

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. 93,839**

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**PETER VENTURA,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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**ON APPEAL FROM THE CIRCUIT COURT  
OF THE SEVENTH JUDICIAL CIRCUIT,  
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA**

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**INITIAL BRIEF OF APPELLANT**

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## **PRELIMINARY STATEMENT ABOUT REFERENCES**

This is an appeal of the circuit court's denial of Ventura's Rule 3.850 motion for postconviction relief. Ten of the fifteen claims raised in the motion were summarily denied and the rest were denied after an evidentiary hearing.

The record on appeal comprises the record initially compiled by the clerk, a supplement to the record, and exhibits which were admitted into evidence at the evidentiary hearing. The pages of the record initially prepared by the clerk were numbered one through 758, and references to this portion of the record are of the form, e.g., (R. 123). A supplement to the record has also been prepared. It comprises a transcript of the Huff hearing held in this case and excerpts from the trial of Ventura's co-defendant, Jerry Wright. It comprises two volumes and is numbered one through 162. References to it are of the form, e.g. (R. Supp. 123). The exhibits were not repaginated for appeal purposes and are simply referred to descriptively; e.g., "Defense exhibit 3." References are also made to the record prepared in the direct appeal of the appellant's conviction and sentence and are of the form, e.g., (Dir. 123). The direct appeal record also contains depositions which were not repaginated, and the few references made to them are clearly described.

Where there is a reason to draw attention to trial counsel for either side, they are referred to as "the prosecutor" or "defense counsel," or by name (Mr. Stark and Mr. Cass respectively), where doing so is useful for the sake of clarity. The phrase "evidentiary hearing" refers to the evidentiary hearing conducted on Ventura's motion for postconviction relief.

## **REQUEST FOR ORAL ARGUMENT**

Mr. Ventura has been sentenced to death. The resolution of the issues involved in this action

will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the gravity of the penalty. Mr. Ventura, through counsel, accordingly urges that the Court permit oral argument.

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
PRELIMINARY STATEMENT ABOUT REFERENCES .....	i
REQUEST FOR ORAL ARGUMENT .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	v
STATEMENT OF FACTS AND OF THE CASE .....	1
A.    PROCEDURAL HISTORY .....	1
B.    STATEMENT OF FACTS .....	3
SUMMARY OF THE ARGUMENT .....	25
ARGUMENT .....	35
I.    BRADY/GIGLIO ERROR .....	35
II.   INEFFECTIVE ASSISTANCE OF COUNSEL .....	58
A.    Failure to Investigate .....	59
B.    Failure to Cross Examine .....	66
C.    Disclosure of Prior Record .....	70
D.    Failure to Object .....	70
E.    Ineffective Voir Dire and Jury Selection .....	76
F.    Ineffective Investigation and Presentation of Mitigating Evidence .....	78
III.  NEWLY DISCOVERED EVIDENCE .....	82
IV.  UNTIMELINESS OF THE STATE’S RESPONSE TO THE MOTION FOR POSTCONVICTION RELIEF .....	86

V.	VIOLATION OF THE RIGHT TO REMAIN SILENT .....	87
VI.	FAILURE TO CONSIDER MITIGATING EVIDENCE .....	89
VII.	BURDEN SHIFTING .....	93
VIII.	ESPINOSA ERROR .....	95
IX.	CUMULATIVE ERROR .....	98
	CONCLUSION AND RELIEF SOUGHT .....	99
	CERTIFICATE OF FONT SIZE AND SERVICE .....	100

## TABLE OF AUTHORITIES

	<u>Page</u>
<i>Alderman v. Zant</i> , 22 F.3d 1541, 1554 (11 <sup>th</sup> Cir. 1994) .....	39
<i>Banda v. State</i> , 536 So.2d 221, 224 (Fla. 1988) .....	88
<i>Bedford v. State</i> , 589 So.2d 245 (Fla. 1991) .....	92
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215 (1963) .....	2
<i>Brookings v. State</i> , 495 So.2d 135 (Fla. 1986) .....	85
<i>Craig v. State</i> , 685 So.2d 1224 (Fla. 1996) .....	39, 45
<i>Dolinsky v. State</i> , 576 So.2d 271 (Fla. 1991) .....	92
<i>Doyle v. Ohio</i> , 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) .....	88
<i>Espinosa v. Florida</i> , 505 U.S. 1079, 112 S. Ct. 2926, 120 L.Ed.2d 854 (1992) .....	96
<i>Giglio v. United States</i> , 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) .....	38

<i>Gorham v. State</i> , 597 So.2d 782 (Fla. 1992) .....	50
<i>Hamilton v. State</i> , 547 So.2d 528 (Fla. 1989) .....	88
<i>Harris v. Dugger</i> , 874 F.2d 756 (11th Cir. 1989) .....	82
<i>Harrison v. Jones</i> , 880 F.2d 1279 (11th Cir. 1989) .....	95
<i>Hitchcock v. Dugger</i> , 481 U.S. 393, 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987) .....	95
<i>Hoffman v. State</i> , 613 So.2d 405 (Fla. 1993) .....	86
<i>Holsworth v. State</i> , 522 So.2d 348 (Fla. 1988) .....	92
<i>Holton v. State</i> , 573 So.2d 284, 292 (Fla. 1991) .....	88
<i>Horton v. Zant</i> , 941 F.2d 1449 (11 <sup>th</sup> Cir. 1991) .....	81
<i>Johnson v. Singletary</i> , 612 So.2d 575 (Fla. 1993) .....	96
<i>Jones v. State</i> , 569 So.2d 1234 (Fla. 1990) .....	98
<i>Kyles v. Whitley</i> , 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed. 490 (1995) .....	35, 44
<i>Kyles v. Whitley</i> ,	

514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) .....	*
<i>Maynard v. Cartwright</i> , 406 U.S. 356, 108 S. Ct. 1853, 100 L.Ed.2d 372 (1988) .....	88
<i>McRae v. State</i> , 582 So.2d 613 (Fla. 1991) .....	92
<i>Middleton v. Dugger</i> , 849 F.2d 491 (11th Cir. 1988) .....	82
<i>Mills v. Maryland</i> , 486 U.S. 367, 108 S. Ct. 1860, 100 L.Ed.2d 384 (1988) .....	95

<i>Mooney v. Holohan</i> , 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935) .....	38
<i>Morgan v. Illinois</i> , 504 U.S. 719, 112 S. Ct. 2222, 119 L.Ed.2d 492 (1992) .....	76
<i>Mullaney v. Wilbur</i> , 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) .....	94
<i>Murphy v. Puckett</i> , 893 F.2d 94 (5th Cir. 1990) .....	95
<i>Napue v. Illinois</i> , 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) .....	39
<i>Nibert v. State</i> , 574 So.2d 1059, 1062 (Fla. 1990) .....	89
<i>Porter v. Singletary</i> , 14 F.3d 554 (11 <sup>th</sup> Cir. 1994) .....	81
<i>Richmond v. Lewis</i> , 506 U.S. 40, 113 S. Ct. 528, 121 L.Ed.2d 411 (1992) .....	95
<i>Rose v. State</i> , 675 So.2d 567 (Fla. 1996) .....	81
<i>Routly v. State</i> , 590 So.2d 397 (Fla. 1991) .....	38
<i>Rutherford v. State</i> ,	

727 So.2d 216 (Fla. 1998) .....	60
<i>Sandstrom v. Montana</i> , 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) .....	94
<i>Scott v. Dugger</i> , 604 So.2d 465 (Fla. 1992) .....	85

<i>Smith v. Kemp</i> , 715 F.2d 1459, 1467 (11 <sup>th</sup> Cir.), cert. denied, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699 (1983) .....	39
<i>State v. Ventura</i> , (Fla. 1996) .....	1
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (U.S. 1984) .....	2
<i>United States v. Agurs</i> , 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) .....	35
<i>United States v. Bagley</i> , 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) .....	41
<i>United States v. Hale</i> , 422 U.S. 171, 95 S.Ct. 2133 (1975) .....	89
<i>Walls v. State</i> , 580 So.2d 131, 133 (Fla. 1991) .....	88
<i>White v. State</i> , 24 FLW S131 (1999) .....	56
<i>Witt v. State</i> , 387 So.2d 922, 925 (Fla. 1980) .....	96

## STATEMENT OF FACTS AND OF THE CASE

### **A. PROCEDURAL HISTORY**

Peter Ventura was convicted of first-degree murder and sentenced to death for his alleged role in the contract murder of a marina employee. This Court set out a factual statement in its opinion on direct appeal in *Ventura v. State*, 560 So.2d 217, cert. den. 498 U.S. 951, 111 S. Ct. 372, 112 L. Ed. 334 (1990). In summary, the state's evidence at trial reflected that co-defendant Jerry Wright took out an employee's insurance policy (called a "key man" policy) on Robert Clemente, who was one of his employees, and later approached one Jack McDonald to find someone to kill Clemente in order to collect the insurance proceeds. McDonald, who was the state's key witness, testified at trial that he arranged for Ventura to carry out the murder. McDonald also testified at Wright's trial. Wright, who was tried about two years after Ventura, was convicted and received a life sentence. Excerpts of the Wright trial were judicially noticed at the evidentiary hearing in this case, (R. 336, 337), and have been made a part of the record on this appeal.

Ventura filed a motion for post conviction relief. The trial court's summary denial of that first motion was reversed in *State v. Ventura*, (Fla. 1996) 673 So.2d 479. After obtaining pertinent records through Chapter 119, Florida Statutes, Ventura filed an amended rule 3.850 motion on August 16, 1996. (R. 1 through 218). This Court had ordered the state to file a response within twenty days after the 3.850 motion was filed. *Ventura*, 673 So.2d 479, at 482. This was not done. Instead, the trial court conducted a hearing on February 6, 1997, at which time it then ordered the state to file a response within twenty days. Ventura filed pro se motions objecting to this enlargement of time on February 10, 1997 (R. 220), and again on January 21, 1998, (R. 290). These motions were adopted

by counsel (R. Supp. 7) and denied. (*Id.* and R. 301).

The rule 3.850 motion then before the trial court raised fifteen claims for relief. Ten of them were summarily denied after a Huff hearing by an order dated April 3, 1998. Claim one, relating to public records requests, was deemed moot. Claims seven through fourteen were summarily denied as being procedurally barred because they “. . . could have and should have been raised on direct appeal.” The fifteenth claim alleging cumulative error, was found to be without merit and subject to summary dismissal because many of the errors described in this claim had been found to be procedurally barred. (R.303).

The remaining claims (two through six) were denied after an evidentiary hearing by an order dated July 28, 1998 (R. 304). Claim IV specifically alleged *Brady*<sup>1</sup> violations. Generally, the court found that the defendant had not met the second prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (U.S. 1984):

This Court specifically finds that the evidence of guilt of the defendant, Peter Ventura, was so overwhelming that even if there was a deficient performance by the attorney or there was newly discovered evidence, in any result there is no reasonable probability that the results would have been different had the trial counsel for the defendant performed better or if any newly discovered evidence was revealed to the jury. (R. 306).

In its order, the trial court specifically dealt with claims of ineffective assistance of counsel in the context of jury selection and penalty phase mitigation. At the evidentiary hearing, collateral counsel had brought out evidence in the form of letters and testimony that the prosecutor had brokered a deal between Jack McDonald and federal authorities in exchange for McDonald’s testimony, and then concealed it from

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<sup>1</sup>*Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215 (1963).

the trial court. (See *infra*). The lower court did not specifically address this evidence, commenting that, “The Court acknowledges that it has specifically addressed only a few of the numerous issues raised by the defendant in his claims two through five, but the other issues are not worthy of any specific discussion.” *Id.* (R. 308). The orders denying postconviction relief are the subject of this appeal.

## **B. STATEMENT OF FACTS**

Physical evidence from the crime scene did not point to Ventura or to anyone else in particular. The victim’s body was found in a truck parked near a construction site by one of the site workers late in the afternoon on April 15, 1981. (Dir. 307 -9). From the testimony of this witness and that of several officers who testified at either the Wright or the Ventura trials it is apparent that the body was discovered and that the engine compartment of the truck was still warm between 5:00 and 6:00 p.m.. (Dir. 313, 315; R. Supp.9, 10). The police found some footprints leading away from the truck which eventually disappeared onto hard road. (Dir. 331). Two days later, the police found some spent cartridges about five hundred yards from where the truck had been found. (Dir. 328). The cartridges were never matched to any particular firearm. No one ever claimed to have witnessed the killing other than Jack McDonald, and there were no fingerprints, blood typing, fiber evidence or the like pointing to any particular suspect.

The state’s key witness at trial was Jack McDonald. McDonald’s testimony was described in some detail by this Court in its opinion in the direct appeal. According to McDonald, the scheme to kill the victim and collect the proceeds from the key man life insurance policy had its origins in Jerry Wright’s financial problems. McDonald said that Wright owed him seventeen thousand dollars, his

businesses were bad and that he had tax problems. (Dir. 631). McDonald testified at both trials that Ventura set up the meeting with the victim at the Barnett bank, under the pretext of wanting to buy a boat. McDonald never testified to whether or not Ventura used a false name when he set up the meeting with the victim. When asked that question during the Wright trial he responded only that he had left the details of the plot to Ventura. (R. Supp. 60, 63). On the other hand, he also testified that he worked out the specific plans for the killing with Ventura the day before it happened. (Dir. 657).

McDonald testified that the killing took place around noon or early afternoon. He described getting to the bank where Ventura was to meet Clemente “very late morning, early afternoon,” (Dir. 638 et seq.).

Tina Clemente, the victim's widow, was not called by either side in the Ventura trial. She was called as a defense witness in the Wright trial. She testified that the individual who called the victim on the fifteenth and requested a meeting at the Barnett bank to see about buying a boat identified himself as "Alex Martin."

. . . Bobby had a message that he was supposed to meet a man named Alex Martin and this man wanted to buy a boat from him and someone had referred this man to Bobby but they never told him who referred him, or anything like that, and it kind of drove Bobby crazy because it was like I don't know this guy and who would have referred him to me or whatever.

Plans were made for him to meet this man behind Barnett Bank and I told him it was stupid . . . He was very nervous that night. We stayed up until maybe one, 1:30 in the morning arguing about it. (R. Supp. 82,3).

On the other hand, she also testified that her husband had known Ventura, evidently quite well:

Q. And have you ever met an individual by the name of Peter Ventura?

A. I met an individual named Pete Ventura, not Peter, Bobby didn't introduce him

as Peter.

Q. Who introduced him?

A. Bobby did.

Q. And where was that?

A. Madison Avenue store.

Q. And was Mr. Wright present for this introduction?

A. No. Did you ever see Mr. Ventura again?

A. I saw him twice. The first time when Bobby introduced me to him, and then he came back to the store maybe a couple of weeks or a month later.

And all he said was hello, and then he left with Bobby. (R. Supp. 79).

It is not completely clear who actually heard the message in which the caller setting up the meet identified himself as Alex “Martin,” or how many such messages there actually were. At one point Wright’s counsel asked Tina Clemente a question about “Bob getting any messages,” and it appears that she was going to describe a message received at the Crow’s Bluff Marina by one of the people working there (“Cindy or Deedee”). The court sustained a hearsay objection at that point. (R. Supp. 82). Deedee Jorgensen was deposed by Ventura’s counsel but never called as a witness. She was a co-owner of the marina and said that she took the message from the person claiming to be “Alex Martin.” She also said there had been at least two such calls. (Deposition of Deedee Jorgensen). On the other hand, Tina Clemente referred to the “Alex Martin” message described above in response to a question about what happened when she and the victim returned home that day. (R. Supp. 82, 3). Tina Clemente was not among the seventy witnesses listed by the state in its answer to the defendant’s

demand for disclosure. (Dir 926,7).

Insurance agent Saul Minkoff testified that Jerry Wright had told him to cancel the insurance policy on Robert Clemente about three months before Clemente was killed. (R. Supp. 72). Minkoff further testified that he did not cancel the policy mainly because he did not want to lose his commission, and that he never got around to telling Jerry Wright that he had not canceled the policy. *Id.* In fact, on cross examination Minkoff stated: "As far as he was concerned, I canceled it." (R. Supp. 73). He said that the premium payments for the policy had been made automatically through a "check-o-matic" program. Premium payment notices were not sent to Jerry Wright. (R. Supp. 71). According to Attorney Withers the transaction which included the insurance policy which purportedly provided the motive for the murder was part of a routine sweat equity deal in which Clemente became a 49% owner and primary manager of a tire store, with an option to buy the other 51%. Clemente was required to put no money down to purchase the 49% holdings. As a result, the only way Wright could protect his investment was to buy a life insurance policy on Clemente. (R. Supp. 74 - 76) According to attorney Withers the misnamed "key man" insurance policy is and was a routine business practice. (R. Supp. 76).

Additionally, accountant Yordon testified that Wright's financial situation was hardly desperate. Wright's tire company had assets of around three hundred and fifty thousand dollars at the end of 1979. (R. Supp. 70) Daytona Beach resident Toni Gustafson testified that she borrowed \$40,000 from Jerry Wright in 1981, and again agreed to pay it back at the rate of \$1,800 per month for approximately three years (R. Supp. 158).

As noted in this Court's opinion, the state provided evidence that Ventura was in Florida on the

dates in question through some business receipts. On the other hand, as Tina Clemente indicated, Ventura knew her husband, in fact her husband had introduced him to her by name, and she, at least had seen Ventura twice, so it was not especially unusual for Ventura to be in the area.

The state called a number of witnesses at Ventura's trial to establish that he had made damaging admissions. None of them claimed to be present or in any way actively involved in the killing, none of the described admissions were specific, and each witness was impeached. Joseph Pike and Reginald Barrett were two acquaintances of Ventura and McDonald who had provided information leading to their arrest. Both were convicted felons who had participated in the bank scam that had been masterminded by McDonald. Joseph Pike claimed that Ventura spoke with him on May 6, 1981 and admitted that he had been involved in a homicide along with McDonald. According to Pike, Ventura provided a number of details about the homicide that were consistent with the version given by McDonald, including the mention of a key man insurance policy. He also said that "He [Ventura] never said that he directly committed it . . . " (Dir. 506), and " . . . he had never said anything about what he did in it." (Dir. 512). Pike testified about an interview he gave to Inspector Berger and a Captain Carroll on May 18, 1981 as follows:

The question was: When he said that he had handled this – this is from Carroll – when he said he had handled the extermination, did you get the impression from what he said that he was involved in it perhaps more than McDonald was?

And my answer was: Just because of my prior knowledge of Pete and the way he actually says things, I got a strong feeling that it may be McDonald himself. (R. 508).

Pike was a cooperating witness and co-conspirator in the bank fraud scheme masterminded by McDonald. (See Dir. 483). According to Pike, the scam had involved as many as twenty-five people.

(Dir. 518). Pike eventually pled to three felony counts in connection with the scam, but was sentenced to only five years probation and thirty days incarceration. (Dir. 510). He said that he had only known a very few of the people involved and that his part in it was very small. (Dir. 519). He described McDonald as being “. . . one of the key people . . .” in the scam. Id.

Reginald Barrett was called by the state. He said that Ventura never told him that he had been involved in a homicide. (Dir. 524) According to Barrett, Ventura asked him to furnish a gun because a “. . . person from Atlanta wanted to have a pistol, or a gun . . .” (R.525), but Barrett also said that in the twenty years he had known Ventura he had never known him to carry a gun because “. . . it was not his style.” (542, 543). Barrett said that on two occasions Ventura had used him as a “refuge” because he (Ventura) apprehended danger from McDonald. (R.545).

When Ventura was first arrested, he was able to post bond, after which he absconded. He was rearrested in Austin, Texas in June 1986 because a 16 year old boy named Timothy Arview walked into police headquarters and said that he believed a man named Juan Contreras/aka Peter Ventura was wanted out of Chicago for homicide (Dir. 686). According to the officer who met with Arview, Sgt. Gonzales, the boy did not tell him that Ventura admitted to committing a homicide, but only that Ventura admitted to being wanted for a homicide.

Arview gave a taped statement to Detective Hudson, a transcript of which was introduced at the evidentiary hearing as state’s exhibit #2. Arview’s statement on the transcript is at times almost incoherent, but he does say, referring to Ventura: “But then he went down there and met the guy and the night of the races was when he shot him.” Later on in the transcript Arview tied the “races” to the Daytona area, so this is the only alleged admission by Ventura contained in the transcript that could

have anything to do with this case. These words are described as part of a rambling account of past transgressions sparked when Arview slapped Ventura “u[p]side the head” while the two were wrestling. Arview did say, as he said at trial, that his motivation in going to the police was righteous; i.e., “When you kill somebody [you’re] supposed to pay for it.” On the other hand, when he was asked about the time that elapsed between the conversation and when he went to the police, the following exchange ensued:

Hudson: When did this conversation take place prior to when you went to the police, how long ago?

Arview: When was it that I got into trouble?

Arview’s mother: Which one?

Arview: The one with (inaudible).

Arview: . . . four . . . is that February or March?

Hudson: And why did you wait for a few months to (inaudible) or what?

Arview: I didn’t know what to do, ya know, to decide what to do.

Hudson: Have you ever seen a wanted poster in the past six months?

Arview: No. . . another reason I did it because he owed me money from work . . . he didn’t pay me . . . I figured he didn’t pay me my money, ya know . . . I’ll get my money from the reward.

Hudson returned the reward money later in the interview:

Hudson: . . . I don’t know, I guess I thin[k] Sgt. Gonzales told you or maybe your mother did. I do not remember, I don’t remember if there is a reward or how much there is. It won’t be through the federal government.

Arview: Alright.

Hudson: But I think the victim's father at one time did. I will check that with him and get back with him and let you know for sure through your mother. If there is one and he is convicted, which I don't think there be too much problem in that, you're certainly entitled to it. Because um . . .

Arview: What about the other reward . . .

At the trial of this case, the prosecutor asked Jack McDonald the following question on direct examination and received the following answer:

Q. Any promises been made to you concerning your testimony here?

A. None whatsoever. (R. 649).

This denial was reinforced during the trial. During defense counsel's cross examination of Postal Inspector Ed Berger, prior to McDonald's taking the stand, the following exchange took place:

Q. Now, with regard to Mr. McDonald coming to you to ask you for leniency or special consideration in his prosecution --

MR. STARK: Your Honor, I don't believe that's a fair characterization of his testimony. I don't think he ever said that McDonald came to him.

THE COURT: Let's hear the question and see.

MR. CASS: I'm merely responding to an answer that Inspector Berger gave, Your Honor, as to whether or not McDonald was looking for anything for the statement --

THE COURT: You can go ahead and ask the question.

MR. CASS: All right, sir.

BY MR. CASS:

Q. It was my impression that Mr. McDonald was not looking for anything in giving you that statement in 1983, and I thought you said: No, he said he was dying of cancer and he just wanted to clear the air?

A. Yes, sir. (Dir. 489).

After McDonald made the “none whatsoever” statement during direct examination, defense counsel did not cross examine him on the issue. On redirect, however, the following exchange took place:

[Prosecutor]: And what is your motivation for testifying here today?

A. Well, I’m nearing sixty years of age. This is probably, undoubtedly, the most horrendous thing I have ever been involved in, and I think it is about time we cleared the air and it might give Mr. and Mrs. Clemente a little peace of mind knowing exactly what happened.

\* \* \*

[Defense counsel] You have just said that your motive for testifying is simply to clear the air, and bring the truth out; is that correct?

A. And for no other reason?

A. None. (Dir. 672, -3).

The timing of this exchange is worth noting. The prosecutor led off his direct examination of McDonald by having him admit to his prior felony convictions. This testimony was immediately followed by the news that McDonald had received an honorable discharge from the military. (Dir. 629). McDonald’s testimony about “clearing the air” and giving the victim’s widow “peace of mind” was elicited by the prosecutor on redirect examination – after defense counsel’s cross examination and as a dramatic conclusion to McDonald’s testimony.

The investigation that led to Ventura’s arrest stemmed from an investigation into the bank scam being conducted Postal Inspector Ed Berger, who received information from a confidential informant about an April homicide in Volusia County implicating Ventura and McDonald. (Dir. 467 to 471). That

information led to their arrest, however the police knew they could not make a case against either one unless they could get one to “flip” against the other. As Inspector Berger said, “It was our position that we could not successfully prosecute one without the other. That is why we were so careful in effecting the arrest within thirty minutes of each other in Chicago and Daytona.” (Dir. 572). Berger interviewed McDonald while he was under arrest in this case and McDonald denied any involvement in the Clemente murder. (R. Supp. 65). While being cross examined about this interview during the Wright trial, McDonald agreed that he had said he was in Daytona and met with Ventura around the time of the murder but not because of anything connected to the Clemente killing. (R. Supp. 61, 62). During the same time period McDonald told his own attorney, Dan Warren Esquire, that he had nothing to do with the Clemente murder (R. Supp. 69). Ventura bonded out shortly after his arrest and did not appear for an extradition proceeding. Without testimony from Ventura a case could not be made against McDonald, so McDonald was discharged under the speedy trial rule on December 26, 1991. *Id.* Thereafter, on October 20, 1982, McDonald gave an interview to Detective Hudson implicating Ventura, but denying his own presence at the crime scene. In exchange for this interview he was reassured that he could not be prosecuted by the state because of the speedy trial violation and promised that he would not be prosecuted in connection with the homicide by the federal government. (R. 469, 470). This fact was not brought out at Ventura’s trial.

At the time of McDonald's release from custody on the murder charges, he faced significant incarceration on federal charges stemming from the bank fraud operation. (Dir. 483, -4). According to McDonald, the operation was complete in 1980 after netting either half a million dollars (R. Supp. 59), or perhaps 1.4 million dollars (Dir. 555). Whatever the amount, in 1980 and early 1981, McDonald

was “flush.” He admitted to having ninety thousand dollars, (R. Supp. 66), he repaid an old loan with eight thousand dollars worth of cash and Krugeraands, and made business loans of at least forty five thousand dollars. (R. Supp. 159 to 161).

McDonald pled guilty to several federal criminal counts in the bank fraud operation in early 1983 and was eventually sentenced to nine years in jail plus probation with the requirement that he repay one hundred thousand dollars in restitution. (R. Supp. 59). However, the federal judge permitted McDonald to report for his incarceration at a later time. Instead of reporting, McDonald absconded, and was not taken into custody again until September 1987.

Ventura was rearrested June 11, 1986. (Dir. 575).

On December 19, 1986, Mr. Stark, who prosecuted Mr. Ventura, wrote the United States Attorney's Office and solicited its help:

I feel that the interests of justice could be better served by having Mr. McDonald on lengthy probation with a short jail term if necessary, available to testify at the trial of Peter Ventura and possibly Jerry Wright (in the event he is indicted).

\* \* \*

I would appreciate any consideration your office could give in the effort to locate Jack McDonald, or coax him out of hiding.

Letter From Mr. Stark to Mr. Grossman of the United States Attorney's Office dated December 19, 1986. (Defense Exhibit 3 and R 503 to 509).

On March 6, 1987, while McDonald was still a fugitive, the United States Attorney's Office responded to Mr. Stark's December 19 letter:

. . . . After Mr. McDonald surrenders to federal authorities, should he decide to appear as a witness for the state in the case against Mr. Ventura, his cooperation and truthful

testimony in that case can be made known to the Federal Parole Board at his first parole hearing. Your office can present to the parole board all relevant information regarding Mr. McDonald's cooperation.

In your letter, you have also asked whether the sentencing court could reduce Mr. McDonald's sentence, should he surrender himself and appear as a witness at Mr. Ventura's trial. Under the federal Rules of Criminal Procedure, the sentencing court can only reduce a criminal sentence within 120 days of the time it becomes final. After that time, the sentencing court completely loses [sic] jurisdiction of the case. Consequently, in view of the lapse of time, the sentencing court no longer has jurisdiction to reduce Mr. McDonald's sentence.

Should Mr. McDonald surrender to federal authorities and also appear as a witness in Mr. Ventura's trial, this office will consider the nature of Mr. McDonald's cooperation and truthful testimony in evaluating whether to pursue further prosecution of Mr. McDonald on bond jumping charges.

Letter from Mr. Grossman of the United States Attorney's Office to Mr. Stark dated March 6, 1987.

(Defense exhibit 3).

On September 3, 1987, while still at large, Mr. McDonald sent a letter to Detective Hudson with the Volusia County Sheriff's Office (R.19 to 23, Defense exhibit 2):

At this point in time it will have to be a two for one trade. In other words I will cooperate fully provided I am released by court order from all federal charges including the IRS.

\* \* \*

[If you can do this] I will promptly turn myself in and cooperate fully.

\* \* \*

If by some fluke I am apprehended without any deal being made I will rot in hell before I would give any testimony on anything. This is a promise.

\* \* \*

Dave, I will call you Monday September 14th at work, for one minute at 1:00 pm.

Ventura filed a pro se demand for speedy trial September 17, 1987. McDonald was arrested six days later, and two days after that, on September 25, 1987, Mr. Stark wrote the following letter to the United States Attorney's Office:

*Pursuant to our telephone conversation of today's date, I would like to formally request that you consider dismissing the bond jumping charges against Jack McDonald.* [Emphasis added].

Please be advised that Mr. McDonald was taken into custody by the Federal Marshall's Office in Atlanta, Georgia on September 23, 1987. On September 24<sup>th</sup>, David Hudson, the lead investigator on the Ventura case interviewed Mr. McDonald and was assured of McDonald's cooperation with us in the prosecution of Peter Ventura and others involved in the murder of one Robert Clemente. *Needless to say, Mr. McDonald is a crucial witness in both cases.* [Emphasis added].

The case of the State of Florida vs. Peter Ventura is presently scheduled for trial in Circuit Court, Volusia County on October 12, 1987. *Mr. McDonald's cooperation is essential.* [Emphasis added].

I have enclosed copies of my letter of December 19, 1986 and Alan Grossman's response of March 6, 1987 for your information.

I would also like to request that certified copies of Jack McDonald's judgment and sentence in Case # 83-CR-121-2 and Case # 83-CR-123-2 be sent to me as I will need to provide that information to the Defense pursuant to our discovery rules. . . .

Letter from Mr. Stark to Mr. Schweitzer of the United States Attorney's Office dated September 25, 1987. (Defense exhibit 3). On October 5, 1987 -- seven days before the then scheduled trial date -- the United States Attorney's Office wrote a letter to Mr. Stark:

*Pursuant to your request, my office will not pursue bond-jumping charges against Jack McDonald as long as he cooperates fully with your office in the upcoming murder case referred to in your letter of September 25, 1987. Should Mr. McDonald fail to testify truthfully in that case or in some other way fail to cooperate with your office, we will then be free to pursue bond-jumping charges. Id.* [Emphasis added].

Letter from Mr. Valukas of the United States Attorney for the Northern District of Illinois to Mr. Stark dated October 5, 1987. In a letter dated January 20, 1988, the day after Ventura's trial and the day before his sentencing, Mr. Stark wrote another letter to the United States Attorney's Office stating that he felt a "compelling obligation" to advise them and the court of Mr. McDonald's assistance to the State of Florida. This letter is a curiosity. It is dated January 20, but it contains a chronology which in turn contains an entry for January 21, the date Ventura was sentenced to death. The letter was copied to McDonald's federal judge, and contains the statement that ". . .there were no promises made to Mr. McDonald in return for his testimony. . . his motivation for giving his testimony has been to clear the air and set the record straight so that the family of the victim can have some peace of mind." Mr. Stark's letter also stated that Mr. McDonald was equally responsible for whatever happened to Mr. Clemente, and that Mr. McDonald "will again be a crucial witness for the state of Florida in Mr. Wright's trial."

Mr. Stark's letter concluded:

Whatever consideration can be given [Mr. McDonald] at any future hearings in his two federal cases in return for this assistance would, in my opinion, be in the interests of justice.

\* \* \*

Corporal David Hudson of the Volusia County Sheriff's Office and I would appreciate the courtesy of a telephone call regarding the scheduling of any future hearings to be held for Mr. McDonald so that we can make arrangements to be heard by the court considering Mr. McDonald's cooperation in Florida. *Id.*

Letter from Mr. Stark to Mr. Grossman of the United States Attorney's Office dated January 20, 1988.

Mr. Stark also wrote to the Federal Public Defender's Office:

Mr. McDonald has been an essential and cooperating witness [in Mr. Ventura's and Mr. Wright's cases].

\* \* \*

Needless to say, Jack McDonald has cooperated and has agreed to cooperate with the state authorities since his resentencing in July by Judge Aspen.

\* \* \*

Any consideration that the federal courts could show Mr. McDonald for his efforts in this regard for his cooperation to date and in the future would be appreciated.

Letter from Mr. Stark to Mr. Galvan of the Federal Public Defender's Office dated October 31, 1988.

*Id.*

Mr. Stark and Mr. Cass both testified at the rule 3.850 evidentiary hearing. At one point in the hearing Mr. Cass testified as follows:

Q. You were asked if you thought you did the best you could, and you indicated you thought you did?

A. That's what I thought.

Q. Isn't it possible that your best was deficient?

A. Deficient?

Q. Yes? Ineffective?

A. In light of the questions you've asked, and I've answered, I would have to feel ineffective.

Q. By that, then, Mr. Ventura did not get a fair trial, did he?

A. I don't think so. (R. 591, -2).

Mr. Stark was questioned about the agreement to drop bond jumping charges and about such matters as his obligation to correct false testimony that he had elicited during the trial and to disclose exculpatory evidence. Rather than characterize his responses, an excerpt of his testimony is quoted

here:

Q. You also wrote a letter to I think it was Mr. Grossman asking that the bond jumping charges against Mr. McDonald be dropped in exchange for his testimony. Correct?

A. I did ask him if he would consider doing that. Yes, sir.

He wrote back to me indicating that he would not pursue that as long as he gave truthful testimony.

Q. So in fact he got immediate benefits for testifying at your request, and that would be that the bond jumping charges would be dismissed, if he testified.

A. Would you rephrase or repeat the question?

Q. Mr. McDonald received a benefit per your request for testifying against Mr. Ventura that the bond jumping charges be dismissed against Mr. McDonald. And the feds wrote back that –

A. The feds wrote back and indicated they would not pursue the bond jumping charges, yes, at my request.

Q. Okay, thank you.

Now at the trial, Mr. McDonald testified, when asked by yourself, did you receive any benefit whatsoever. And his answer was none whatsoever.

Does that refresh your memory?

A. No it doesn't.

Again we're talking about a trial that took place over ten years ago.

Q. If he had said that . . .

A. I'd have to read the transcript.

Q. ... Did you ever bring that to anybody's attention that you recall?

A. I would have to look at the record. I don't have any independent

recollection at this time.

Q. Did you turn these letters over to Mr. Cass . . .

A. Which letters are you referring to?

Q. The whole packet that's been introduced, any of those.

A. All of those letters weren't available. They hadn't been written. The only letters that had been sent were the December '86 letter, the March 6 letter of '87, and the September 25 of '87. Those were the only prior letters.

Q. I understand.

Did you ever give those to Mr. Cass so that he would have the benefit, if he chose, to impeach Mr. McDonald when he took the stand?

A. I don't recall whether they were in the file. Mr. Cass had access to the file.

We had an open file policy at the time as far as discovery. So I don't know if he had an opportunity to look at those in the file. Normally the file was accessible except for my own personal notes.

Q. ... Even if you didn't elicit false information you certainly had an obligation to correct it. Wouldn't that be a correct statement.

A. Where you have an obligation. (R. 508 - 511).

The letters had been introduced into evidence at the evidentiary hearing and authenticated by the trial prosecutor. (R.503, 504).

Mr. Cass was shown these letters at the evidentiary hearing and said that he had not been aware of any communications between the state and federal prosecutors at all, that if he had, he would have used them for impeachment, and that he was essentially stuck when Mr. McDonald denied the existence of any deals. (R. 548, 549). Mr. Stark said: "I don't know that Mr. Cass asked too many

questions about promises in his [McDonald's] deposition, if I recall correctly.” (R. 512) Mr. Stark said that the letters described above, presumably including the October 5, 1987 letter from the United States Attorney’s office confirming that bond jumping charges had been dropped pursuant to Stark’s request, would have been kept in his (the state attorney’s) file, and that the state at the time had an “open file policy.” This he described by saying that their file was available for copying and inspection whenever defense counsel made an appointment to do so. (R. 515, 516). As he put it, “. . . if it was in the file, it was in the file, and he would have had access to it.” (R. 517). On the other hand, as noted above, Mr. Stark said that he did know whether the letters had been in the file or not, and Mr. Cass stated that he had problems with what he termed the "so-called" open file policy of the state, that what he needed to get out of them wasn't there. (R. 584). The record does not establish when the defense inspected the state’s file, but according to Mr. Stark, the letters of December 19, 1986, where he suggested that Mr. McDonald receive a period of probation on the federal charges, and the reply of March 6, 1987, where United States Attorney’s Office agreed to consider the “. . . nature of Mr. McDonald’s cooperation . . .” in deciding whether to pursue bond jumping charges, were in the possession of the state when on March 31, 1987, it responded to the defense demand for discovery. (Dir. App. 925). The record on appeal reflects that the defense engaged in routine pre trial discovery; the record contains a demand for discovery, an answer to the demand by the state which denied possession of any evidence tending to negate the guilt of the accused, and fifteen discovery depositions taken by defense counsel.

Ventura raised ineffective assistance of counsel in his direct appeal, presenting nineteen separate instances during the trial. At the time, this Court ruled:

Given this record, we hold that none of these claims of ineffective assistance of counsel warrant relief, but we do so without prejudice to Ventura to assert these claims in a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850.

In his post conviction motion, Ventura pled ineffective assistance specifically in Claims II, III and V and conjointly with the issues raised in Claims VII through XV. Specific instances of ineffective assistance which are reflected in the record are described in detail where this issue is argued later in the brief, but, as noted above, defense counsel testified at the evidentiary hearing that his performance had been deficient, ineffective, and because of that he did not believe Ventura had received a fair trial. Claims VII and XI were that Mr. Ventura's sentencing judge improperly relied upon Ventura's failure to present his version of the offense. Claims VIII and XII were that the eighth amendment was violated by the sentencing court's refusal to consider mitigating circumstances clearly set out in the record. Claims IX, X, XIII, XIV addressed the jury instructions in the penalty phase and Claim XV raised a cumulative error allegation. Arguments addressing these issues are presented below and the comments made by the sentencing judge, the evidence of mitigation established on the record, and the jury instructions in question are cited with the corresponding arguments.

## **SUMMARY OF THE ARGUMENT**

The prosecution deceived the court in the trial of this case. The key state's witness, Jack McDonald, who faced serious federal charges throughout the proceedings in this case but who had evaded prosecution for his admitted role in the killing of Robert Clemente, testified at Ventura's trial that he had received no deals "whatsoever" in exchange for his testimony. In a dramatic, and in retrospect, well orchestrated, conclusion to his testimony, McDonald explained that his motivation for testifying against McDonald was that he wanted to "clear the air" and provide the victim's widow with some "peace of mind." In fact, a series of letters written by McDonald, the state prosecutor, and the U.S. Attorney's Office which came to light after the trial show that this evidence was simply false. The state prosecutor had brokered a quid pro quo deal between McDonald and the U.S. Attorney's Office to drop federal bond jumping charges against McDonald in exchange for his testimony against Ventura. The letters also show that this deal was not an isolated instance of negotiations between McDonald and the authorities. Rather, they show that McDonald and the state and federal prosecutors had been engaged in negotiations for over a year which began while McDonald was still a fugitive from the federal system, and which continued through and on past Ventura's trial. At one point, while McDonald was still at large, he had written to the authorities that he would "rot in hell" before he gave any testimony unless he got the deal he wanted.

While it is conceivable that McDonald honestly felt that he had received no deals "whatsoever" because he had been bargaining for a much more comprehensive deal and he may have regarded what he actually got as too trivial to mention, it is nevertheless clear that the prosecutor engaged in deliberate deception. Ventura had earlier absconded, so that when he was eventually rearrested speedy trial was

not an issue. When he made speedy trial an issue by filing a pro se demand for speedy trial, the prosecutor wrote to the U.S. Attorney's Office "formally" requesting that bond jumping charges not be pursued against McDonald, a request that was honored by return letter. The tone of the state prosecutor's letter was urgent, even pleading. He wrote that McDonald was a "crucial" and "essential" witness in his case against Ventura. He wrote a letter to the U.S. Attorney's Office, copied to McDonald's federal judge, stating that he felt a "compelling obligation" to verify that McDonald had cooperated with him and asking that McDonald be rewarded in any way possible. Given these circumstances, the notion that the prosecutor somehow forgot that he had brokered a deal to drop federal bond jumping charges against McDonald during the course of the trial is simply not credible. It follows that the prosecutor had a duty to correct the "none whatsoever" testimony that he had elicited from McDonald. Instead, the trial record shows that he emphasized, exploited, and in fact, orchestrated this false testimony in a calculated strategy to enhance McDonald's credibility with the jury.

This issue was specifically pled in Ventura's motion for postconviction relief, but the lower court's order denying relief did not mention anything about prosecutorial deception, misconduct, or non-disclosure. An overall reading of the lower court's order strongly suggests that it did not consider prosecutorial deception or non-disclosure at all. The court found that the evidence against Ventura was "overwhelming" and that "even if there was a deficient performance by the attorney or there was newly discovered evidence," the results would not have been different if defense counsel had "performed better" or if the newly discovered evidence had been revealed to the jury. In other words, the lower court did not make any finding with regard to the first prong of any claim for relief cognizable in a motion for post conviction relief, and instead based its decision on an overall finding of no prejudice.

The order is deficient in a number of respects, but its particular weakness is that it addressed prejudice only in terms of ineffective representation and newly discovered evidence. While the ultimate test to determine whether there was sufficient prejudice to warrant relief may be the same for both ineffective representation and prosecutorial non-disclosure or deception, the facts that must be examined to reach that determination are obviously quite different. Thus, it is meaningless to examine the quality of defense counsel's performance and the impact it may have had on the trial when considering the prejudicial effect of prosecutorial non-disclosure and deception. Aside from ineffectiveness the lower court's order by its terms addressed prejudice only in the context of newly discovered evidence, but a claim for post conviction relief based on newly discovered evidence requires a higher showing of prejudice than does a claim based on prosecutorial non-disclosure or deception. Thus, the failure of the lower court to even mention non-disclosure or deception in its order and to address prejudice only within the context of ineffectiveness and newly discovered evidence indicates that its prejudice analysis was necessarily flawed.

In any event, the lower court's characterization of the evidence against Ventura as "overwhelming" is problematic. The order does not specify whether the evidence that was "overwhelming" included all, some, or none of Jack McDonald's testimony. If McDonald's testimony were to be taken at face value, then indeed the evidence against Ventura was overwhelming, but this obviously begs the point. Absent McDonald's testimony, the evidence against Ventura was not overwhelming. It probably would not have sustained a conviction, it clearly would not have supported a finding that the result was reliable and worthy of confidence, and it would not have supported a finding of the CCP and pecuniary gain aggravators. This Court used the term "key witness" to describe

McDonald in its opinion on direct appeal. The prosecutor, in his letters to the U.S. Attorney's Office urgently seeking a deal after Ventura had filed a pro se demand for speedy trial, described McDonald as a "crucial" witness whose testimony was "essential" to his case. There was no crime scene evidence tying Ventura to the killing, and the only physical evidence tending to do so comprised some motel receipts and western union documents that showed he was in the area at the time. No one other than McDonald has ever claimed to have been a witness to or direct participant in the killing. Two witnesses were called to testify about damaging admissions made by Ventura. Neither could provide any specifics. One of them, Joseph Pike, was a convicted felon and a crony of McDonald's. Timothy Arview, the other one, was not effectively cross examined at trial although defense counsel had the means to do so in his hand at the time, but what cross examination there was showed that he turned Ventura in to get the reward money that he thought was available.

Evidence that was not provided at the trial but which was provided to the lower court at the evidentiary hearing, namely evidence from the trial of the co-defendant, Jerry Wright, also showed that the evidence against Ventura, absent McDonald's testimony, was far short of "overwhelming." In particular, the victim's widow, Tina Clemente, testified that the caller who set up the meeting behind the Barnett Bank on the day of the killing had identified himself as "Alex Martin." If McDonald's testimony were to be believed, this caller could only have been Ventura. But Tina Clemente had also testified that her husband was well acquainted with Ventura by name, so that it would make no sense for him to use a false name. Her testimony, if believed, could only mean that McDonald's testimony was partly true and partly false: true in that he knew of the circumstances of the killing but false in that Ventura could not have been the one who did what McDonald said he did.

The order of the lower court in this case stands in stark contrast to the order denying relief which this Court approved in *White v. State*, 24 FLW S131 (1999). In *White*, the lower court described the particulars of a deal between the state and one of its witnesses which had not been disclosed to the defense, but noted that defense counsel had done an excellent job cross examining the witness and had in fact brought out all the major components of the deal. The same analysis here produces exactly the opposite result: the lower court avoided any mention of McDonald's deal or any of his negotiations with the authorities, defense counsel's cross examination only made the situation worse, none of the components of the deal were brought out, and the prosecutor strategically exploited his concealment of a deal to enhance McDonald's credibility.

Ventura's counsel also provided ineffective assistance in a number of ways. This Court was presented with nineteen claims of ineffective assistance on direct appeal, but declined to address them without prejudice to their being raised in a motion for postconviction relief.

Although all the evidence in the record shows that the prosecutor concealed evidence of a deal and of ongoing negotiations to obtain McDonald's testimony, to the extent that the failure of defense counsel was to blame for failing to uncover this information he provided ineffective assistance. Also, defense counsel was clearly ineffective for failure to discover and present the testimony of Tina Clemente. He had taken the deposition of marina co-owner Deedee Jorgensen, who said that the caller who set up the meeting with Clemente had identified himself as "Alex Martin." At that point, it should have been obvious to defense counsel that any testimony showing that Clemente had been acquainted with Ventura by name would have been important, and the obvious person to ask was Clemente's wife. That she was available was shown by the fact that she did testify at the trial of co-defendant Jerry

Wright. Although her testimony did not help Wright, that was because his circumstances were very different from Ventura's. There was a paper trail leading directly to Jerry Wright because he had taken out the insurance policy on Clemente and he was the one who obtained the proceeds when Clemente was killed. His jury did not have to be concerned with the specifics of how Clemente was killed or who actually did it.

Defense counsel was also ineffective for failing to adequately cross examine Timothy Arview, although he had the means to do so literally in his hands at the time of trial. A transcript of his statement to the police was introduced at the evidentiary hearing. In it he says, referring to Ventura: "But then he went down there and met the guy and the night of the races was when he shot him." Later on in the transcript Arview tied the "races" to the Daytona area, so this is the only alleged admission by Ventura contained in the transcript that could have anything to do with this case. This statement, which was generally rambling and at times incoherent, showed that he was motivated by the hope of reward money, that his asserted good citizenship motive was implausible given the time he waited before going to the police with his story plus the fact that he evidently only went to the police when he got into some unspecified trouble, that he was further motivated to retaliate against Ventura for perceived physical abuse and cheating him out of his wages, and that there had been some parting of the ways between the two of them. Aside from motivations, Arview's testimony about this admission was impeachable in and of itself because of its vagueness, because of the circumstances in which it was allegedly made, i.e., just after Arview had slapped Ventura "upside the head," and especially because the actual killing took place during the day, and not on the "night of the races" or the night of anything else. Although the record reflects that defense counsel had a copy of this transcript in his hand while he was questioning

Arview, he did not pursue any of these points in his cross examination.

Defense counsel also provided ineffective representation by unnecessarily disclosing Ventura's prior record when Ventura did not take the stand, by failing to object numerous times during the trial when the prosecution elicited inadmissible hearsay and collateral crimes evidence, and by failing to challenge either peremptorily or for cause jurors who were predisposed to recommend a death sentence.

Ventura is also entitled to relief because the letters showing that the state had brokered a deal between McDonald and the federal authorities and that this deal was but one instance in a year long pattern of horse trading over McDonald's testimony constitute newly discovered evidence. It is true that the main use to which these letters would have been put would have been to impeach Jack McDonald, and that traditionally impeachment evidence has not been a ground for relief under newly discovered evidence, but this rule has been relaxed. Particularly, this is not a case where the evidence would have served merely to impeach an already impeached witness. Instead, the prosecutor disclosed McDonald's prior convictions at the outset of his testimony while concealing the evidence contained in these letters as part of a well orchestrated strategy to enhance his credibility. Moreover, McDonald's influence in Ventura's trial was so pervasive that disclosure of the letters at any time prior to or during the trial would have changed its character or brought it to a halt. It is also true that the requisite showing of prejudice is higher for a newly discovered evidence claim than for ineffective representation or prosecutorial non disclosure or deception, but even under the higher standard Ventura is entitled to relief because the evidence, absent McDonald's testimony, would not have sustained the conviction and would not have supported the CCP and pecuniary gain aggravators.

This Court did not conduct a proportionality analysis on direct appeal. McDonald did not serve any sentence for his admitted role in the killing of Robert Clemente and Jerry Wright, who eventually received a life sentence, was not tried until about two years after Ventura. This issue was pled in Ventura's motion for postconviction relief but not addressed by the lower court. Newly discovered evidence is an appropriate vehicle to consider the proportionality of Ventura's sentence in view of the lesser sentence received by his co-defendant.

Ventura's trial and sentence were unfair because the trial judge used his silence during the trial as a non statutory aggravator, because the jury instructions given during the penalty phase were vague and improperly shifted the burden to the defense to prove that death was not the proper penalty, because the court ignored clearly established mitigation evidence, and because of the cumulative impact of the many and pervasive errors shown on the record. The lower court summarily denied these claims as being procedurally barred, but it did so on the urging of the state's response to Ventura's motion for postconviction relief, and the state's response was itself untimely. This Court had set specific time limits for the filing of the postconviction motion and for the state's response, and the state did not comply with those time limits. The lower court not only in effect granted the state an enlargement of time beyond that established by this Court's Order but then granted the state everything it had sought in that response. The appropriate remedy would be to declare the state's response a nullity and require the lower court to consider these claims on their merits.

## **ARGUMENT**

### **I. BRADY/GIGLIO ERROR**

In Claim IV of his postconviction motion Mr. Ventura claimed that he was deprived of his rights

to due process under the fourteenth amendment to the United States Constitution as well as his rights under the fifth, sixth, and eighth amendments because the state withheld evidence that was material and exculpatory in nature and/or presented misleading evidence, and that such omissions rendered defense counsel's representation ineffective and prevented a full adversarial testing.

The evidence in this case establishes not only isolated instances of Brady violations but an overall pattern of deception and intentional covering up by the prosecution.

While the prosecution's constitutional duty of disclosure no longer measured by moral culpability or willfulness, *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable, *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). It is clear from the record of the evidentiary hearing that going into the trial, defense counsel did not know of any deals or any negotiations going on between the prosecutor and the prosecution's key witness, Jack McDonald. The first time the question of deals between McDonald and the state or the police came up during the trial was during the direct testimony of Postal Inspector Ed Berger. There, the state elicited testimony that McDonald was cooperating with the state because he was dying of cancer and wanted to "clear his conscience." (R. 479). Defense counsel attempted to probe this issue during cross examination by asking Mr. Berger a leading question about "leniency or special consideration in his prosecution." This question was immediately objected to by the prosecutor as an unfair characterization. That was the extent of any probative examination of McDonald's dealings with the state or federal authorities at any time during Ventura's trial. When Jack McDonald was called by the state, the prosecutor asked him whether ". . . Any promises been made to you concerning

your testimony here?” McDonald replied: “None whatsoever,” (R. 649). Just in case the judge and jury had missed the point, the prosecutor followed up on re-direct by asking McDonald about his motivation for testifying, to which McDonald replied:

Well, I’m nearing sixty years of age. This is probably, undoubtedly, the most horrendous thing I have ever been involved in, and I think it is about time we cleared the air and it might give Mr. and Mrs. Clemente a little peace of mind knowing exactly what happened.

(R. 672). This testimony came from the same witness who (unbeknownst to the judge and jury) had earlier written:

If by some fluke I am apprehended without any deal being made I will rot in hell before I would give any testimony on anything. This is a promise. (Defense exhibit 2).

The prosecutor had led off his direct examination of McDonald by having him admit to his prior felony convictions. This was a fairly standard tactic designed to defuse the impeaching impact of a witness’s criminal record, and to forestall any stumbles by the witness that might open the door to opposing counsel’s exploration of otherwise inadmissible details about it. This testimony was followed immediately by the news that McDonald had received an honorable discharge from the military. (Dir. 629). Information about Mr. McDonald’s honorable discharge was wholly gratuitous, but defense counsel did not object to it.<sup>2</sup> McDonald’s testimony about “clearing the air” and giving the victim’s widow “peace of mind” was elicited by the prosecutor at the conclusion of McDonald’s testimony. It is noteworthy that it was elicited on re-direct, not direct examination. Thus, defense counsel would presumably have exhausted his cross examination, and this story about remorse and pure motives

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<sup>2</sup> The fact that it was brought out at all belies any argument that the prosecutor did not argue McDonald’s credibility to the jury.

would serve as a dramatic conclusion to the witness's overall testimony.

The evidence introduced at the evidentiary hearing shows that the jury and the court were deceived. Ventura filed a pro se demand for speedy trial a little over a year after he was rearrested. McDonald, who had been in communication with the Volusia County sheriff's office while remaining at large on his federal case, was picked up six days later. Two days after that, Mr. Stark wrote a letter formally requesting that federal bond jumping charges against McDonald be dropped in exchange for his cooperation. (Defense exhibit 3). About eight days later the U.S. Attorney's office wrote back that the bond jumping charges would not be pursued ". . . as long as he cooperates fully with your office in the upcoming murder case referred to in you letter. . . ." *Id.* This was a straight quid pro quo deal for testimony. Whether or not defense counsel could have or should have uncovered this evidence and used it to impeach McDonald, it is clear that the prosecutor knowingly elicited false testimony from McDonald when he obtained the "none whatsoever" response and did not immediately correct the remark. Likewise, the prosecutor clearly misled the court by repeatedly eliciting testimony about "dying of cancer," wanting to "clear the air," and giving the victim's widow "peace of mind" from McDonald – the same witness who had earlier written to say that he would "rot in hell" before he gave any testimony unless he got what he wanted.

This case falls squarely within the parameters of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). If anything, the situation here more nearly resembles cases predating *Giglio* which seemed to require an affirmative showing of moral impropriety on the part of the prosecution. For example, the *Giglio* court cited *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935) for the proposition that ". . . deliberate deception of a court and jurors by

the presentation of known false evidence is incompatible with ‘rudimentary demands of justice.’” In *Routly v. State*, 590 So.2d 397 (Fla. 1991), this Court stated: “The thrust of *Giglio* and its progeny has been to ensure that the jury knows the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury.” (Quoting *Smith v. Kemp*, 715 F.2d 1459, 1467 (11<sup>th</sup> Cir.), cert. denied, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699 (1983); accord *Alderman v. Zant*, 22 F.3d 1541, 1554 (11<sup>th</sup> Cir. 1994); cited in *Craig v. State*, 685 So.2d 1224 (Fla. 1997).

It is conceivable that McDonald meant what he said when he testified that he had received no deals “whatsoever.” In his “rot in hell” letter of September 3, 1987 (Defense exhibit #2), he made it clear that -- now that he had evaded first degree murder charges because of the speedy trial rule and now that he had avoided any federal charges in connection with the homicide merely by giving a (according to him, false) statement to Detective Hudson implicating Ventura (R. 469, 470) -- he now wanted a deal absolving him from all liability in the bank scam in exchange for his actual trial testimony. He conceivably regarded dropping the bond jumping charge and promises of future assistance at federal parole hearings as too insignificant to consider. Nevertheless, a deal did exist and the prosecutor had an obligation to correct the “none whatsoever” remark. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) was cited in *Giglio* for the proposition that: “. . .the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.” *Giglio* itself dealt with a situation where the prosecutor at trial did not know about the existence of a deal that had been made by another attorney in the office, and allowed the witness to deny the existence of the deal during cross examination by the defense. By comparison Ventura’s prosecutor,

who brokered the deal, was the same person who elicited the false denial of the existence of a deal on direct examination.

It is true that the prosecutor stated that “there were no promises made to Mr. McDonald in return for his testimony” in his letter to the U.S. Attorney’s Office of January 20, 1988. (Defense exhibit #3). There are different ways of viewing this letter, some more benign than others. For one thing, Mr. Stark did not make any deals with Jack McDonald, he merely brokered them. The letter itself was copied to the federal judge, and its stated purpose was to obtain any benefit for McDonald that might be forthcoming from any source in the federal system. The detailed chronology contained in the letter made no references to any negotiations or discussions about a deal and certainly made no reference to the letters exchanged between Mr. Stark and the U.S. Attorney’s Office regarding McDonald’s cooperation. Given the urgency of Mr. Stark’s September 25, 1987 letter, the fact that it was written after Mr. Ventura had filed a pro se demand for speedy trial and a trial date was imminent, given Mr. Stark’s language in that letter (“ . . . I would like to *formally request* that you consider dismissing the bond jumping charges . . . ”[emphasis added]), and especially given the strategic placement of McDonald’s “clear the air” and “peace of mind” speech at the close of his testimony in Ventura’s trial, the notion that the existence of a bond jumping deal somehow slipped the prosecutor’s mind during the trial is absurd. It follows that the denial of any promises contained in the January 20 letter was a fraud.

*Giglio* was specifically pled in the motion for post conviction relief (R. 80) in Claim IV in general and paragraphs 64 through 67 in particular. The lower court’s order denying relief addressed claims of ineffectiveness in jury selection and the penalty phase with some specificity, but it is silent with

regard to *Giglio* error or to any claims of prosecutorial non-disclosure or misconduct. (R. 304 et seq.). Generally, the lower court's order denying relief did so on the basis of lack of prejudice. Although the standard of prejudice for ineffective assistance of counsel under *Strickland* may be the same as the *Brady* materiality standard, *Mills v. State*, 684 So.2d 801 n. 4, it is not clear from the lower court's order that the court recognized the existence of any *Giglio* error at all. This point is important because the prosecutor's affirmative deception of the jury occurred independently of any performance or even participation by defense counsel. While the ultimate standard to be used in determining whether sufficient prejudice existed to warrant relief may be the same for *Bagley*<sup>3</sup> materiality and *Strickland* ineffectiveness, the facts that must be analyzed to make that determination are necessarily different. As Mr. Cass put it, he was "stuck" when Inspector Berger and Jack McDonald, on repeated questioning by the prosecutor, denied that any deals existed. Defense counsel had a right to be stuck under those circumstances, because the prosecution has an affirmative duty not to deliberately deceive or mislead the jury. Indeed, any effort by defense counsel to pursue the matter would only serve to re-ring the bell, which is exactly what did happen in Ventura's trial when defense counsel, in his counter-productive efforts at cross examination, elicited testimony denying the existence of a deal from both Inspector Berger and from Jack McDonald. (R. 489, 672). In short, any effort on the part of defense counsel to probe what has now been shown to be knowing deception by the prosecutor and his key witness could in itself be challenged as ineffectiveness. The lower court's order rendered after the evidentiary hearing in this case addressed as potential grounds for relief only ineffectiveness of counsel and newly discovered evidence with regard to claims two through five (without determining whether

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<sup>3</sup> *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

either ineffectiveness or newly discovered evidence even existed), acknowledged the existence of other issues in these claims only to the extent that they were “unworthy of discussion,” and addressed ineffective assistance only in the context of the penalty phase and jury selection. These facts strongly suggest that the lower court did not consider the prejudicial impact of the prosecutor’s independent deception at all.

The one point in the order where the lower court did address prejudice in a general way, it mentioned only *Strickland*, ineffective assistance of counsel, and newly discovered evidence. The lower court concluded that there was not a reasonable probability of a different outcome if the newly discovered evidence had been presented to the jury or if counsel’s performance had been better. This conclusion overlooked two related points: 1. As noted above, in the face of prosecutorial deception the quality of defense counsel’s performance is impossible to evaluate. Conceivably, a gifted lawyer might pierce the veil of deception, but that could only happen if the lawyer decided to gamble against the chance of re-ringing the bell (as happened here). Counsel had a right to rely on the prosecutor’s duty not to mislead or deceive the court. Without any rational way to determine how counsel’s performance could have been better or worse in the face of prosecutorial deception, it would be logically impossible for the court to determine that the outcome of the trial would have been the same (or different or anything else) if counsel’s performance had been better. 2. Likewise, in order for the lower court to conduct a meaningful comparison between the trial as it occurred and a trial where the newly discovered evidence had been presented to the jury, there must be a reasonable way to envision such a trial. If the newly discovered evidence had been presented to the jury, as proposed in the lower court’s order, it could not merely have been grafted onto the evidence introduced at the trial and presented to

the jury as such. If, as proposed by the court's order, ". . . any newly discovered evidence [that the prosecutor had knowingly elicited false testimony from its star witness and covered up an under the counter deal to drop charges in exchange for favorable testimony] was revealed to the jury," there presumably would have been a mistrial declared on the spot.

Moreover, the use of the term "any" in the court's order suggests that the court did not follow the rule enunciated in *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed. 490 (1995), that *Bagley* materiality is defined in terms of suppressed evidence considered collectively, not item by item. This point is especially relevant here for a number of reasons. First, there is now extensive evidence of previously undisclosed negotiations between Jack McDonald and the state from at least the December 19, 1986 letter (Defense exhibit 3) up to, in the middle of (the January 20, 1988 letter), and after Ventura's trial. There is a significant difference under any prejudice analysis between an isolated instance of dissembling during the trial and a year long pattern of horse trading.

Also, it would be a mistake to regard this evidence as merely one more avenue of impeachment against an already impeached witness. It is remarkable that, in the same September 25, 1987 letter in which the prosecutor formally requested that bond jumping charges against McDonald be dropped, an action which he concealed, he also requested certified copies of McDonald's convictions ". . . as I will need to provide that information to the Defense pursuant to our discovery rules . . ." This letter suggests that the prosecutor from the start intended to disclose some impeaching evidence and conceal the rest. His purpose was manifested at the trial, where the state on direct revealed McDonald's prior record but concealed evidence of a deal. The prejudicial impact of what was obviously a prosecutorial strategy is especially evident in view of McDonald's testimony, also elicited by the state, that he was

testifying because this was the “most horrendous thing I have ever been involved in, and I think it is about time we cleared the air and it might give Mr. And Mrs. Clemente a little peace of mind. . . .” This was the testimony of a man who had earlier written that, if by some fluke he got picked up without a deal in place, he would “rot in hell” before he gave the state the testimony it wanted. Although the prosecutor did not expressly argue McDonald’s credibility during closing argument, the state’s strategic concealment of a deal while disclosing convictions that were going to be revealed during the state’s case in chief anyway, coupled with McDonald’s state elicited expressions of remorse and rehabilitation at the conclusion of his testimony, were all a clearly orchestrated effort to establish credibility. As noted by this Court in *Craig v. State*, 685 So.2d 1224 (Fla. 1996), citing *Giglio*: “If there is a reasonable possibility that the false evidence may have affected the judgment of the jury, a new trial is required.” It would be difficult to argue that the false evidence in this case could not have reasonably affected the judgment of the jury given that it was elicited, exploited and dramatized precisely for that purpose.

Also in this regard, the September 3, 1987 letter from McDonald, which would have been admissible to impeach him, was addressed by McDonald to Detective David Hudson. Hudson was therefore privy to the negotiations between the state and McDonald. According to the September 25, 1987 letter from Mr. Stark to the U.S. Attorney’s Office, it was Hudson’s interview of McDonald the day before and the assurances he received from McDonald that actually prompted the state to formally request that bond jumping charges be dropped. What little physical evidence tending to connect Ventura to the crime there was, was collected by Detective Hudson, who was himself a party to the negotiations between the state and federal governments and McDonald. Tina Clemente’s testimony, that her husband was well acquainted with Ventura by name and that the person who set up the phony

boat sale meet introduced himself with the name “Alex Martin,” is totally inconsistent with the theory, based entirely on Jack McDonald’s testimony, that Ventura was the man who set up the meeting about buying a boat behind the Barnett Bank. This evidence could have been used to show that the state team, including the prosecutor and Hudson, were so focused on a theory of the case that was based entirely on McDonald’s testimony that the police did not follow up on existing leads, thus explaining the flimsiness of the physical evidence in this case.

Likewise, the court’s characterization of the evidence against Ventura as “overwhelming” is problematic. This Court termed McDonald the “key witness” in its opinion on direct appeal. According to Inspector Berger, the arrests of Ventura and McDonald were carefully timed in an effort to get one to flip against the other, because “. . . we could not successfully prosecute one without the other.” (Dir. 572). When Ventura made himself unavailable, the state allowed speedy trial in McDonald’s case to expire because there was insufficient evidence to prosecute. When Ventura was re-arrested on June 11, 1986, speedy trial was not an issue because of his previous failure to appear. Speedy trial became an issue when Ventura filed a pro se demand for speedy trial over a year later, on September 17, 1987. During the time between Ventura’s arrest and the date he filed his pro se demand, Jack McDonald had remained at large on his federal charges. At trial, Detective Hudson testified that all efforts were turned to locating McDonald after Ventura’s re-arrest, but that the first contact he had with him was a telephone conversation in August of 1987. (Dir. 576) During the evidentiary hearing, he stated:

Every time I talked to him, from the very first time, I kept tracing the phone calls and kept inducing him to call me back and call me back, because I didn’t feel that he would turn himself in.

So the first time we got it, it was out of the state of Florida. The next time we got it in Georgia. The next time we got Atlanta. So we knew the next time he was supposed to call, and we flooded Atlanta, Georgia with as many people as we could in downtown Atlanta. There was evidence he was supposed to be there.

And as he called me on the phone, they got it traced. (R. 476).

Whatever the actual extent of communication between McDonald and the authorities during that time, Mr. Stark began communicating with the U.S. Attorney's office at least as early as the December 19, 1986 letter in which he suggested that the "interests of justice" would be served by offering McDonald probation with "a short jail term if necessary" in exchange for his testimony against Ventura. The U. S. Attorney responded that it was too late to judicially mitigate McDonald's sentence, but that actions through the federal parole board and prosecution on bond jumping charges were still on the table. McDonald made his position known in his "rot in hell" letter of September 3, 1987. This state of affairs necessarily put the prosecution in a bind. If McDonald were picked up he might clam up. At least while he remained at large, negotiations could continue. Ventura forced the issue by filing a pro se demand for speedy trial, and McDonald was arrested six days later. Two days after that, the prosecutor wrote a letter to the U.S. Attorney's Office in which he formally requested that the bond jumping charges be dropped. The tone of the letter is urgent; it notes the impending scheduled date of the trial, less than three weeks in the future, and contains the statements, "Needless to say, Mr. McDonald is a crucial witness in both cases. . . .Mr. McDonald's cooperation is essential." In the letter written the day after Ventura's trial but before his sentencing, the prosecutor stated he felt a "compelling" obligation to report McDonald's cooperation, to note that he would be a "crucial witness" in the trial of the co-defendant, and to make arrangements to reward or urge others to reward McDonald in any way

possible. In subsequent letters written to the federal public defender's office and to McDonald himself, the prosecutor continued to describe McDonald as an essential witness and continued to offer his services to help mitigate McDonald's federal sentence. It seems safe to conclude that the prosecutor did not regard his case, absent McDonald's testimony, as "overwhelming."

Moreover, evidence from the trial of co-defendant Jerry Wright, which became available to the lower court at the evidentiary hearing, contradicts any conclusion that the evidence against Ventura was "overwhelming." McDonald testified that the killing around noon, give or take a little. He described getting to the bank where Ventura was to meet Clemente "very late morning, early afternoon," (Dir. 638). Two witnesses at the Wright trial, Gerald and Sharon Smith, neighbors of Robert Clemente, stated that they saw the Crow's Bluff Marina vehicle that contained the victim's body, in the driveway of his home at 4:15 on April 15, 1981 (R. Supp. 148 -157). From the testimony of witnesses who testified at either the Wright or the Ventura trials it is apparent that the body was discovered and that the engine compartment of the truck was still warm at some point between 5:00 and 6:00 p.m. (Dir. 313, 315; Wright 56, 57). There was no crime scene evidence pointing to Ventura as the perpetrator.<sup>4</sup> Moreover, evidence from the Wright trial contradicted McDonald's testimony that Jerry Wright was in desperate financial straits. Wright's tire company had assets of around three hundred and fifty thousand dollars at the end of 1979. (R. Supp. 70) There was testimony that Wright privately loaned out \$40,000 in 1981. (R. Supp. 158)

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<sup>4</sup> By contrast, a new trial was granted on a motion for post conviction relief because the prosecutor unwittingly failed to disclose its witness's status as a police informer *in other cases* and where crime scene evidence (of a robbery/murder) included the defendant's fingerprint on one of the victim's papers near the body. *Gorham v. State*, 597 So.2d 782 (Fla. 1992) (see Grimes, J., dissent, McDonald, J., concurring).

Moreover, Wright's insurance agent said that Wright had told him to cancel the insurance policy on Robert Clemente about three months before Clemente was killed. (R. Supp. 72). In fact, on cross examination he stated: "As far as he was concerned, I canceled it." (R. Supp. 73). He said that the premium payments for the policy had been made automatically through a "check-o-matic" program. Premium payment notices were not sent to Jerry Wright. (R. Supp. 71). According Wright's attorney, the transaction which included the insurance policy which purportedly provided the motive for the murder was part of a routine sweat equity deal and was a routine business practice. (R. Supp. 76).

Tina Clemente's testimony about "Alex Martin" and the fact that her husband knew Ventura by name flatly contradicts the theory that Ventura would assume an alias as part of a plot to set up a phony meeting about buying a boat. This evidence might not have been especially significant to Wright's jury because the entire focus of his trial was whether Wright had acted as a principal, not as the actual killer. There was a paper trail leading to Jerry Wright which included proof that he benefitted from the offense by personally receiving the benefits of the insurance policy. His jury might well have concluded that McDonald's account about the specifics of the killing was generally irrelevant to whether Wright participated to some extent in some kind of plot to have the killing done and to whether Wright ultimately benefitted from it, and thus that any evidence tending to contradict McDonald's account of the killing was likewise irrelevant. By contrast, Ventura's guilt and the CCP and pecuniary gain aggravators could only be established by unquestioned acceptance of McDonald's testimony in its entirety. Tina Clemente also stated that Robert Clemente was extremely nervous before meeting "Alex Martin." Such extreme nervousness is inconsistent with a simple boat sale. It is more consistent with illegal activity, such as the drug dealing that Clemente indulged in, according to his own wife. Tina

Clemente testified in both her statement and at the Wright trial to seeing the victim sell small quantities of drugs on numerous occasions, to having access to quick cash, a circumstance which is consistent with drug dealing, and to being present at the Marina when a full boat load of marijuana was unloaded. At the evidentiary hearing, the state elicited testimony that Jerry Wright's name was on a "hit list" connected with drug dealing in the area, and that his death came within three days of the killing of another individual on that list. (R. 533). All of this evidence is inconsistent with or flatly contradicts the state's theory of the case, presented through Jack McDonald, in Ventura's trial.

The state called a number of witnesses at Ventura's trial to establish that he had made damaging admissions. None of them claimed to be present or in any way actively involved in the killing, none of the described admissions were specific, and each witness was impeached. Joseph Pike claimed that Ventura spoke with him on May 6, 1981 and admitted that he had been involved in a homicide along with McDonald. According to Pike, Ventura provided a number of details about the homicide that were consistent with the version given by McDonald, including the mention of a key man insurance policy. He also said that "He [Ventura] never said that he directly committed it . . . ." (Dir. 506), and ". . . he had never said anything about what he did in it, (Dir. 512). Pike testified about an interview he gave to Inspector Berger and a Captain Carroll on May 18, 1981 as follows:

The question was: When he said that he had handled this – this is from Carroll – when he said he had handled the extermination, did you get the impression from what he said that he was involved in it perhaps more than McDonald was?

And my answer was: Just because of my prior knowledge of Pete and the way he actually says things, I got a strong feeling that it may be McDonald himself. (R. 508).

Pike was a cooperating witness and co-conspirator in the bank fraud scheme masterminded by

McDonald. According to Pike, the scam had involved as many as twenty-five people. (Dir. 518). Pike eventually pled to three felony counts in connection with the scam, but was sentenced to only five years probation and thirty days incarceration. (Dir. 510). He said that he had only known a very few of the people involved and that his part in it was very small. (Dir. 519). He described McDonald as being “. . . one of the key people . . .” in the scam. *Id.*

Reginald Barrett was called by the state. He said that Ventura never told him that he had been involved in a homicide. (Dir. 524) According to Barrett, Ventura asked him to furnish a gun because a “. . . person from Atlanta wanted to have a pistol, or a gun . . .” (R.525), but Barrett also said that in the twenty years he had known Ventura he had never known him to carry a gun because “. . . it was not his style.” (542, 543). Barrett said that on two occasions Ventura had used him as a “refuge” because he (Ventura) apprehended danger from McDonald. (R.545).

When Ventura was first arrested, he was able to post bond, after which he absconded. He was rearrested in Austin, Texas in June 1986 because a 16 year old boy named Timothy Arview walked into police headquarters and said that he believed a man named Juan Contreras/aka Peter Ventura was wanted out of Chicago for homicide (Dir. 686). According to the officer who met with Arview, Sgt. Gonzales, the boy did not tell him that Ventura admitted to committing a homicide, but only that Ventura admitted to being wanted for a homicide. Arview’s entire trial testimony occupies six pages of the trial transcript. His bare bones testimony on direct examination was that Ventura made an admission that he had killed a man in Florida and that he was motivated to testify because of moral concerns. The minimal cross examination conducted by defense counsel showed that Arview was motivated by his desire to acquire reward money and exact some revenge against Ventura for past misdeeds.

Arview gave a taped statement to Detective Hudson, a transcript of which was introduced at the evidentiary hearing as state's exhibit #2. Arview's statement on the transcript is at times almost incoherent, but he does say, referring to Ventura: "But then he went down there and met the guy and the night of the races was when he shot him." Later on in the transcript Arview tied the "races" to the Daytona area, so this is the only alleged admission by Ventura contained in the transcript that could have anything to do with this case. Arview's trial testimony and this taped statement, which had both been placed before the lower court for its consideration of Ventura's postconviction motion, are discussed in more detail elsewhere in this brief in connection with ineffective assistance issues. Suffice it to say here that Arview's taped statement, which was generally rambling and often unintelligible, showed that he was motivated by the hope of reward money, that his asserted good citizenship motive was implausible given the time he waited before going to the police with his story plus the fact that he evidently only went to the police when he got into some unspecified trouble, that he was further motivated to retaliate against Ventura for perceived physical abuse and cheating him out of his wages, and that there had been some parting of the ways between the two of them. Aside from motivations, Arview's testimony about this admission was impeachable in and of itself because of its vagueness, because of the circumstances in which it was allegedly made, i.e., just after Arview had slapped Ventura "upside the head," and especially because the actual killing took place during the day, and not on the "night of the races" or the night of anything else.

By any standard, the evidence introduced at trial, absent Jack McDonald's testimony, was not "overwhelming." The prosecutor's evaluation of McDonald as a "crucial" and "essential" witness is born out by an examination of the trial record. The *Kyles* court observed that *Bagley* materiality is not a

sufficiency of evidence test: “A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.” Even so, it is questionable whether the state’s case, absent McDonald’s testimony, would have survived a motion for a directed verdict. The prosecutor did not seem to think so. In any event, the *Bagley* materiality standard set out in *Kyles* and quoted at length by this Court in *Young* is as follows:

[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal (whether based on the presence of reasonable doubt or acceptance for an explanation for the crime that does not inculpate the defendant). [Citations omitted]. *Bagley*’s touchstone of materiality is a “reasonable “ probability of a different outcome, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the government’s evidentiary suppression “undermines confidence in the outcome of the trial.” [Citing *Bagley*, “*Agurs* ‘rejected a standard that would require the defendant to demonstrate that the evidence probably would have resulted in acquittal;’” *Strickland v. Washington*, 466 U.S. 668 (1984), “[W]e believe that a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome of the case”; and *Nix v. Whiteside*, 475 U.S. 157 (1986), “[A] defendant need not establish that the attorney’s deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*”]. *Kyles*, 1566. Also *Smith v. Wainwright*, 799 F.2d 1442 (11th Cir. 1986); *Chaney v. Brown*, 730 F.2d 1334 (10th Cir. 1984).

If the lower court really did follow the standard described in these cases rather than take a purely outcome determinative approach it should have said as much in its order. In *White v. State*, 24 FLW S131 (1999) this Court was presented a situation that is somewhat similar to this case. There the state withheld two items: 1. A memorandum which memorialized an agreement between the state and the testifying co-defendant, and 2. A \$1,000 payment to the witness’ wife. In determining that the *Brady* materiality test had not been met, the lower court’s order, which this Court incorporated in its

opinion, stated:

Defense counsel conducted an excellent cross-examination of [co-defendant] DiMarino. [Appellant's] attorney showed the jury that DiMarino had much to gain by his testimony. Defense counsel brought out that DiMarino lied when it was to his benefit, that he obtained a better sentencing deal via his testimony, that he would be kept safe from the Outlaws and that his girlfriend and child would be taken care of. Even though some of the details of the agreement were not presented to the jury, counsel more than sufficiently acquainted the jury with the fact that there was an agreement between DiMarino and the State and counsel introduced most of the agreement's major components. The additional material of which [appellant] now complains would not have added to DiMarino's impeachment. Consequently, this court finds there is no reasonable probability that this evidence, if it had been presented at trial, would have changed the outcome.

This Court agreed with the lower court's analysis and found that the "cumulative effect" of the state's failure to disclose the memorandum did not undermine confidence in the jury's conviction.

The *White* analysis is included verbatim here for a number of reasons. For one, it stands in stark contrast to the order rendered by the lower court in this case, which did not address the non-disclosure issue raised in claim IV of the 3.850 motion at all, except perhaps to lump it in with the issues raised in claims II through V which it deemed "not worthy of any specific discussion." Likewise, the *White* analysis addressed various factual elements of prejudice by describing the contents of the undisclosed evidence and comparing it to evidence adduced at trial, whereas here, the lower court did not make any mention of the undisclosed evidence produced at the evidentiary hearing – in fact, did not even acknowledge its existence – and simply concluded that the evidence against Ventura, most of which was the testimony of Jack McDonald, was "overwhelming." Moreover, each and every point made in the *White* analysis produces the exactly opposite result when applied to the facts here. Ventura's counsel did not do an excellent job in cross examination. He did not cross examine

McDonald on the issue at all, and, if anything, he re-rang the bell with Inspector Berger when he inquired about any deals and received, not only a false denial, but a story about McDonald's deep remorse and desire to "clear the air." In fact, in questioning Berger, it was defense counsel who phrased these prejudicial remarks in the form of a question. In short, defense counsel did not do an excellent job in cross examination; he did a bad job. White's counsel introduced the major components of the deal between the state's witness. Not only did Ventura's counsel not do that, he reinforced the denial of the existence of a deal with his own questions, he did not challenge the state when it elicited the "none whatsoever" testimony from Jack McDonald, and he thereby (albeit unknowingly) permitted the state to exploit its own deception of the jury. Finally, it was possible in *White* to envision the trial with the undisclosed evidence admitted in reaching the conclusion that disclosure would not have changed the outcome, whereas here, disclosure at any time before or during the trial would have completely changed the character of the trial, or more likely brought it to a halt.

## **II. INEFFECTIVE ASSISTANCE OF COUNSEL**

Ventura raised ineffective assistance of counsel in his direct appeal, presenting nineteen separate incidents committed during the trial. At the time, this Court ruled:

Given this record, we hold that none of these claims of ineffective assistance of counsel warrant relief, but we do so without prejudice to Ventura to assert these claims in a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850.

In his post conviction motion, Ventura pled ineffective assistance specifically in Claims II, III and V and conjointly with the issues raised in Claims VII through XIV. Claim II was that Ventura was denied the effective assistance of counsel pretrial and at the guilt/innocence phase of his trial, in violation of the sixth, eighth and fourteenth amendments. A full adversarial testing did not occur. Counsel's

performance was deficient and as a result Ventura's conviction is unreliable. Claim III was that Ventura was denied the effective assistance of counsel at the sentencing phase of his trial, in violation of the sixth, eighth, and fourteenth amendments. Counsel's performance was deficient and as a result the death sentence is unreliable. Claim V was that Ventura was denied the effective assistance of counsel due to an actual conflict of interest that adversely affected defense counsel's representation of Ventura, in violation of the sixth, eighth, and fourteenth amendments.

**A. Failure to Investigate**

Among the allegations made in the 3.850 motion is that defense counsel was ineffective for failing to investigate and present evidence of the deals and negotiations between the state and Jack McDonald. (Claim II, paragraph 3). The lower court did not address *Brady* or *Giglio* error at all, and applied the same standard of prejudice to both ineffectiveness and newly discovered evidence claims. The lower court ruled: “. . .in any result there is no reasonable probability that the results would have been different had the trial counsel for the defendant performed better or if any newly discovered evidence was revealed to the jury.” While the court used the phrase “reasonable probability,” the fact that the order speaks of the outcome of the trial without saying anything about its fundamental fairness or the reliability of the verdict shows that the court erroneously used only an outcome determinative standard in measuring prejudice. As explained in *Strickland* and reiterated by this Court in *Rutherford v. State*, 727 So.2d 216 (Fla. 1998):

On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths . . . .Nevertheless, the standard is not quite appropriate.

Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

The greater weight of the evidence in light of both the trial record and the evidence produced at the evidentiary hearing indicates that the prosecutor concealed evidence that he had brokered a deal between McDonald and the federal authorities in exchange for McDonald's testimony. At the evidentiary hearing, the prosecutor stated that his office had an "open file" policy, that he had not "squirreled away" the letters which would have documented the deal, and that defense counsel had not asked too many questions about deals during McDonald's deposition, all implying that the reason for non-disclosure was simply negligence on the part of defense counsel.<sup>5</sup> This view overlooks certain facts: At the evidentiary hearing, the prosecutor stated that he did not know whether the letters in question were in the file or not. Defense counsel stated that he had problems with what he termed the "so-called" open file policy. The defense engaged in routine pre trial discovery; the record on direct appeal contains a demand for discovery, an answer to the demand by the state which denied possession of any evidence tending to negate the guilt of the accused, and fifteen discovery depositions taken by defense counsel. Eight days after Ventura filed a pro se demand and about three weeks before his then scheduled trial

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<sup>5</sup> When defense counsel did depose Jack McDonald (styled "Deposition of Jerry McDonald" in the record on direct appeal), McDonald gave a different story from what he later said at trial.

date, the prosecutor formally requested that federal bond jumping charges against McDonald be dropped, described McDonald as a “crucial witness” whose cooperation was “essential,” and requested certified copies of McDonald’s convictions because he would “. . . need to provide that information to the Defense pursuant to our discovery rules. . . .” On the day between Ventura’s trial and sentence, the prosecutor wrote to the U.S. Attorney’s office to advise them of McDonald’s assistance and ask for whatever consideration that could be given to him at any future hearings “in return for this assistance.” Given the timing and the language, the notion that the prosecutor and McDonald somehow forgot about a deal on the bond jumping charge or any hoped for benefits during Ventura’s trial is simply not plausible. Even at the evidentiary hearing the prosecutor replied to a question about his obligation to correct false information that he had knowingly elicited only by saying, “Where you have an obligation.” Given these circumstances, it is far more likely that this information was concealed by the state rather than that it was overlooked by defense counsel. As noted in *Strickland*, the government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. Still, the defendant’s right to effective assistance of counsel can be violated simply by counsel’s failure to render adequate legal assistance, *id.*, and to the extent that the jury was not presented with this information due to the failure of defense counsel to adequately investigate the deals made between McDonald and the state and present that information to the jury counsel was ineffective and the prejudice caused by the omission is manifest.

The lower court’s order on claims of ineffective representation addressed only specific acts and omissions during jury selection and the penalty phase of the trial. The court ruled that there was no reasonable probability that the results would have been different if defense counsel had “performed

better.” In fact, failure to investigate the negotiations between McDonald and the state was specifically pled in Ventura’s motion for postconviction relief at Claim II(A), and it appears from its order that the lower court did not address this claim, other than perhaps to group it with those claims which were deemed not worthy of any specific discussion. At the evidentiary hearing defense counsel himself said he had rendered ineffective assistance. He also said he had not known of the letters, and that if he had known about them he would have used them for impeachment, so this claim cannot be dismissed as a strategic move on the part of the defense. To the extent that defense counsel could have uncovered this evidence and failed to do so, the prejudice under *Strickland* and *Rutherford* is obvious: “An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable.” *Id.* In this case, defense counsel failed to keep the prosecution honest and the prosecutor took advantage of the situation by being dishonest. Thus, not only one, but two of the crucial assurances that the result of the proceeding was reliable were missing.

Defense counsel also failed to investigate and present the testimony of the victim’s widow, Tina Clemente. This claim was specifically pled in Claim II(A), paragraph 30, of the motion for postconviction relief. Tina Clemente’s testimony, that her husband was well acquainted with Ventura by name and that the person who set up the phony boat sale meet introduced himself with the name “Alex Martin,” is totally inconsistent with the theory, based entirely on Jack McDonald’s testimony, that Ventura was the man who set up the meeting about buying a boat behind the Barnett Bank. The state had not listed her name among the seventy witnesses provided to the defense, and the court reporter from Ventura’s trial testified at the evidentiary hearing that defense counsel at one point said: “. . . I am so overworked, and I’m working on so many murder cases, and so much information has come in that I

don't know what information is in each file" (R. 463), so it is possible that defense counsel simply did not get around to investigating the case beyond the four corners of the pleadings. Still, the failure to investigate and develop this information is inexcusable and somewhat inexplicable. Deedee Jorgensen was deposed by Ventura's counsel but never called as a witness. She was co-owner of the marina and said that she took the message from the person claiming to be "Alex Martin." She also said there had been at least two such calls. (Deposition of Deedee Jorgensen). Although admittedly without Tina Clemente's testimony that her husband had been well acquainted by name with Ventura Deedee's testimony alone would have helped the state's case more than hurt it. Nevertheless, once the fact that the caller who presumably was the killer had identified himself as "Alex Martin" became known to counsel it would have been obvious that any testimony from any source that Ventura was known by name to the victim would be worth exploring, and the obvious person to ask would have been the victim's wife. The fact that the caller identified himself as "Alex Martin" and spoke of a meeting at the Barnett Bank would not have been hearsay; it would not have been offered for the truth of the matter asserted or for any reason other than that the words were said, and in any event would have been admissible to explain the activities of the victim the next day. Once admitted, the testimony would have stood at stark odds with Tina Clemente's testimony that her husband had introduced Ventura to her by name and was evidently well acquainted with him. There are fanciful scenarios where these facts could be explained away by the prosecution, but the obvious conclusion is that someone other than Ventura called for Clemente, used a false name, set up the meeting at the Barnett bank, and did the killing. While admittedly speculative at this point, the possibility that voice recognition and comparison would have exculpated Ventura also should have been at least investigated.

Tina Clemente was available to defense counsel, as shown by the mere fact that she did testify at Jerry Wright's trial. Wright was convicted and eventually sentenced to life, but his circumstances were different from Ventura's. There was a paper trail leading to Jerry Wright which included proof that he benefitted from the offense by personally receiving the benefits of the insurance policy. His jury might well have concluded that McDonald's account about the specifics of the killing was generally irrelevant to whether Wright participated to some extent in some kind of plot to have the killing done by someone, sometime, somewhere, somehow, and to whether Wright ultimately benefitted from it. By contrast, Ventura's guilt and the CCP and pecuniary gain aggravators could only be established by unquestioned acceptance of McDonald's testimony in its entirety.

**B. Failure to Cross Examine**

Two other witnesses against Ventura were Timothy Arview and Juan Gonzalez. Ventura was taken into custody in Austin, Texas in June 1986. Police Sergeant Gonzalez testified that a 16 year old boy named Timothy Arview walked into police headquarters and said that he believed a man named Juan Contreras/aka Peter Ventura was wanted out of Chicago for homicide (Dir. 686). According to Sergeant Gonzalez, Arview did not tell him that Ventura admitted to committing a homicide, but only that Ventura admitted to being wanted for a homicide. At trial, the entire direct and cross examination lasted only 6 pages. The aforementioned discrepancy was never explored in any depth (Ventura R. 677-684).

Aside from pleasantries, the entire cross examination of Timothy Arview at trial was as follows:

- Q. . . .Did you have a difference with Mr. Ventura or who you know as Mr. Gadaña about money?
- A. A slight difference – yes.
- Q. And you didn't get paid what you wanted to get paid; is that correct?

A. Well, I understood he wasn't getting paid too.

Q. You were concerned about collecting a reward too, weren't you?

A. No, sir. At first yes, but nobody told me that there was one or I would get anything. Nobody informed me of anything like that.

Q. Did you tell somebody in Austin, the Police Department, that you had told them that because you wanted the reward?

A. No, sir. He took notes down.

Q. I can't hear you.

A. No, sir. I didn't tell anybody that.

My statement of the tape was, I said: If somebody kills somebody, they should pay for it.

It's right there in the paper that you have.

Q. That was a tape that was made when you were talking to Investigator Hudson?

A. Yes, sir.

Q. You did express a concern about a reward?

A. Yes, sir.

After all, I felt I was in danger in the first place for doing that.

Q. You were, therefore, entitled to it?

A. I don't know if I am or not. Nobody has told me anything.

Q. You're concerned about coming to Daytona and having your room on the beach?

A. I was 16. I had never been to the beach. (Dir. 682 -684).

The tape transcript referred to here was introduced at the evidentiary hearing as state's exhibit

#2. It had been provided to defense counsel prior to trial, and it is evident that defense counsel had it in his hand during Arview's cross examination. Arview's statement on the transcript is at times almost incoherent, but he does say, referring to Ventura: "But then he went down there and met the guy and the night of the races was when he shot him." Later on in the transcript Arview tied the "races" to the Daytona area, so this is the only alleged admission by Ventura that could have anything to do with this case. These words are described as part of a rambling account of past transgressions sparked when Arview slapped Ventura "u[p]side the head" while the two were wrestling. Arview did say, as he said at trial, that his motivation in going to the police was righteous; i.e., "When you kill somebody [you're] supposed to pay for it." On the other hand, when he was asked about the time that elapsed between the conversation and when he went to the police, the following exchange ensued:

Hudson: When did this conversation take place prior to when you went to the police, how long ago?

Arview: When was it that I got into trouble?

Arview's mother: Which one?

Arview: The one with (inaudible).

Arview: . . . four . . . is that February or March?

Hudson: And why did you wait for a few months to (inaudible) or what?

Arview: I didn't know what to do, ya know, to decide what to do.

Hudson: Have you ever seen a wanted poster in the past six months?

Arview: No. . . . another reason I did it because he owed me money from work . . . he didn't pay me . . . I figured he didn't pay me my money, ya know . . . I'll get my money from the reward.

Hudson returned the reward money later in the interview:

Hudson: . . . I don't know, I guess I thin[k] Sgt. Gonzales told you or maybe your mother did. I do not remember, I don't remember if there is a reward or how much there is. It won't be through the federal government.

Arview: Alright.

Hudson: But I think the victim's father at one time did. I will check that with him and get back with him and let you know for sure through your mother. If there is one and he is convicted, which I don't think there be too much problem in that, you're certainly entitled to it. Because um . . .

Arview: What about the other reward . . .

Evidently, Arview hoped to cash in twice. Although the circumstances are not clear from the transcript, possibly because of the presence of Arview's mother at the interview, there is also an account of an alleged sexual advance by Ventura which prompted Arview to give him a bloody nose and was the reason "why he left." Arview also stated that Ventura "never had a firearm."

Arview's taped statement was generally rambling, at times almost incoherent. Nevertheless, defense counsel clearly had enough evidence to impeach Arview by showing that he was motivated by the hope of reward money, that his asserted good citizenship motive was implausible given the time he waited before going to the police with his story plus the fact that he evidently only went to the police when he got into some unspecified trouble, that he was further motivated to retaliate against Ventura for perceived physical abuse and cheating him out of his wages, and that there had been some parting of the ways between the two of them. Aside from motivations, Arview's testimony about an actual admission by Ventura was impeachable because of its vagueness, because of the circumstances in which it was allegedly made, i.e., just after Arview had slapped Ventura "upside the head," and

especially because the killing took place during the day, not the “night of the races” or the night of anything else. Defense counsel’s effort at cross examination of this witness was a mere case of going through the motions. It is doubtful whether he read Arview’s transcript other than to give it more than a cursory glance.

### **C. Disclosure of Prior Record**

Defense counsel during voir dire disclosed to the jury venire that Mr. Ventura was a convicted felon. (Dir. 104-105). Several jurors said it would prejudice their view of Mr. Ventura, which naturally had the effect of prejudicing the remaining jurors. (Dir. 106). Furthermore, the jurors who disclosed their prejudice were not challenged on any basis. (Dir. 281-282). This matter has greater significance because Mr. Ventura did not testify at trial; therefore, evidence of his prior felony convictions would not have been admissible. As a result, Mr. Ventura was denied an adversarial testing.

### **D. Failure to Object**

Defense counsel failed to move to strike or, in the least, object to the inadmissible hearsay testimony of the medical examiner, Dr. Arthur Schwartz. Dr. Schwartz improperly testified:

Q. Doctor, were you made aware that there were bullets recovered from the vehicle of the deceased?

A. *I was told* bullets were recovered later than the autopsy (Dir. 431)(Emphasis added).

Defense counsel failed to object to the inadmissible hearsay testimony of Edward Berger. (Dir. 465; 471; 477). Mr. Berger testified:

Q. Did Mr. Barrett or Mr. Pike continue to provide you with information?

A. Yes, sir.

Q. *Did they indicate to you* who the source of their information was?

A. Yes, sir. Most of the information they were obtaining was obtained from Mr. Ventura.

(Dir. 471)(Emphasis added). Mr. Berger's testimony continued:

Q. Did they pass information on to you regarding -- either one of them -- pass information to you regarding the insurance policy after that conversation you had on the 17th of May?

A. I recall receiving information, I believe, from Mr. Barrett or it was Mr. Pike.

Those would have been the only two that I would have received information from. I leaned more toward Mr. Barrett that there was -- that Pete knew that payday was coming soon and this was, I believe, a couple of days prior to when the insurance payment was being made because *I was being advised from Carroll* that they were trying to, you know, they were setting up an insurance payoff to Jerry Wright.

(Dir. 477)(Emphasis added). Mr. Berger also testified:

Q: Were any promises made to him by you or by Hudson at that time regarding information for the homicide versus cutting any kind of slack on the others?

A. No sir.

As a matter of fact, *he [Jack McDonald] indicated* he was not looking for anything because *he alleged* that he was dying of cancer. He was kind of clearing his conscience. He confessed to being a mastermind over a million dollar fraud scheme.

(Dir. 479)(Emphasis added).

During his cross examination of Inspector Berger, defense counsel elicited testimony that Mr. Ventura was involved in a bank fraud scheme. (Dir. 481). The evidence was irrelevant to the charges against Mr. Ventura and constituted inadmissible collateral crimes evidence, or alternatively,

inadmissible character evidence:

Q. I wonder if you would be so kind now to tell us under what circumstances he [Mr. Barrett] came to you?

A. Back in March of 1980, I started an investigation concerning a bank fraud.

Q. And the particular one that Mr. McDonald and Mr. Pike were involved in?

A. Yes, sir.

Q. And Mr. Ventura?

A. Yes, sir.

(Dir. 481).

Defense counsel failed to object to inadmissible collateral crimes evidence (or inadmissible character evidence) introduced during the testimony of Joseph Pike. Mr. Pike testified:

Q. Isn't it true that you were charged with some crimes involving fraud?

A. That's correct.

Q. And were you involved with Mr. McDonald?

A. That's correct.

Q. And Mr. Ventura?

A. Yes.

(Dir. 496-497).

Defense counsel failed to object to the inadmissible collateral crimes evidence (or inadmissible character evidence) found in the testimony of Gary Eager, a U.S. Postal Inspector:

Q. Was this involving the bank fraud scheme that Detective Berger was involved in at the time?

A. That's correct.

Q. And did you ever have any occasion to discuss firearms with Mr. Ventura at any time?

A. Yes, sir.

Q. And do you recall what discussion you may have had with regarding firearms?

A. It was June -- last of June, 1981. I had discussed with him the purchase of some firearms and he stated that he could possibly sell me a 38 caliber revolver, 357 magnum, or a 32 caliber revolver, and we had made arrangements to meet at the McCormick's Inn (phonetic) in Chicago that day.

Q. And did that ever take place?

A. No.

Q. Was Mr. Ventura arrested after that?

A. Yes, sir.

(Dir. 548-549).

Defense counsel also failed to object to the inadmissible hearsay testimony of Deputy David Hudson:

Q. Did you check out any telephones?

A. Yes, sir, we did. We checked out a phone number 252-9383 -- (904). That had been information *related to us from Reggie Barrett* in Chicago, and determined that came back to the Days Inn Motel located at 92 and 95.

There's a pay phone on the outside of the restaurant area kind of away from the motel.

(Dir. 559-560)(Emphasis added). Deputy Hudson's improper testimony continued:

Q. And had you received any information that led you to believe that Mr. McDonald and Mr. Ventura, that either one or both, had any idea that the insurance policies were to be paid on the 24th or 25th?

A. Yes, *through Mr. Barrett*. We had received some information stating that, in effect that -- I believe the *statement was that it was "pay day"*.

(Dir. 568)(Emphasis added). Deputy Hudson also testified:

Q. And did you ever get any more information on Mr. Ventura?

A. We had Federal agents involved in looking for him. We had ran down leads all over the United States, both [f]ederally, our department, Cook County looking for both of them.

The information that we found finally revealed that panned out on Mr. Ventura was in June of 1986.

Q. June, 1986?

A. That's correct.

Q. And where did that information come from?

A. The information *had come from* the Austin, Texas Police Department, Senior Sergeant Juan Gonzalez had an individual that *had given or supplied him information* that he thought the individual was Peter Ventura, although he knew him under a different name. And it was in fact Peter Ventura that was wanted by our department and Sergeant Gonzalez followed up that information for us.

(Dir. 574-575)(Emphasis added).

Defense counsel failed to object to inadmissible collateral crime evidence (or inadmissible character evidence) by the State's star witness Jack McDonald:

Q. Mr. McDonald, have you ever been engaged in any kind of business arrangement or business venture with Mr. Ventura?

- A. Legal or illegal?
- Q. Legal.
- A. No, nothing of any legal nature.
- Q. Any illegal?
- A. Yes.
- Q. And what was that?
- A. A murder in Volusia County.
- Q. Anything else?
- A. There was a bank scam situation in Chicago.

(Dir. 630).

Defense counsel also reinforced Mr. Ventura's involvement in collateral crimes in his ineffective cross examination of Mr. McDonald:

[BY MR. CASS]:

- Q. And then the other four counts that you mentioned, that's the other?
- A. Yes, right.
- Q. That's the situation from Chicago?
- A. Yes.
- Q. With Mr. Ventura?
- A. Yes.

(Dir. 651).

Finally, defense counsel failed to object to the inadmissible hearsay testimony of Juan Gonzales:

Q. He [Tim Arview] came into your homicide bureau at that time?

A. Yes, sir. He wanted to talk to somebody about a person that was wanted for the homicide out of Florida.

Q. And did you talk to him at that time?

A. Yes, I did.

Q. And did you get information regarding a possible person involved at that time?

A. Yes, sir.

Q. And what information did you get, sir?

A. *He told me* that there was a person by the name of Ventura that was living in Austin, had been living in Austin for approximately two years going under the name of Juan Contreras.

Q. *And did he tell you* where this person lived?

A. He gave me an approximate area in Austin.

He also gave me the telephone number of the person which I used to trace the address.

(Dir. 686)(Emphasis added).

All of the foregoing evidence was inadmissible. Florida Statutes § 90.404; 90.405; and 90.801. It was also prejudicial to Mr. Ventura. In particular, evidence of collateral crimes, which had nothing to do with the present case, did nothing except impugn Mr. Ventura's character. Mr. Ventura's constitutional right to the effective assistance of counsel was thereby violated. *Strickland, supra*, 466 U.S. 668 (1984).

**E. Ineffective Voir Dire and Jury Selection**

Defense counsel failed to challenge, either peremptorily or for cause, jurors who were predisposed to recommend a death sentence. Both Jurors Kirby and Dixon said they would recommend death even if the mitigating factors outweighed the aggravating circumstances. (Dir. 161-163). These jurors were subject to challenge for cause pursuant to *Morgan v. Illinois*, 504 U.S. 719, 112 S. Ct. 2222, 119 L.Ed.2d 492 (1992), and the failure to remove them is constitutional error. *Id.* Mr. Ventura's right to due process and a fair trial was violated.

Also, defense counsel stipulated that jurors Burdick (Dir. 181) and Hopkins (Dir. 182) were subject to a challenge for cause. Mr. Hopkins clearly stated that he could apply the law regardless of his religious beliefs:

MR. STARK: Mr. Hopkins, I'd like to ask you a particular question.

You indicated that you had a problem with the death penalty.

With respect to your ability to sit in judgment of your fellow man, do you have any problems with that?

MR. HOPKINS: No.

(Dir. 124). Mr. Hopkins also answered this Court's questions:

THE COURT: Let me ask you another question.

Would your objections, reservations, doubts about the death penalty interfere with your ability to objectively determine the guilt or innocence of the Defendant?

MR. HOPKINS: I don't think so.

THE COURT: If the Defendant was proven guilty beyond a reasonable doubt, would you return a verdict of guilty knowing the death penalty was a possibility?

MR. HOPKINS: I think I could.

(Dir. 139-40). Finally, Mr. Hopkins stated that he could vote for the death penalty:

BY MR. STARK:

Q. Mr. Hopkins, you indicated that this is a philosophy or religious belief. You indicate a prayer or things like that.

You pray. You would consider whether or not you could impose a death penalty.

Could you abandon your philosophy of life and religious beliefs and follow the law after instructions by the Court regarding the aggravating and mitigating circumstances and impose the death penalty?

A. I feel that I could do that.

(Dir. 141-42). Mr. Hopkins was improperly excused for cause. (Dir. 183). Mr. Cass provided ineffective assistance of counsel for failing to object to Mr. Hopkins improper recusal from the jury. Regarding Ms. Burdick, Mr. Cass was ineffective in making no effort to rehabilitate Ms. Burdick, who stated she could follow the law regarding the first phase. (Dir. 174).

During voir dire, Mr. Cass asked a prospective juror if she would "hear the evidence on mitigation and if it outweighed that of aggravation, you would vote for a life sentence." (Dir. 260). This improperly shifted the burden to the defense.

#### **F. Ineffective Investigation and Presentation of Mitigating Evidence**

During the penalty phase, Ventura's counsel presented three witnesses. The first witness, Larry Gainly, was a lay minister who counseled inmates, including Ventura. He provided testimony that Ventura was a model prisoner with strong religious convictions. (Dir. 864-66)

Ventura's second witness, Deborah Vallejo, was Ventura's daughter. Ms. Vallejo testified that Ventura is a "real good father" and a "very wise man" (Dir. 871). According to Ms. Vallejo's

testimony, Ventura was very supportive (Dir. 871), loves children (Dir. 871), counseled his children to stay away from trouble (Dir. 872), provided emotional care for his children (Dir. 872), and deserved saving (Dir. 873). Ms. Vallejo's testimony went unrefuted by the State.

Ventura's final witness, Cleon Zotas, was a longtime friend of Ventura and Ventura's ex-employer. Zotas has known Ventura for forty years. (Dir. 876). Zotas testified that Ventura "provided good for his family and used to work two jobs when we were young. He's a hard worker, and he went in his own business, contracting, and he was super." (Dir. 877). Zotas testified that Ventura worked for him in the printing business. Zotas testified that Ventura had learned a "very good trade" (Dir. 878), and that Ventura was worth saving (Dir. 878).

At the evidentiary hearing, defense counsel was asked what he did to prepare for the penalty phase. From his reply it appears that his efforts were limited to asking Ventura for information and referring the matter to his secretary:

Q. What did you do to prepare for the mitigation phase of this case, the penalty phase?

A. I think I talked to Mr. Ventura to find out who I could get. I think I wound up with about two witnesses.

Q. How did you get these witnesses? How did you contact them? How did they come about?

A. I think my secretary contacted them.

Q. Did you familiarize yourself with the rest of the family of Mr. Ventura?

A. No, I didn't know his family.

Q. Did you ever make any attempts to contact them?

A. It seems to me that I did.

Q. How would you have done that?

A. From whatever lead he gave me. (R. 555)

\* \* \*

Q. That fact that you did not call or search for any additional family members to testify in mitigation, was that a strategy decision on your part or, was it neglect?

A. I think the question assumes that if I had asked I would have found more people, and I just neglected them, I don't think so.

Q. Okay.

A. Because we were real thin in the penalty phase. I'm sure I would have wanted more people than I had.

Q. Okay. So then my question then is it was not strategy on your part to limit the mitigation witnesses.

A. No. (R. 560).

On cross examination by the state Mr. Cass said:

Q. . . . Do you have a clear recollection or a recollection as to how you handled the penalty phase in obtaining mitigation witnesses? What was your primary source for those witnesses?

A. My client.

Q. The defendant himself.

A. Yes, sir. (R. 582).

Ventura testified at the evidentiary hearing and said that he had not wanted his family involved with the trial because he did not think the trial would be fair. (R. 619). In fact, he said that he had not contacted his family members to testify at the evidentiary hearing; CCRC did that. *Id.* Collateral counsel

did indeed call a number of witnesses to demonstrate the abundance of mitigation that would have been available if defense counsel at trial had sufficiently investigated the matter and presented it to the jury. Three brothers, Frank M., Frank T. and Daniel Ventura, and three sisters, Natty Ventura, Theresa Hernandez and Ester Garay, all testified that they would have been available to testify on Ventura's behalf, but that no one ever contacted them in an effort to have them do so. If they had been called to testify in the penalty phase they would have provided detailed mitigating evidence about Ventura's family and religious background, good works that he did through his church and on his own, strong mitigating evidence about his non violent, responsible, hard working and caring character, and many other circumstances about his life which may well have affected the outcome of the penalty phase. (See generally R. 327 through 450). Collateral counsel also introduced the testimony of Reverend Hershey, who testified about Ventura's lifelong involvement with the church. (R. 356 et. seq.). In the absence of this evidence, the prosecutor at the penalty phase effectively argued that the evidence of Ventura's religious activity in prison was nothing more than a death row conversion. (Dir. 890).

There is no evidence that Ventura actively hindered Mr. Cass from investigating mitigation. "An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Porter v. Singletary*, 14 F.3d 554 (11<sup>th</sup> Cir. 1994). "Case law rejects the notion that a 'strategic decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.'" *Horton v. Zant*, 941 F.2d 1449 (11<sup>th</sup> Cir. 1991), cited in *Rose v. State*, 675 So.2d 567 (Fla. 1996). Defense counsel did not conduct an investigation into Ventura's background when he could and should have. It also appears from the record that defense counsel made no effort to investigate potential mental mitigation. *Ake v. Oklahoma*,

470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Where counsel does not fulfill the duty to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. *Harris v. Dugger*, 874 F.2d 756 (11th Cir. 1989); *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988).

### **III. NEWLY DISCOVERED EVIDENCE**

In Claim VI of the motion for postconviction relief Ventura claimed that newly discovered evidence establishes that his capital conviction and sentence are constitutionally unreliable and in violation of the fifth, sixth, eighth, and fourteenth amendments.

Ventura is entitled to relief because the letters revealing that the state brokered and then concealed a deal for Jack McDonald's testimony constitute newly discovered evidence. Clearly, this claim cannot be dismissed on the theory that defense counsel could have obtained these letters prior to trial through due diligence when all the evidence available shows that the prosecutor deliberately concealed their existence.

It may be argued that Ventura is not entitled to relief on this point because the newly discovered evidence would serve only to impeach Jack McDonald. The Second District Court of Appeals has addressed this point:

Historically, newly discovered evidence in the form of impeachment evidence was considered insufficient as a matter of law to warrant a new trial. [Citations omitted].

Recently, however, this rule on impeachment evidence has been expanded. Florida courts now are willing to consider newly discovered "impeachment" evidence as sufficient to grant a new trial in certain limited circumstances. In *Jones* [*Jones v. State*, 709 So.2d 512 (Fla.1998)], the supreme court stated: "[A]n evaluation of the weight to be accorded the [newly discovered] evidence includes whether the evidence

goes to the merits of the case or whether it constitutes impeachment evidence.” 709 So.2d at 521; see also *McDonald v. Pickens*, 544 So.2d 261 (Fla. 1<sup>st</sup> DCA 1989) (“[T]here may be cases where newly discovered evidence may warrant a new trial notwithstanding that the evidence goes only to the impeachment of a witness.”). *State v. Robinson*, (Fla. 2d DCA 1998) 711 So.2d 619, 622, *rev. granted* 727 So.2d 910.

Regardless, Jack McDonald’s influence on this case was so pervasive that it would be a mistake to view this evidence as merely impeaching. Joseph Pike and Reginald Barrett were called by the state to show that Ventura had made damaging admissions. Both were co-conspirators and co-perpetrators with McDonald in the bank scam, which had been masterminded by McDonald. The evidence is clear that McDonald had a position of domination or influence over these witnesses, and evidence that McDonald was a schemer who had cut a deal with the government and was actively trading his cooperation for possible benefits in the future would have called into question their testimony as well. Further, what little physical evidence tending to connect Ventura to the crime there was, was collected by Detective Hudson, who was himself a party to the negotiations between the state and federal governments and McDonald. Tina Clemente’s testimony, that her husband was well acquainted with Ventura by name and that the person who set up the phony boat sale meet introduced himself with the name “Alex Martin,” is totally inconsistent with the theory, based entirely on Jack McDonald’s testimony, that Ventura was the man who set up the meet. The letters in question showed not only the negotiations but also the eagerness and at times almost desperation with which the state pursued them. Evidence that the state team, including the prosecutor and Hudson, were so focused on a theory of the case that was based entirely on McDonald’s testimony that the police did not follow up on existing leads, thus explaining the flimsiness of the physical evidence in this case, could have in and of itself established a reasonable doubt.

It is true, as discussed above, that the standard of prejudice is higher under a newly discovered evidence theory than under *Brady*, *Giglio*, or *Strickland*. The reason for the difference is that a newly discovered evidence claim presumes that the trial was essentially reliable, whereas an ineffectiveness or *Brady/Giglio* claim asserts that one of the crucial assurances that the trial was fair is missing. *Strickland, Rutherford, supra*. As discussed above, the fact that the prosecutor, at a bare minimum, failed to correct McDonald's "none whatsoever" remark and in fact capitalized on it, and defense counsel's inability to effectively cross examine McDonald on this point, show that not one but two of those crucial assurances were missing. Nevertheless, even if the trial as it occurred were presumed to be reliable, the prejudicial impact of evidence that McDonald had been engaged in a pattern of horse trading his testimony against Ventura in exchange for immediate and future benefits would have changed the whole character of the trial. Instead, the jury heard only that McDonald, who had planned to "rot in hell" before he gave any testimony without a deal, was providing testimony because of his wish to "clear the air" and give the victim's widow some peace of mind.

In addition, evidence of a codefendant's life sentence may be considered in mitigation. Where the evidence demonstrates a disparity of sentences, it is appropriate to correct the disparity. Mr. Ventura's codefendant, Jack McDonald, has never spent a day in jail for his alleged participation in this homicide and in fact received a deal on his federal charges in exchange for his testimony. Subsequent to Ventura's trial, Jerry Wright received a life sentence. This Court has held that a principal's deal with the state for leniency in exchange for testimony is an appropriate consideration in determining whether a defendant's death sentence is proportionate. *Brookings v. State*, 495 So.2d 135 (Fla. 1986). Ventura's jury did not have the opportunity to consider McDonald's deal because the state concealed

it. A codefendant's life sentence imposed after the defendant's death sentence has also been held to constitute newly discovered evidence cognizable in a postconviction proceeding as a reason to address the proportionality issue. *Scott v. Dugger*, 604 So.2d 465 (Fla. 1992). As it is, no sentencer has been provided a "vehicle" for considering the codefendant's life sentence or Jack McDonald's deals and favorable treatment. Mr. Ventura respectfully requests that this Court on disparity grounds set aside this invalid death sentence and enter in its place a sentence of life imprisonment. At the least, a proper resentencing is required, at which the disparate treatment of the principals may be taken into account.

#### **IV. UNTIMELINESS OF THE STATE'S RESPONSE TO THE MOTION FOR POSTCONVICTION RELIEF**

Ventura filed an amended rule 3.850 motion on August 16, 1996. (R. 1 through 218). This Court had ordered the state to file a response within twenty days after the motion was filed. *Id.* 673 So.2d 479, at 482. This was not done. Instead, the trial court conducted a hearing on February 6, 1997, at which time it then ordered the state to file a response within twenty days. Ventura filed pro se motions objecting to this enlargement of time on February 10, 1997 (R. 220), and again on January 21, 1998, (R. 290). These motions were adopted by counsel ( (R. Supp. 7) and denied. (*Id.*, R. 301)

This Court addressed a similar situation in *Hoffman v. State*, 613 So.2d 405 (Fla. 1993):

The facts and procedural history of the case are stated in the prior opinions in this matter. [Citations omitted.] In the last matter before this Court in 1990, we remanded to the trial court with instructions to hold a hearing under Rule 3.850. This, the trial court did not do; and the assistant attorney general could provide us with no good reason for this lapse. When a lower court receives the mandate of this Court with specific instructions, the lower court is without discretion to ignore that mandate or disregard the instructions. It was clear error to do otherwise here. *Id.* 406.

The lower court's after the fact enlargement of time beyond the limits set by this Court was therefore clearly improper. Nevertheless, not only was the state permitted to file an untimely response, the lower court granted the state everything it asked for. The appropriate remedy would be to regard the state's response as a nullity and to remand this case for an evidentiary hearing on those claims which were summarily denied on the urging of the state's untimely response.

## **V. VIOLATION OF THE RIGHT TO REMAIN SILENT**

Claims VII and XI were that Mr. Ventura's sentencing judge relied upon Ventura's failure to present his version of the offense to find aggravating circumstances, in violation of the fifth, sixth, eighth, and fourteenth amendments, and that counsel was ineffective for failing to address these errors. These claims were summarily denied.

At sentencing, Mr. Ventura reasserted his innocence and expressed his belief that the justice system would eventually uncover evidence which Mr. Ventura believed was being concealed by the Volusia County Sheriff's Department. (Dir. 910-911)

In sentencing Mr. Ventura to death, the sentencing judge reacted to the defendant's declaration of innocence by stating:

Mr. Ventura, about all I'd like to say, of course, is as to the absolute question of guilt of [sic] innocence, I was not there. The jury was not there. There appears to be three, possibly four people who might know for sure what happened, tragically, of course Mr. Clemente is dead and he can't tell us what happened. *Apparently you know what happened*, Mr. McDonald knows what happened, and possibly Jerry Wright knows what happened.

(Dir. 911-912)(Emphasis supplied).

The trial court's consideration of Mr. Ventura's assertion of innocence as aggravation was flatly

improper. *Holton v. State*, 573 So.2d 284, 292 (Fla. 1991). The sentencer's consideration of improper and unconstitutional non-statutory aggravating factors violated the Eighth Amendment to the United States Constitution, and prevented the constitutionally required narrowing of the sentencer's discretion. *Maynard v. Cartwright*, 406 U.S. 356, 108 S. Ct. 1853, 100 L.Ed.2d 372 (1988). Our version of criminal justice is based on an "accusatorial and not an inquisitorial system." *Walls v. State*, 580 So.2d 131, 133 (Fla. 1991).

Mr. Ventura has no burden to prove the nonexistence of aggravation. The State has the sole burden to prove its case in aggravation beyond a reasonable doubt. *Hamilton v. State*, 547 So.2d 528 (Fla. 1989). "[T]he State must prove [the] element[s of aggravating circumstances] beyond a reasonable doubt." *Banda v. State*, 536 So.2d 221, 224 (Fla. 1988).

The presentation and use of evidence of post-*Miranda* silence is forbidden by the United States Constitution. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). *Doyle* reversed a criminal conviction where the prosecution attempted to impeach a defendant's exculpatory trial testimony by eliciting testimony that the defendant remained silent following *Miranda* warnings. The Court reasoned that the promise of a right to remain silent carries with it the implicit promise that silence will not be penalized. *Doyle*, 426 U.S. 610, 619, quoting *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133 (1975)(White, J., concurring). Thus, use of a defendant's post-*Miranda* silence is fundamentally unfair, in violation of the due process clause of the fourteenth amendment. *Doyle*, 426 U.S. 610, 619.

To the extent counsel failed to object or argue against the trial court's consideration of Ventura's assertion of innocence in determining its sentence, counsel failed to provide effective

assistance. As a result of these errors the outcome of Mr. Ventura's trial and sentencing was materially unreliable and no adversarial testing occurred in violation of Mr. Ventura's rights as guaranteed by the Constitution of the State of Florida and the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution.

## **VI. FAILURE TO CONSIDER MITIGATING EVIDENCE**

In Claims VIII and XII, Ventura argued that the eighth amendment was violated by the sentencing court's refusal to consider mitigating circumstances clearly set out in the record. These claims were also summarily denied by the lower court.

When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." *Nibert v. State*, 574 So.2d 1059, 1062 (Fla. 1990). During the penalty phase, Mr. Ventura presented three witnesses. The first witness, Larry Gainly, was a lay minister, and Mr. Gainly counseled inmates, including Mr. Ventura. On direct examination, Mr. Gainly testified:

A. If there is a mercy judgment here where Peter would go to prison for the rest of his life, Peter said that he would want to continue with listening to other people within the confines of the jail.

Q. Do you know whether or not, sir, in his character there is a sound Christian foundation?

A. Yes. I'm assured of that, that there is a sound Christian foundation because he has received Jesus Christ. That's his Lord and Savior. He has counseled others within the prison walls and when they would come to him, naturally -- and I'd get the story from other prisoners, not from Pete.

MR. STARK: I would object to that as being hearsay, what other prisoners may have told him.

THE COURT: Sustain the hearsay objection.

BY MR. CASS:

Q. You can't say what those people told you, only what you know.

A. Okay. Yes. I know that Peter has continued in his work within the prison walls when he was not meeting with me. He would bring more people to these Bible Studies, and for the past month, we have had Sunday morning services within the prison which is something they never had before, and Peter was encouraging the other prisoners to come out and hear the message of Jesus Christ.

Q. Did he assist you in any other way in your prison ministry?

A. In that respect, that was really big.

Q. I'm sure, but I wondered and I meant any other instances that he had assisted you?

A. Off hand, sir, I can't think. I don't know just what you mean, but he's been a tremendous assistance to us.

Q. Do you believe he harbors any ill will or malice in his soul?

MR. STARK: Your Honor, I would object. That's an opinion and conclusion of the witness.

THE COURT: Overruled. I will allow it.

A. My last conversation with Pete was yesterday, and this is exactly what I wanted to find out if he did harbor any ill feeling toward anyone.

He said, no, he did not and he was ready for whatever the Court and jury may decide.

Q. Toward the people that testified against him?

A. No ill feeling toward anyone.

Q. And not the jury for having found him guilty?

A. Absolutely not.

As a Christian, he couldn't do that, or shouldn't do that.

Q. But you don't believe he would do that?

A. No.

Q. You do believe that he would not?

A. I believe he would not hold a grudge against anyone.

Q. I think I can ask you an opinion question.

Is Peter Ventura worth saving?

A. In my opinion, sir, he is. I believe that the Lord has much more work for him within the prison walls, and I believe that Pete is equipped for this.

I found out through conversations with him and teachings that he is well equipped to carry on and witness for Jesus Christ.

(Dir. 864-66).

Mr. Ventura's second witness, Deborah Vallejo, was Mr. Ventura's daughter. Ms. Vallejo testified that Mr. Ventura is a "real good father" and a "very wise man" (Dir. 871). According to Ms. Vallejo's testimony, Mr. Ventura was very supportive (Dir. 871), loves children (Dir. 871), counseled his children to stay away from trouble (Dir. 872), provided emotional care for his children (Dir. 872), and deserved saving (Dir. 873).

Mr. Ventura's final witness, Cleon Zotas, was a longtime friend of Mr. Ventura and Mr. Ventura's ex-employer. Mr. Zotas has known Mr. Ventura for forty years. (Dir. 876). Mr. Zotas testified that Mr. Ventura "provided good for his family and used to work two jobs when we were young. He's a hard worker, and he went in his own business, contracting, and he was super." (Dir. 877). Mr. Zotas testified that Mr. Ventura worked for him in the printing business. Mr. Zotas testified that Mr. Ventura had learned a "very good trade" (Dir. 878), and that Mr. Ventura was worth saving.

(Dir. 878).

Mr. Ventura presented unrefuted nonstatutory mitigating evidence rejected by the trial court, despite contrary precedent. Evidence that a defendant is a caring family person is mitigation, *Bedford v. State*, 589 So.2d 245 (Fla. 1991); *Dolinsky v. State*, 576 So.2d 271 (Fla. 1991), as is evidence that Mr. Ventura had a good employment history and positive character traits, *Holsworth v. State*, 522 So.2d 348 (Fla. 1988), that Mr. Ventura was a model prisoner, *McRae v. State*, 582 So.2d 613 (Fla. 1991), and that he developed and evidenced strong spiritual and religious standards. *Id.*

Despite the presence of mitigating circumstances, the court concluded "there are no mitigating circumstances" to be considered. (Dir. 1050).

To the extent counsel failed to argue that the trial court was required to find the existence of established mitigating factors and consider their weight, trial counsel was ineffective. **VII.**

## **BURDEN SHIFTING**

Claims IX and XIII were that Mr. Ventura's sentence of death violates the fifth, sixth, eighth and fourteenth amendments because the penalty phase jury instructions shifted the burden to Mr. Ventura to prove that death was inappropriate and because the sentencing judge himself employed this improper standard in sentencing Mr. Ventura to death. Failure to object or argue effectively rendered defense counsel's representation ineffective.

At the outset of the penalty phase, the jury was instructed as follows:

The State and the Defense may now present evidence relative to the nature of the crime and the character of the defendant.

You are instructed that this evidence, when considered with the evidence you have already heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death

penalty.

And second, whether there are mitigating circumstances *sufficient to outweigh the aggravating circumstances*, if any.

(Dir. 858)(emphasis added).

In his instructions before the jury retired to deliberate, the judge again explained that once aggravating circumstances were found the jury was to recommend death unless the mitigating circumstances outweighed the aggravating circumstances:

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law that will now be given to you by the Court and render to the Court advisory sentences (sic) based upon your determination as to whether sufficient aggravating circumstances exist to justify imposition of the death penalty and whether sufficient mitigating circumstances exist to *outweigh any aggravating circumstance found to exist*.

(Dir. 900)(emphasis added).

Then, the trial court at sentencing stated:

[t]he Court has considered the aggravating and mitigating circumstances presented in the evidence in this case and determined that sufficient aggravating circumstances exist; and that there are insufficient mitigating circumstances *to outweigh the aggravating circumstances*.

(Dir. 948)(emphasis added).

The instructions shifted the burden of proof to Mr. Ventura on the central sentencing issue of whether he should live or die. Under *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) this unconstitutional burden-shifting violated Mr. Ventura's due process and Eighth amendment rights. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

In being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances

were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. *Mills v. Maryland*, 486 U.S. 367, 108 S. Ct. 1860, 100 L.Ed.2d 384 (1988); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987).

Counsel's failure to object to the clearly erroneous instructions was deficient under the principles of *Harrison v. Jones*, 880 F.2d 1279 (11th Cir. 1989) and *Murphy v. Puckett*, 893 F.2d 94 (5th Cir. 1990). Counsel failed to know the law and that the judge was imposing a burden on the defense to prove mitigation outweighed aggravation. This was deficient performance which prejudiced Mr. Ventura at sentencing.

#### **VIII. ESPINOSA ERROR**

Claim X and XIV were that Mr. Ventura's sentencing jury was improperly instructed on the aggravating circumstances, and the aggravators were improperly argued and imposed, in violation of *Maynard v. Cartwright*, *Hitchcock v. Dugger*, and the Eighth and Fourteenth Amendments." "[I]n a 'weighing' State [such as Florida], where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." *Richmond v. Lewis*, 506 U.S. 40, 113 S. Ct. 528, 121 L.Ed.2d 411 (1992). A facially vague and overbroad aggravating factor may be cured where "an adequate narrowing construction of the factor" is adopted and applied. *Id.* However, in order for the violation of the Eighth and Fourteenth Amendments to be cured, "the narrowing construction" must be applied during a "sentencing calculus" free from the taint of the facially vague and overbroad factor. *Id.* at 535. In Florida, the jury is a co-sentencer. *Johnson v. Singletary*, 612 So.2d

575 (Fla. 1993). "By giving 'great weight' to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found." *Espinosa v. Florida*, 505 U.S. 1079, 112 S. Ct. 2926, 120 L.Ed.2d 854 (1992). This indirect weighing of the facially vague and overbroad aggravators violates the Eighth and Fourteenth Amendment. *Id.* Therefore, the jury's sentencing calculus must be free from facially vague and overbroad aggravating factors. *Id.* at 2929. Thus, in order to cure the facially vague and overbroad statutory language, the jury must receive the adequate narrowing construction. *Id.* at 2928.

In Mr. Ventura's case the jury was not instructed as to the limiting constructions placed upon any of the aggravating circumstances. The failure to instruct on the elements of the aggravating circumstances in this case left the jury free to ignore those elements, and left no principled way to distinguish Mr. Ventura's case from one in which the state-approved and required elements were applied and death was not imposed. "The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness." *Witt v. State*, 387 So.2d 922, 925 (Fla. 1980). "Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Id.* Accordingly, the Florida Supreme Court held in *Witt* that "only major constitutional changes of law" as determined by either itself or the United States Supreme Court are cognizable in post-conviction proceedings. 387 So.2d at 929-30. Mr. Ventura's appellate counsel challenged the vagueness of the jury instructions as well as the constitutionality of the death penalty statute. This Court found both points to be procedurally barred because they were not presented to the trial court, and now the trial court has found them, along with all the points argued in Claim X of the

3.850 motion, to be procedurally barred because “. . .they could have and should have been addressed on direct appeal.” (Dir. 303). The most elemental work that could be expected of a lawyer in the preparation and presentation of a case is to research the law as it applies to the facts, and the way to apply the applicable law to the facts of a particular case is to request appropriate jury instructions. If, indeed, *Espinosa* and *Richmond*, are not entitled to retroactive application under *Witt*, trial counsel was ineffective for failing to properly preserve the issue for appellate review. Even if this Court cannot afford relief in the form of a new sentencing proceeding before a jury, the cause should be remanded for an evidentiary hearing to determine whether or not trial counsel’s failure to request appropriate jury instructions or make the appropriate motions or objections was the result of ineffective assistance of counsel.

#### **IX. CUMULATIVE ERROR**

Claim XV of the motion for postconviction relief raised cumulative error. Florida courts have clearly recognized the principle of cumulative error. In *Jones v. State*, 569 So.2d 1234 (Fla. 1990) the Florida Supreme Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." *Id.* at 1235 (emphasis added). The lower court found this claim to be without merit and noted that “. . . many of the alleged errors contained in the prior claims are procedurally barred as discussed above.” This finding is contained in the same order in which the judge determined that an evidentiary hearing would be required on claims two through six. Because claims two through six had not been decided on the merits at that point in time, there was no way for the judge to know whether they would or would not have supported a claim of cumulative error in and of themselves. This point strongly suggests that the lower court had

prejudged these claims, and granted an evidentiary hearing only because the state had admitted that one would be necessary with regard to certain claims. If so, it necessarily follows that the Ventura did not receive an evidentiary hearing before a fair and impartial magistrate and the presumption of correctness that would ordinarily attach to the lower court's order denying relief after the evidentiary hearing should not apply here.

### **CONCLUSION AND RELIEF SOUGHT**

Ventura is entitled to a new trial free from prosecutorial deception and misrepresentation, where he will be represented by informed and competent counsel, where the trial judge will instruct the jury in accordance with the law and not hold Ventura's exercise of his constitutional rights against him, and where a fair, impartial, and unprejudiced jury will receive all the admissible evidence that is relevant to the case and will not be exposed to evidence that is inadmissible, prejudicial, deceptive or misleading. In the alternative, he requests such relief to which this Court may deem him entitled.

**CERTIFICATE OF FONT SIZE AND SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant, which has been typed in Courier 12 Font, has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this **11th** day of **August, 1999**.

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