct in eliciting that other suspects agreed to testify before the Grand Jury and then immediately asking Agent Ray if Mr. Serrano testified before the Grand Jury knowing that Mr. Serrano had exercised his constitutional right not to testify before the Grand Jury and that this question would draw a defense objection clearly created a supposition that Mr. Serrano - unlike the suspects in this case - refused to testify before the Grand Jury so he must be guilty.

It is crystal clear that it is improper for a prosecutor to elicit that a defendant failed to testify before a Grand Jury. *Simpson v. State*, 418 So.2d 984 (Fla. 1982)

(reversing conviction because prosecutor elicited testimony concerning the defendant's failure to testify before a Grand Jury). Because this proposition is so clear, the prosecutor in this case obviously fully expected that his question would be objected to and no answer would be forthcoming but nevertheless asked the question to prejudice Mr. Serrano. Such conduct has been condemned as inexcusable. *Molina v. State*, 447 So.2d 253, 255-56 (Fla. 3d DCA 1983)(Pearson, J. concurring specially) (where prosecutor asked a question designed to bring forth an impermissible comment on the defendant's right to remain silent and the prosecutor had to have expected that his question would be objected to, the objection would be sustained, and no answer from the defendant would be forthcoming and then defended the propriety of asking the question by asserting that, since it was not answered, no error occurred, the "prosecutor's conduct was inexcusable"). The prosecutor's conduct when asking this question is "especially egregious" because this is "a death case, where both the prosecutors and the courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects." *Salazar v. State*, 991 So.2d 364, 383 (Fla. 2008)(citing to *Berger v. United States*, 295 U.S. 78, 88 (1935).

Accordingly, the prosecutor's improper question and his other comments on Mr. Serrano's right to silence discussed in Mr. Serrano's Initial Brief were plainly erroneous. *See e.g., State v. DiGuilio*, 491 So.2d 1129, 1135-36 (Fla. 1986)("any

comment which is fairly susceptible of being interpreted as a comment on silence will be treated as such"). Because the State cannot "show beyond a reasonable doubt that these specific comments did not contribute to the verdict," reversal is required. *Id*. at 1136.

**The Prosecutor Improperly Vouched For The Credibility Of Witnesses.**

The prosecutor improperly bolstered the testimony of its key witness, David Catalan, by intentionally eliciting that the prosecutor told Catalan that the most important thing he could do as a witness in this case was to tell the truth. (T3247-48) The prosecutor contends that this was not improper bolstering because there is nothing wrong with telling a witness to tell the truth. However, the issue raised herein is not that the prosecutor erred in telling Catalan to tell the truth. Rather, the issue is that the prosecutor erred in intentionally informing the jury that he (the prosecutor) told Catalan that the most important thing that he could do as a witness in this case was to tell the truth. The prosecutor additionally improperly bolstered the testimony of jailhouse snitch Leslie Todd Jones by eliciting from him that, if he was untruthful, his probation would be violated. (T5587)

Plainly, the prosecutor's questions to Catalan and Jones constituted improper bolstering. *See e.g., Gorby v. State*, 819 So.2d 664, 684 n. 34 (Fla. 2002)(noting that the trial judge properly sustained the defendant's objection to a prosecutor's

statement made when State witnesses were on the stand that the prosecutor had a rule for each witness and that he required each witness "to tell the truth"); *Tumblin v. State*, ___ So.3d ___, 2010 WL 652982 (Fla. 2010)(reversing defendant's murder conviction because police officer's testimony that he told a detective that he believed an accomplice would tell the truth improperly vouched for accomplice's truthfulness); *Cisneros v. State*, 678 So.2d 888 (Fla. 4th DCA 1996)(reversing conviction for "improper bolstering" where prosecutor argued to the jury that the testimony of a State witness should be believed because he would never have violated his sacred oath to tell the truth).

The error cannot be deemed harmless. Catalan was a key State witness who the prosecution relied upon to argue that Mr. Serrano kept a firearm in his office and had been seen moving a ceiling tile in his office. The prosecution theorized that this tile was moved by Mr. Serrano to retrieve a firearm from the ceiling that was used in the murders. Jones was likewise a critical State witness whose testimony the State relied upon heavily during closing argument. (T6111, 6145-49, 6165-66)

**The Prosecutor Improperly Elicited Testimony To Show Mr. Serrano's Lack of Remorse.**

The State claims that the prosecutor's question to State witness Detective Parker, "Did he [Mr. Serrano] ever cry [when he was interviewed the day after the

murders of four people he knew]" to which Parker responded, "No" was not improper. This claim is specious as shown by the fact that the State has not cited a single case in support of this claim. In addition, the State ignores that in a litany of cases this Court has held that a defendant's lack of remorse is inadmissible in a guilt or penalty phase of a capital case. *See Randolph v. State*, 562 So.2d 331, 337-38 (Fla. 1990); *Colina v. State*, 570 So.2d 929, 932 (Fla. 1990); *Robinson v. State*, 520 So.2d 1, 5-6 (Fla. 1988); *Pope v. State*, 441 So.2d 1073, 1077-78 (Fla. 1983).

Such testimony is so prejudicial that it requires the vacating of a death sentence although it is never mentioned during the prosecutor's argument. *Colina v. State*, 570 So.2d 929, 932 (Fla. 1990)(vacating the defendant's death sentence because the prosecutor erroneously elicited testimony regarding the defendant's lack of remorse). Notably, because this is a capital case, there is a danger that the jury considered this lack of remorse evidence when considering whether or not to impose the death sentence as well as in determining its verdict in this case. Accordingly, the State has failed to meet its burden of showing that this error was harmless beyond a reasonable doubt. *See DeGuilio*, 491 So.2d at 1138.

**The Prosecutor Improperly Made Comments And Elicited Evidence The Sole Relevance Of Which Was To Demonstrate Mr. Serrano's Alleged Bad Character.**

The prosecutor improperly and prejudicially stated during opening statements that, while Mr. Serrano was at Erie/Garment, he decided to "*take some money* owed to the two corporations and open up *his own* bank account," suggesting that Mr. Serrano stole money from Erie/Garment. The prosecutor also erroneously told the jurors during his opening statement that they would hear the testimony of the banker who helped Mr. Serrano open up this bank account that she knew something was not "right" because "[y]ou can't open corporate accounts by yourself." (T2635) At the trial, defense counsel explained that the opening of the new bank account by Mr. Serrano was investigated by law enforcement and deemed to be a legal and proper transaction. (T2657-59) Moreover, the State ignores that Courts have found such comments to be both improper and prejudicial. *See Murphy v. State*, 642 So.2d 646 (Fla. 4th DCA 1994)(error for prosecutor to elicit testimony from State lay witness that she thought "something illegal was going on"); *Somerville v. State*, 584 So.2d 200 (Fla. 1st DCA 1991)(prosecutor improperly elicited testimony of lay witness's opinion to prove the state of mind of the accused).[6]

[6] The State notes that Mr. Serrano did not ever "[p]rovide the proper paperwork" for this new corporate bank account implying that this was somehow improper. However, the evidence merely established that Mr. Serrano never followed up with providing paperwork which would have enabled him to spend the money in that account because he never spent any of this money. (T4433-71)

The State contends that the admission of the evidence that Mr. Serrano owned a lot of guns in his gun collection was not error. However, none of Mr. Serrano's guns were linked to the crimes in this case *in any way*. Recently, in *Jackson v. State*, 25 So.3d 518, 528 (Fla. 2009), this Court held that, in order for evidence of a defendant's ownership of a gun to be relevant in a murder case, "the State must show a sufficient link between the weapon and the crime." This Court noted that an example of a "sufficient link" would be where a bullet fired from a gun that was possessed by the defendant showed that this same gun was used to kill the victim in the case. *Id*. Under *Jackson*, therefore, the admission of Mr. Serrano's ownership of a lot of guns in his gun collection without linking any of those guns to the crimes committed in this case was plainly error.

This error cannot be deemed to be harmless beyond a reasonable doubt. Over defense objection, the prosecutor spent a lot of time introducing evidence regarding Mr. Serrano's ownership of firearms and his permits and sales receipts to purchase them dating back to 1972. (T3323-24, 4165-67, 4355, 5113-5138; EV920-934, 1130-1154). In his closing argument, the prosecutor argued that it was no coincidence that the murders were committed with a .22 caliber gun and (1) Mr. Serrano owned .22 caliber firearms both at the time of the investigation and long before then; (2) he had permits for the purchase of .22 caliber firearms purchased before the murders, the whereabouts of which were unknown; and (3) he

had .22 caliber bullets in his house at the time of the investigation. (T6104, 6151-56) Significantly, the prosecutor promised the trial judge that he would not argue that, since Mr. Serrano had permits for the purchase of .22 caliber firearms but their whereabouts were unknown, he must have used one of them to commit the crimes. (T5129) However, that is precisely what the prosecutor argued. (T6151)

Furthermore, the admission of the testimony of jailhouse snitch Leslie Jones that Mr. Serrano was housed in the "protective unit" of the jail reserved mostly for accused murderers and sex offenders was irrelevant, did not prove any fact in issue in this case, was highly prejudicial improper evidence of bad character which Sections 90.403 and 90.404(1) of the Florida Statutes seek to exclude and eroded the presumption of innocence. *See Thomas v. State*, 701 So.2d 891 (Fla. 1st DCA 1997)(testimony that the defendant charged with murder was housed in a section of the prison reserved for the more violent inmates was reversible error); *Estelle v. Williams*, 425 U.S. 501 (1976) (compelling an accused to go to trial in prison clothing poses an unacceptable risk of impermissible factors coming into play). The State asserts that this testimony of Jones is not attributable to any prosecutorial misconduct. However, the prosecutor plainly intentionally elicited this testimony. (T5468) In addition, the State asserts that the jury was aware that Mr. Serrano was charged with murder. However, this assertion ignores that the issue raised by Mr. Serrano herein is that the prosecutor erroneously elicited testimony that Mr.

Serrano was housed in a "*protective unit*" of the jail reserved for the worst offenders which would imply that he was so dangerous that the other prisoners needed to be protected from him and that he probably acted consistently with that propensity with regard to the charged crimes.

**The Prosecutor Improperly Argued At Closing Argument That Mr. Serrano Was Diabolical And Called Him A "Liar" And Improperly Shifted The Burden Of Proof.**

The prosecutor's reliance upon *Craig v. State*, 510 So.2d 857, 865 (Fla. 1987) as justifying the prosecutor's improper argument that Mr. Serrano was diabolical and a "liar" is misplaced. The holding of *Craig* applies when a defendant has testified at his trial and Mr. Serrano did not testify at his trial. Furthermore, these clearly improper arguments were such that the interests of justice compel that the fundamental error doctrine be applied. *See Sochar v. State*, 619 So.2d 285, 290 (Fla. 1993)(defining the fundamental error doctrine as one "where the interests of justice present a compelling demand for its application").

**Conclusion**

The State's assertion that, when curative instructions were given, the damage was erased is meritless because the errors were so egregious and so numerous. "The giving of a curative instruction will often obviate the necessity of a mistrial. However, there are some instances in which the prejudice is so great that it is impossible to unring the bell." *Tumblin v. State*, ___ So.3d ___, 2010 WL 652982 *7 (Fla. 2010)(citations omitted)(reversing defendant's murder conviction although a curative instruction regarding erroneous testimony was given).

## V. THE TRIAL COURT ERRED IN DENYING MR. SERRANO'S MOTION FOR A CHANGE OF VENUE. THIS ERROR VIOLATED HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

The State notes that, after a mock jury selection, defense counsel stated that this particular mock jury panel was not permeated with publicity. However, the State ignores that, at that time, defense counsel also stated that Mr. Serrano was not withdrawing his motion for a change of venue because there likely would be a lot more publicity at the time of the actual jury selection than there was then. (R908-909) The State also ignores the material fact that this jury selection took place on May 9, 2005, over 15 months before the real jury selection began, and that there was an increase in the publicity prior to the actual jury selection and that the national "Court TV" television station broadcast the real jury selection live. (R1240-1280; T4-10, 2770-72) Indeed, during jury selection the trial judge stated that, "[t]here is an *exorbitant* amount of [media] coverage about this case," the publicity was "a *nightmare* and everywhere" and that some of the media reports contained incorrect facts. (T101, 217-18, 329, 632-35)

The State points out that, after conducting the actual voir dire, defense counsel renewed the motions for change of venue without any argument. However, as explained in Mr. Serrano's Initial Brief, Mr. Serrano made numerous

pre-trial motions for a change of venue and the trial court was well aware of the intense media presence and publicity.

The State argues that the pre-trial publicity was not so pervasive as to result in prejudice. However, as explained in Mr. Serrano's Initial Brief and acknowledged by the trial judge, the publicity was "a nightmare and everywhere" and often contained incorrect facts. (T101, 217-18, 329, 632-35) Furthermore, the prosecutor ignores that prejudice from publicity is presumed when the publicity is sufficiently prejudicial and inflammatory that it pervades the community where the trial is to be held. *Noe v. State*, 586 So.2d 371, 379 (Fla. 1st DCA 1991); *Murphy v. Florida*, 421 U.S. 794 (1975).

## VI. THE HEARSAY TESTIMONY OF THE STATE'S BLOODSTAIN PATTERN EXPERT VIOLATED THE CONFRONTATION CLAUSE.

The State's bloodstain pattern expert, FDLE Agent Parker, never went to the crime scene. He was permitted to testify at the trial, over defense objection, as to his opinions regarding bloodstain pattern analysis based on measurements measured by FDLE Agent Lynn Ernst at the crime scene that were described in an FDLE Bloodstain Pattern Analysis Report authored by FDLE Agent John Wierzbowski, *not Agent Parker*. (T3878-88) Wierzbowski's Bloodstain Pattern Analysis Report is the only report in this case concerning bloodstain pattern analysis. (T3871)

The prosecutor conceded and the trial court ruled that this testimony of Agent Parker violated Mr. Serrano's constitutional right to confrontation. However, the prosecutor promised that he would call Agent Ernst after Parker testified and have Agent Ernst testify as to her measurements described in the FDLE report to satisfy the trial court's concern. (T3886-87) Although the prosecutor subsequently presented testimony from Agent Ernst about fingerprints on airport parking garage tickets, the prosecutor failed to ask Agent Ernst about her bloodstain measurements which Parker relied upon in his bloodstain pattern analysis. (T5313-46)

The State argues that defense counsel should have cured the State's error by questioning Agent Ernst about her crime scene measurements. However, this Court has squarely rejected such an argument. More specifically, in *State v. Belvin*, 986 So.2d 516, 525 (Fla. 2008), this Court held that the admission of a breath test affidavit of a technician who did not testify at a defendant's trial violated the defendant's constitutional right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004). This Court further held that, although the defendant had the right to subpoena and question the breath test technician as an adverse witness at the trial, this did not preserve the defendant's constitutional right to confrontation because "the burden of proof lies with the *state*, not the

defendant." *Belvin*, 986 So.2d at 525 (emphasis added). This Court explained as follows:

> Not only does a defendant have no burden to produce constitutionally necessary evidence of guilt, but he has the right to stand silent during the State's case in chief, all the while insisting that the State's proof satisfy constitutional requirements.

*Id*. (citations omitted).[7]

The State asserts that Mr. Parker testified regarding his bloodstain analysis obtained "on his own review of the crime scene photographs" and that "Mr. Parker only relied on measurements obtained from ... FDLE Agent Lynn Ernst when she placed pieces of standard 3 cm tape on the wall as a matter of routine." Answer Brief at 79. This assertion is misleading.

Agent Parker testified that he could not come to any conclusions in the field of bloodstain pattern analysis without measurements. (T3868-69) The prosecutor told the court that Parker's "conclusions are based on his review of the photographs that are in evidence *as well as a review of the crime scene report of Ms. Ernst*." (T3883) Parker also testified that, in reaching his conclusions, he relied on photographs of the crime scene *and* documentation of the bloodstain

[7] Notably, since Ernst only testified about fingerprints, any cross-examination of her about bloodstain pattern measurements would have been inadmissible as beyond the scope of her direct examination. *See e.g., Smith v. State*, 7 So.3d 473, 500 (Fla. 2009)("cross-examination is limited to the subject matter of the direct examination....").

patterns at the scene, specifically the FDLE Bloodstain Pattern Analysis Report reflecting Ernst's measurements at the crime scene. (T3870-72, 3880-86) That report, which was identified as State Exhibit 225, sets forth measurements which were taken by Agent Ernst at the crime scene and the conclusions therefrom which are the same measurements and conclusions that Agent Parker testified to at the trial. (Ev796-799; T3889-3925)

This violation of the Confrontation Clause was not harmless error. In evaluating violations of the Confrontation Clause, "the reviewing court must determine whether there was a reasonable possibility that the error affected the verdict." *State v. Lopez*, 974 So.2d 340, 351 (Fla. 2008)(holding that a violation of the Confrontation Clause was reversible error) (citations omitted). "The State, as a beneficiary of the error, has the burden to show that the error was harmless." *Id*. (citations omitted). "If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." *Id*. (citations omitted).

In the instant case, it cannot be said "beyond a reasonable doubt that the error did not affect the verdict." *Lopez*, 974 So.2d at 351. Parker was the only witness to provide expert testimony that Diane Patisso was located just inside the entrance door to Erie/Garment at the time that she was first shot. Parker was also the only witness to provide expert testimony that Patisso was first shot in the head

while standing upright and then fell down. (T3908-17) The medical examiner provided no testimony as to Patisso's location at Erie/Garment at the time that she was shot or as to which injury she sustained first. (T4027-29) Parker was also the only witness to provide expert testimony that George Gonsalves, Frank Dosso and George Patisso were all shot in a room at Erie/Garment that was formerly occupied by Mr. Serrano as his office and that they were all low to the ground as if in a kneeling position at the time they were shot. Indeed, Parker specifically opined as an expert that Gonsalves and George Patisso were on their knees at the time they were shot. (T3889-3906) Without Parker's testimony, the jury and the trial judge would have known where the victims died but, since they were not experts in the field, they would not have known where they were shot and the approximate positions of their bodies when they were shot.

This testimony allowed the prosecutor to argue during his closing argument that Gonsalves was the target of the crime and Mr. Serrano, who was angry with Gonsalves, was the one who had the motive to kill him. (T6118, 6153-54, 6164) Parker's testimony also allowed the prosecutor to argue during his closing argument that Diane Patisso was not the target of the crime but merely "walked into the middle of something." (T6119) From this evidence, the prosecutor further argued at his closing argument that, when Mr. Serrano stated in his taped statement the day after the murders that he "assumed" the female victim was murdered

because she walked in, in the middle of something" this revealed that he was the shooter because only the shooter would know such a thing. (T6119-20) This evidence also was relied upon by the trial court to rule that the State proved the "avoid arrest" aggravating circumstance. (R2511-12)

In addition, Parker provided the only expert testimony that, in gunshot wounds, the muzzle of the gun has to make close contact with the skin in order to cause back or side blood spatter and that the bloodstain pattern evidence did not rule out that no such "contact wounds" occurred. (T3857, 3873-74, 3925) The medical examiner testified that there were no such contact wounds on anyone. (T4042-44) During the prosecutor's closing argument, the prosecutor relied upon this testimony of Parker and the medical examiner to argue that, although no blood was found in the rental car that the State contended was driven by Mr. Serrano after the murders and Mr. Serrano was wearing the same clothes, including a white turtleneck, the whole day of the murders, the murderer in this case would not necessarily have had blood spatter on him because blood spatter only occurs when a shooter places a firearm directly against a person's body when pulling the trigger and that did not occur in this case. (T6103-04)

## VII. THE IMPROPER CROSS-EXAMINATION OF DEFENSE WITNESSES REGARDING UNSUBSTANTIATED SEXUAL ABUSE BY MR. SERRANO IN THE PENALTY PHASE DENIED MR. SERRANO HIS RIGHT TO A

**FAIR SENTENCING WHICH IS REQUIRED BY THE FEDERAL AND STATE CONSTITUTIONS.**

It is acknowledged that the prosecution's repeated assault of Mr. Serrano's character by attempting to impeach witnesses by graphically alleging that Mr. Serrano had molested his daughter occurred before the judge at the *Spencer* hearing. However, the State concedes that such evidence is inadmissible at *any* phase of a capital murder trial. It cannot be said that this error did not influence the judge's decision to impose the death penalty because it was a pervasive theme of the prosecutor during his cross-examination of several defense witnesses. In addition, the prosecution reminded the trial judge of this unduly prejudicial allegation and relied upon it as if it were true in urging the trial judge to impose the death penalty in its sentencing memorandum. (R2457)

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, Attn: Stephen D. Ake, Esq., Concourse Center 4, 3507 E. Frontage Road, Ste. 200, Tampa, FL 33607-7013 on this day 26th of March 2010.

## CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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MARCIA J. SILVERS, ESQUIRE