No. _____

IN THE

Supreme Court of the United States

TERENCE VALENTINE,

Petitioner,

v.

STATE OF FLROIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX

MARIE-LOUISE SAMUELS PARMER
COUNSEL OF RECORD
SAMUELS PARMER LAW, P.A.
P.O. BOX 18988
TAMPA, FLORIDA 33679
(813) 732-3321
MARIE@SAMUELSPARMERLAW.COM

Counsel for Petitioner

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339 So.3d 311
Supreme Court of Florida.

Terance VALENTINE, Appellant,
v.
STATE of Florida, Appellee.

No. SC20-1805
|
April 7, 2022

Synopsis

Background: Defendant filed second successive motion for postconviction relief following decision of the Supreme Court, Shaw, J., 688 So.2d 313, affirming remaining murder conviction and death sentence. The Circuit Court, 13th Judicial Circuit, Hillsborough County, Michelle Sisco, J., denied relief without evidentiary hearing. Defendant appealed.

Holdings: The Supreme Court held that:

[1] alleged eyewitness's statements were not newly discovered evidence, and

[2] defendant failed to demonstrate state's suppression of allegedly exculpatory evidence in alleged eyewitness's affidavit.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (7)

[1] **Criminal Law** Questions of law or fact

A circuit court should hold an evidentiary hearing on a motion for postconviction relief whenever the movant makes a facially sufficient claim that requires a factual determination; in contrast, a circuit court may summarily deny a claim that is legally insufficient or refuted by the record. Fla. R. Crim. P. 3.851.

[2] **Criminal Law** Review De Novo

Standard of review of denial of motion for postconviction relief is de novo. Fla. R. Crim. P. 3.851.

[3] **Criminal Law** Newly discovered evidence

To be facially sufficient, a claim of newly discovered evidence must meet two-part test: first, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial.

[4] **Criminal Law** Newly discovered evidence

Alleged eyewitness's statements about hearing gunshots, fleeing, calling police, and receiving a hotel room, meals, and $300 in cash from law enforcement during first trial were not newly discovered evidence and did not warrant postconviction relief in capital murder prosecution; police reports and transcript from second trial contained much of the information in eyewitness's affidavit, and defense counsel was aware of eyewitness's involvement in the case and could have ascertained additional facts about hotel, meals, and cash if counsel had exercised due diligence.

[5] **Criminal Law** Constitutional obligations regarding disclosure

To prevail on *Brady* claim, defendant must demonstrate that favorable evidence which is exculpatory or impeaching was suppressed by state, and because evidence was material, he was prejudiced. U.S. Const. Amend. 14.

[6] **Criminal Law** Conduct and argument of prosecutor

Defendant moving for postconviction relief failed to demonstrate state's suppression of allegedly exculpatory evidence in alleged eyewitness's affidavit and thus failed to demonstrate *Brady* violation in absence of allegation that state prevented defendant from calling eyewitness at third trial.

[7] **Criminal Law** Points and authorities

Defendant abandoned any argument as to denial of *Giglio* claim for postconviction relief based on false testimony presented by state, where he made no argument on appeal challenging the ruling.

1 Cases that cite this headnote

***312** An Appeal from the Circuit Court in and for Hillsborough County, Michelle Sisco, Judge – Case No. 291988CF012996000AHC

Attorneys and Law Firms

Marie-Louise Samuels Parmer and Maria DeLiberato of Parmer DeLiberato, P.A., Tampa, Florida, for Appellant

Ashley Moody, Attorney General, Tallahassee, Florida, and Rick A. Buchwalter, Assistant Attorney General, Tampa, Florida, for Appellee

Opinion

PER CURIAM.

Terance Valentine, a prisoner under sentence of death, appeals the circuit court's order summarily denying his second successive motion for postconviction relief, filed under rule 3.851 of the Florida Rules of Criminal Procedure.[1] For the reasons that follow, we affirm.

I. Background

Valentine brutally tortured and murdered Ferdinand Porche in 1988. The evidence from Valentine's third trial establishes the following sequence of events on the day Porche was murdered. Porche arrived home from work in the early afternoon. Upon his entry into the home, Valentine shot him in the back, paralyzing him from the waist down. Valentine announced, "[T]his is my revenge." *Valentine v. State*, 688 So. 2d 313, 315 (Fla. 1996).

Valentine then forced Porche to crawl into a bedroom "where he found his wife nude, bound, and gagged and his baby crying and covered in blood." *Id.* In that bedroom, Valentine bludgeoned Porche in the head at least three times with a gun, which broke Porche's jaw and caused him to lose several teeth. After that beating, Valentine told Porche, "I'm gonna kill you, but you're gonna suffer. This is not going to be easy." *Id.* He then stabbed Porche in the buttocks and bound him with baling wire.

Following the brutal attack in the home, Valentine took Porche and his wife[2] to a remote location nine miles away. There, Valentine again confronted Porche who was bound, helpless, and in severe agony. Valentine pointed a gun at one of Porche's eyes from point-blank range and then pulled the trigger. That shot finally killed Porche. Remarkably, Porche's wife—whom Valentine also shot in the head—survived and would later become a key State witness.

The State charged Valentine with the first-degree murder of Porche and other crimes. Valentine's first trial resulted in a mistrial. Following his second trial, a jury found him guilty of first-degree murder and recommended a sentence of death. However, due to a jury-selection error, we reversed Valentine's convictions and vacated his sentences. *Valentine v. State*, 616 So. 2d 971, 974-75 (Fla. 1993).

On remand, a jury again found Valentine guilty of several crimes, including first-degree murder. Valentine waived a penalty-phase jury, and the trial court ultimately sentenced him to death. We affirmed the first-degree murder conviction and death sentence. *Valentine*, 688 So. 2d at 318.

Since that time, Valentine has sought relief in both state and federal court, but has had no success in either forum. *See* ***313** *Valentine v. State*, 98 So. 3d 44, 58 (Fla. 2012) (affirming denial of initial postconviction motion and denying habeas petition); *Valentine v. State*, 296 So. 3d 375, 376

(Fla. 2020) (affirming summary denial of first successive postconviction motion).

Valentine has now filed his second successive motion for postconviction relief asserting three claims that all involve an eyewitness named Terry Spain who recently completed an affidavit. Valentine's primary claim seeks relief on the ground that Spain's affidavit constitutes newly discovered evidence which entitles him to a new trial. In his affidavit, Spain states that he saw a white male standing roughly 40 to 50 yards away from him. After hearing two gunshots, Spain fled from the scene and called for police assistance—ultimately speaking with police on multiple occasions. Later, during Valentine's first trial, law enforcement provided Spain a hotel room, meals, and $300 in cash. According to the affidavit, Spain did not testify at that trial or the subsequent trials, nor did trial counsel or any defense investigator ever contact him.

In addition to the newly discovered evidence claim, Valentine alleged that the State violated *Brady* and *Giglio* in its handling of Spain during the first trial. *See* *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

The circuit court summarily denied Valentine's motion in its entirety. As an initial matter, the court ruled that all the claims were procedurally barred for not being timely raised. In addition, applying the standard set forth in *Jones v. State*, 709 So. 2d 512 (Fla. 1998), the court ruled that the allegations in the affidavit did not constitute newly discovered evidence, and, even if they did, that evidence was not of such a nature as would likely produce an acquittal on retrial—stressing the overwhelming evidence of guilt. As for the other claims, the court found that the record refuted the *Brady* claim and that the *Giglio* claim was legally insufficient.

This appeal follows.

II. Analysis

Valentine argues that the circuit court erred in denying his postconviction motion without first holding an evidentiary hearing. We disagree.

[1] **[2]** "A circuit court should hold an evidentiary hearing on a rule 3.851 motion 'whenever the movant makes a facially sufficient claim that requires a factual determination.' " *Rogers v. State*, 327 So. 3d 784, 787 (Fla. 2021) (quoting *Pardo v. State*, 108 So. 3d 558, 560 (Fla. 2012)). [3] In contrast, a circuit court may summarily deny a claim that is legally insufficient or refuted by the record. *Id.* at 787-88; *McDonald v. State*, 296 So. 3d 382, 383 n.2 (Fla. 2020). With these principles in mind, we turn to Valentine's claims.

[3] As noted above, Valentine's first claim sought a new guilt phase based on newly discovered evidence. To be facially sufficient, a claim of newly discovered evidence must meet the two-part *Jones* test. We have described that test as follows:

> First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such [a] nature that it would probably produce an acquittal on retrial.

***314** *Long v. State*, 183 So. 3d 342, 345 (Fla. 2016) (quoting *Tompkins v. State*, 994 So. 2d 1072, 1086 (Fla. 2008)).

[4] We agree with the circuit court that the record conclusively refutes Valentine's newly discovered evidence claim. That claim is based on Spain's affidavit. However, as the circuit court noted, police reports and the transcript from the second trial contain much of the information in Spain's affidavit. Information available from those sources clearly does not meet the first prong of *Jones*. The only "new" information in the affidavit was that law enforcement provided Spain a hotel room, meals, and $300 in cash during Valentine's first trial. However, the record demonstrates that trial counsel was aware of Spain's involvement in the case and could have ascertained these additional facts if due diligence had been exercised. *See* *Rogers*, 327 So. 3d at 788. Thus, Valentine failed to meet prong one of the *Jones* test as to all the allegations in Spain's affidavit. [4] Accordingly, the circuit

court properly denied Valentine's newly discovered evidence claim.

[5] Valentine's *Brady* claim fares no better. To prevail on a *Brady* claim, Valentine must demonstrate that (1) favorable evidence which is exculpatory or impeaching, (2) was suppressed by the State, and (3) because the evidence was material, he was prejudiced. *See Sweet v. State*, 293 So. 3d 448, 451 (Fla. 2020).

[6] **[7]** As noted above, Valentine's *Brady* claim is also premised on information in Spain's affidavit—primarily the State's handling of Spain during Valentine's first trial. However, Valentine does not allege that the State prevented him from calling Spain at the third trial—i.e., the trial resulting in the first-degree murder conviction he is now challenging. Thus, at a minimum, Valentine failed to demonstrate suppression of evidence in relation to the relevant trial. Accordingly, the circuit court properly denied the *Brady* claim.[5]

III. Conclusion

For the foregoing reasons, we affirm the circuit court's summary denial of Valentine's second successive motion for postconviction relief.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

All Citations

339 So.3d 311, 47 Fla. L. Weekly S105

Footnotes

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

2 We are aware that Livia Romero was not legally married to Porche. But we use the designation “wife” as it is in keeping with our past opinions in Valentine's case.

3 “The standard of review here is de novo.” *Rogers*, 327 So. 3d at 787 n.5.

4 Based on our review of the record, we conclude that evidence of the State's handling of Spain during Valentine's first trial would not likely produce an acquittal on retrial—especially given the overwhelming evidence of guilt. Accordingly, the record also refutes the second prong of Valentine's *Jones* claim.

5 As noted above, Valentine asserted a *Giglio* claim in his motion, but he failed to identify any false testimony by a state witness. *See Jimenez v. State*, 265 So. 3d 462, 479 (Fla. 2018). The circuit court found the claim legally insufficient. On appeal, Valentine has made no argument specifically challenging that ruling. Thus, he has abandoned any argument as to the denial of the claim. *See Doorbal v. State*, 983 So. 2d 464, 482-83 (Fla. 2008) (conclusory argument insufficient to support reversal); *Ward v. State*, 19 So. 3d 1060, 1061 (Fla. 5th DCA 2009) (en banc) (finding issues abandoned where appellant did not “address[ ] them in his brief”).

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA **CASE NO.: 88-CF-012996**

v.

TERANCE G. VALENTINE, **DIVISION: J**
Defendant.
_____/

ORDER DENYING SECOND SUCCESSIVE 3.851 MOTION TO VACATE AND SET ASIDE THE JUDGMENT OF CONVICTIONS AND SENTENCE OF DEATH

THIS MATTER is before the Court on Defendant's Second Successive 3.851 Motion to Vacate and Set Aside the Judgment of Convictions and Sentence of Death, filed on February 17, 2020, pursuant to Florida Rule of Criminal Procedure 3.851. On March 9, 2020, the State filed its response. On August 20, 2020, the Court held a case management conference. After considering Defendant's motion, the State's response, the arguments of counsels presented during the August 20, 2020, case management conference, as well as the court file and record, the Court finds as follows.

CASE HISTORY

Defendant's first jury trial, which commenced on January 22, 1990, ended in a mistrial on January 25, 1990. On March 29, 1990, a jury found Defendant guilty of burglary/dwelling/firearm (count one), kidnapping (counts two and three), grand theft/motor vehicle (count four), murder in the first degree (count five), and attempted murder in the first degree with a firearm (count six); on March 30, 1990, the jury recommended a death sentence on count five. On April 12, 1990, the trial court sentenced Defendant on each count and imposed a death sentence on count five. The Florida Supreme Court reversed and remanded for a new trial. *See Valentine v. State*, 616 So. 2d 971 (Fla. 1993).

On July 16, 1994, a jury again found Defendant guilty of armed burglary of a dwelling (count one), kidnapping (counts two and three), grand theft motor vehicle (count four), first degree murder (count five), and attempted first degree murder (count six), as charged. Defendant waived the penalty phase jury recommendation and, on September 30, 1994, the trial court sentenced Defendant on each count and imposed a death sentence on count five. The Florida Supreme Court vacated Defendant's conviction and sentence on count six, but otherwise affirmed Defendant's convictions and sentences. *See Valentine v. State*, 688 So. 2d 313 (Fla. 1996). The Supreme Court of the United States denied certiorari on October 6, 1997. *See Valentine v. Florida*, 522 U.S. 830 (1997).

Defendant filed an initial motion for postconviction relief on May 28, 1998; after various amendments and an evidentiary hearing on certain claims, the postconviction court ultimately rendered an order denying relief on July 6, 2010. Defendant appealed the denial of his postconviction motion, and the Florida Supreme Court affirmed. *See Valentine v. State*, 98 So. 3d 44 (Fla. 2012).

Defendant filed his first successive motion for postconviction relief on December 21, 2017, and the Court summarily denied his motion on April 20, 2018. The Florida Supreme Court affirmed. *See Valentine v. State*, 296 So. 3d 375 (Fla. 2020). Defendant now files the instant second successive motion for postconviction relief.

SECOND SUCCESSIVE MOTION

In his second successive motion, Defendant raises allegations of newly discovered evidence and *Brady/Giglio*[1] violations in the following claim:

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. VALENTINE IS ACTUALLY INNOCENT OF THE CRIME AND THAT THE STATE OF FLORIDA VIOLATED

[1] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

MR. VALENTINE'S FIFTH AND SIXTH AMENDMENT RIGHTS BY CONCEALING THE WHEREABOUTS OF EYEWITNESS TERRY SPAIN DURING MR. VALENTINE'S 1990 TRIAL AND PAYING HIM A SUM OF $300 FOR HIS NON-ATTENDANCE

Defendant cites to rule 3.851(d)(2)(A), and asserts that the instant motion is timely as it is based on newly discovered evidence that was unknown to him and his counsel, and could not have been discovered through the exercise of due diligence. Alternatively, Defendant argues, "first tier post-conviction counsel was ineffective for failing to discover and present this evidence at the evidentiary hearing," and cites *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

As to the evidence at issue, Defendant asserts that on January 30, 2020, he obtained an affidavit from critical eyewitness Terry Spain, who was motocrossing near the sandpit where the victims - Defendant's estranged wife, Livia Romero, and her "husband," Ferdinand Porche - were shot and Mr. Porche was killed.[2] In his affidavit, Mr. Spain asserts he was motocrossing in the area and went to the sandpit where he observed a Chevy Blazer and, when he went to the other side of the Blazer, he saw a naked, hog-tied woman. Mr. Spain also saw a white male with light colored hair standing there and heard two gunshots. Defendant alleges he is a black male and, as evidenced by his booking photo, had "dark skin and very dark hair."

Defendant asserts that Mr. Spain did not testify at any of Defendant's trials, but Mr. Spain's description of the shooter was elicited at his first two trials via cross-examination of Detective Fernandez, who spoke with Mr. Spain. At the third trial, however, "there was no mention whatsoever of Terry Spain, and so the jury that convicted Mr. Valentine never heard there was a white man at the sand pit with a gun who clearly did not match the description of

either man Romero claims attacked her and Porche." Defendant further asserts that at the second trial, the State advised the trial court that it would allow the hearsay testimony regarding Mr. Spain's observations because the defense "could never find" Mr. Spain.

Mr. Spain further alleges in his affidavit that law enforcement actually kept him in a hotel room one day during the January 1990 trial. The police provided food for him and he remained at the hotel until the police told him that his testimony was no longer necessary because Ms. Romero testified to everything. The police also paid him $300 in cash.

Defendant alleges "[t]his new information raises serious questions about the fundamental fairness of the investigation of this case and the judicial process used to convict and sentence Mr. Valentine to death." Defendant alleges this new information "is significant and compelling in a case where there was no physical evidence and where the only testifying eyewitness had credibility problems and a motive to fabricate her testimony and falsely accuse Mr. Valentine." Defendant posits,

> The State argued to all three of Mr. Valentine's juries that this case came down to the word of Livia Romero versus the word of Mr. Valentine's multiple alibi witnesses. This testimony from Terry Spain surely would have tipped the scales in favor of the defense in such a close case, and would have created reasonable doubt that Romero was telling the truth about the events of September 9, 1988. Additionally, that the State secreted Terry Spain in a hotel and gave him $300, and concealed that information from Mr. Valentine's counsel, renders the entire proceedings fundamentally unfair and unconstitutional. After evaluating the totality of the evidence, this new information from Terry Spain would probably produce an acquittal at re-trial and/or warrants a new trial where the jury can be told not only about Spain's identification of the assailant as a white male, but also how he was secreted by law enforcement.
>
> . . . .

[2] The Court notes Defendant and Ms. Romero were still legally married at the time of the offenses; Ms. Romero and Mr. Porche were not legally married but considered and held themselves out as spouses.

> Because this new *Brady* information undercuts the State's theory at trial and demonstrates that a critical witness was concealed from Mr. Valentine's trial counsel and jury, and because the State's case came down to the credibility of a witness who was shown to have made false statements about her marital status and who had a motivation to lie against the Defendant, an acquittal is "probable" under the *Jones* standard.

As to his allegations regarding ineffective assistance of postconviction counsel, Defendant further acknowledges that he raised a claim during his initial rule 3.851 proceedings regarding counsel's failure to locate and present the testimony of Mr. Spain at trial and the postconviction court granted an evidentiary hearing on that claim. Defendant further asserts, however, that postconviction counsel failed - without explanation - to present Mr. Spain at the evidentiary hearing. Defendant asserts, "In fact, the only evidence related to Terry Spain at the evidentiary hearing was trial counsel Unterberger's testimony, elicited by the State, that he tried to locate Terry Spain before trial but was unsuccessful." Defendant requests that the Court "grant an evidentiary to allow a full and fair factual determination."

STATE'S RESPONSE

In its response, the State asserts Defendant's allegations do not constitute newly discovered evidence as he "does not rely on any facts which were not known at the time of his first trial." The State argues, "This claim obviously was available from the record of Valentine's first trial where this potential witness was named and his observations mentioned . . . . [and] counsel had plenty of notice and opportunity to speak with Spain regarding his involvement in this case." The State contends Defendant's allegations are therefore untimely.

The State further contends the alleged newly discovered evidence claim fails on the merits as it would not probably produce an acquittal on retrial. The State asserts,

> Not only was there the surviving eyewitness, Valentine's estranged wife, who immediately identified Valentine as the individual who kidnapped and shot her and murdered her husband, but there was also significant corroborating evidence. This included direct evidence from Valentine's confession to a third party, Nancy Cioll, who "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*, 616 So. 2d at 972. Porche's neighbor 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." *Valentine*, 616 So. 2d at 972. Valentine's role as the murderer was also supported by tapes of threatening phone calls he made to the surviving victim after the murder. Finally, the State introduced evidence that Valentine made travel arrangements between the United States and Costa Rica under false names, paying cash.

The State also argues Defendant's *Brady/Giglio* claims are meritless where "[t]here was nothing withheld from the defense and no false testimony presented." The State further contends Defendant's allegations are irrelevant where they involve the January 1990 trial and "Valentine is not held pursuant to a judgment or sentence from that trial." The State asserts, "There is no allegation that Spain was secreted away or that the defense was in any way precluded from finding or calling him during the retrial." Finally, the State alleges, "Aside from timeliness and the questionable relevance of the affidavit, given the compelling evidence of Valentine's guilt, the alleged impropriety simply makes no difference in a case supported by such strong evidence of guilt." The State requests that the Court summarily deny Defendant's motion.

ANALYSIS AND FINDINGS

After reviewing Defendant's motion, the State's response, the arguments of counsel during the August 20, 2020, case management conference, as well as the court file, and the record, the Court finds the State's response is persuasive and agrees that Defendant's allegations do not constitute newly discovered evidence and are procedurally barred. In order "[t]o prevail

on a newly discovered evidence claim, the defendant must satisfy a two-prong test: first, the evidence was not at the time of trial known by the trial court, by the party, or by counsel, and the defendant or his counsel could not have known of it by the use of diligence; and second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." *Bogle v. State*, 288 So. 3d 1065, 1068-69 (Fla. 2019) (citing *Duckett v. State*, 231 So. 3d 393, 399 (Fla. 2017) and *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998)).

The Court agrees with the State's argument that "Valentine does not rely on any facts which were not known at the time of his first trial." Although Mr. Spain did not personally testify at any of Defendant's jury trials, the existence of Mr. Spain and the substance of Mr. Spain's statement, i.e., his observations at the sandpit, have been previously disclosed to and known by the defense. As Defendant acknowledges in his motion, the substance of Mr. Spain's statements was presented via the cross-examination of Detective Fernandez at Defendant's first and second jury trials and, therefore, would have been known by Defendant and trial counsel before Defendant's third trial. Additionally, as Defendant acknowledges in his motion, he previously raised a postconviction allegation of ineffective assistance of counsel for counsel's failure to locate Mr. Spain and present his testimony at the third trial.

As the State argues, Valentine's counsels "had plenty of notice and opportunity to speak with Spain regarding his involvement in this case." Defendant's allegations are not based on any evidence that was not available to be pursued at the time of his retrial or initial postconviction proceedings, and Defendant has failed to sufficiently explain why the instant allegations could not have been previously raised or could not have been discovered with due diligence before trial or during the initial postconviction proceedings. *See e.g., White v. State*, 964 So. 2d 1278, 1285 (Fla. 2007) (affirming trial court's summary denial of newly discovered evidence claim and

agreeing with the court's conclusion that White "failed to specifically explain why his proposed witness, Frank Marasa, could not have been discovered by diligent efforts either prior to trial, in preparation of his 1983 postconviction motion, or through an amendment to his 1983 postconviction motion....").

Additionally, the only statements in the affidavit that appear to be "new" are Mr. Spain's assertions that police had him spend a day at a hotel during the January 1990 trial and then released him and paid him $300 after informing him that his testimony was no longer necessary because Ms. Romero had testified to everything. Such allegations do not meet the prejudice prong of newly discovered evidence. Even if Defendant presented Mr. Spain's testimony that he was "secreted" in a hotel room for one day during the trial in January 1990, along with his observations - while wearing dark goggles and with the setting sun on his face - regarding a white male with blondish brown hair, and his alibi defense, the Court finds there is not a reasonable probability of an acquittal on retrial.

At trial, Ms. Romero, the surviving victim, identified Defendant as the perpetrator of the instant offenses and the person who shot her and killed Mr. Porche on the afternoon of September 9, 1988. (*See* TT at 511-36, 556-89, 1005-11, 1014, 1019, 1026). Ms. Romero also testified there was a skinny, black male named "John" present and assisting Defendant during the offenses; although she did not see anyone else, Defendant told her there were *two* men helping him. (*See* TT at 519, 523-24, 529-33, 574, 580, 583, 911, 914-22). Defendant's friend, Nancy Cioll, testified she saw Defendant in New Orleans about two weeks after the shootings, and Defendant showed her how he shot Ms. Romero and said he made a mistake leaving her alive. (*See* TT at 1356-67). Ms. Cioll also testified that when she met with Defendant, he introduced her to a skinny black male in a maroon and black Bronco with gray detailing, and neighbors of

Ms. Romero and Mr. Porche testified that on the afternoon of September 9, 1988, there was two men in a maroon Blazer or faded red and white or red and gray Bronco near the home of Ms. Romero and Mr. Porche. (*See* TT at 1064-67, 107-1074, 1361-63, 1370, 1375). The State also presented evidence of Defendant's threats to kill both Ms. Romero and Mr. Porche before the instant offenses, and his threatening recorded phone calls after the offenses. (*See* TT at 485-90, 500-502, 506-508, 794-802, 816-836, 841-92). Finally, the evidence also reflected that Defendant purchased several plane tickets (to and/or from Costa Rica, New Orleans, Miami, Panama, and Honduras) under various names (T.G. Harper, Luis A. Valentine, Terry Harper, Dell Nolli, and Herbert Bush) and he paid for them in cash. (*See* TT at 536-48, attached). In light of the very strong evidence of Defendant's guilt, the Court finds the newly discovered evidence is not of such a nature that it would probably produce an acquittal on retrial.

As to Defendant's alternative argument that his motion is timely due to the ineffective assistance of initial postconviction counsel, the Court finds that allegations of ineffective assistance of postconviction counsel are not cognizable and neither *Martinez* nor *Trevino* provides a basis for relief in state court proceedings. *See e.g., Jimenez v. State*, 153 So. 3d 906 (Fla. 2014) (table) (holding that neither *Trevino* nor *Martinez* "grants Florida criminal defendants the right to challenge the effectiveness of trial counsel or present *Brady* . . . challenges in successive state postconviction proceedings based upon a claim of ineffective assistance of initial collateral counsel."); *Howell v. State*, 109 So. 3d 763, 773-74 (Fla. 2013) (noting the Florida Supreme Court has made it clear that "*Martinez* does not provide an independent basis for relief in state court proceedings" and "repeatedly held that claims of ineffective assistance of postconviction counsel are not cognizable"); *Gore v. State*, 91 So.3d 769, 778 (Fla. 2012) ("It appears that *Martinez* is directed toward federal habeas proceedings and is designed to and

intended to address issues that arise in that context."); *Zakrzewski v. State*, 147 So. 3d 531 (Fla. 2014) (table) ("To the extent that Zakrzewski asserts that he can raise whether initial collateral counsel rendered effective representation in regard to this claim based on *Trevino* . . . this Court has already rejected this general proposition" in *Gore* and *Howell*); *Zack v. State*, 911 So. 2d 1190, 1203 (Fla. 2005) ("Under Florida and federal law, a defendant has no constitutional right to effective collateral counsel.").

Because Defendant's allegations do not qualify as newly discovered evidence and Defendant does not allege any of the other exceptions to the time limitation set forth in rule 3.851, his motion is procedurally barred. *See* Fla. R. Crim. P. 3.851(d).

Moreover, even if Defendant's motion was not procedurally barred, he would not be entitled to relief on his *Brady/Giglio* claim. The Court first finds that Defendant has not set forth any facts that would constitute a *Giglio* violation. *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."); *Guzman v. State*, 868 So. 2d 498, 505 (Fla. 2003) ("To establish a *Giglio* violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material."). 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.

Additionally, the Court finds,

> To demonstrate a *Brady* violation, the defendant has the burden to show (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. *See Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *see also Way v. State*,

> 760 So.2d 903, 910 (Fla.2000). To meet the materiality prong of *Brady*, the defendant must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler*, 527 U.S. at 280, 119 S.Ct. 1936 (quoting *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). "As with prejudice under *Strickland*, materiality under *Brady* requires a probability sufficient to undermine confidence in the outcome." *Duest v. State*, 12 So.3d 734, 744 (Fla.2009). The materiality inquiry is not satisfied by simply discounting the inculpatory evidence in light of the undisclosed evidence and determining if the remaining evidence is sufficient. "Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290, 119 S.Ct. 1936 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)); *see also Rivera v. State*, 995 So.2d 191, 203 (Fla.2008) (same); *Way*, 760 So.2d at 913 (same). "It is the net effect of the evidence that must be assessed."

Franqui v. State, 59 So. 3d 82, 101–02 (Fla. 2011). Defendant's *Brady* claim is based on the affidavit of Mr. Spain, however, as discussed above, the existence of Mr. Spain and the substance of his observations was disclosed to and known by the defense since before the first trial. The Court further agrees with the State that Mr. Spain's allegations involve the January 1990 trial, which ended in a mistrial. As the State argues, "Valentine is not held pursuant to a judgment or sentence from that trial" and there is no allegation or indication that the State further "secreted" Mr. Spain or concealed his whereabouts "or that the defense was in any way precluded from finding or calling him during the retrial." Finally, in light of the strength of the evidence adduced at trial, as set forth above, Defendant has failed to demonstrate he was prejudiced. **Based on the foregoing, no relief is warranted on Defendant's second successive motion.**

It is therefore **ORDERED AND ADJUDGED** that Defendant's Successive 3.851 Motion to Vacate and Set Aside the Judgment of Convictions and Sentence of Death is hereby **DENIED**.

This is a final, appealable order. Defendant has thirty (30) days from the date of rendition to appeal this order. A timely filed motion for rehearing will toll rendition of this order.

DONE AND ORDERED in chambers, at Tampa, Hillsborough County, State of Florida this 13th day of October, 2020.

MICHELLE SISCO
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to Marie-Louise Samuels Parmer, Esquire, and Maria Deliberato, Esquire, Parmer Deliberato, P.A., P.O. Box 18988, Tampa, FL 33679, marie@parmerdeliberato.com and maria@parmerdeliberato.com; Rick A. Buchwalter, Esquire, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607, rick.buchwalter@myfloridalegal.com, deborah.speer@myfloridalegal.com, paula.montlary@myfloridalegal.com, and capapp@myfloridalegal.com; and Ron Gale, Esquire, Office of the State Attorney, 419 Pierce Street, Tampa, FL 33602, gale_r@sao13th.com and mailprocessingstaff@sao13th.com, on this _____ day of _____, 2020.

_____
Deputy Clerk

Supreme Court of Florida

MONDAY, MAY 23, 2022

CASE NO.: SC20-1805
Lower Tribunal No(s).:
291988CF012996000AHC

TERANCE VALENTINE vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

kc
Served:

MARIA E. DELIBERATO
MARIE-LOUISE SAMUELS PARMER
RICK A. BUCHWALTER
HON. CINDY STUART, CLERK
HON. RONALD N. FICARROTTA, CHIEF JUDGE
HON. DEBORAH MICHELLE SISCO, JUDGE
RONALD D GALE