IN THE SUPREME COURT OF FLORIDA

PETER VENTURA,

Appellant,

v. **CASE NO. 98,839**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JUDY TAYLOR RUSH
Assistant Attorney General
Fla. Bar #438847
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR APPELLEE

CERTIFICATE OF FONT

This brief is typed in Courier New 12 point.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF THE FACTS

The Statement of the Facts offered by Ventura is replete with unauthorized argument, as well as incorrect and/or unsupported "facts." Therefore, the State rejects that statement and submits the following one:

An evidentiary hearing was held before the Honorable Michael R. Hutcheson, Circuit Judge for the Seventh Judicial Circuit of Florida, in and for Volusia County, on June 1, 1998. (R 324). It was limited to matters relevant to issues "two through six" as raised in the amended Rule 3.850 motion filed by Appellant, Peter Ventura [hereinafter "Ventura"], on August 20, 1996. (R 328). The defense presented 14 witnesses; the State presented two. (R 328, 639).

Ventura's first witness was Natty Ventura, his older brother. (R 342). Natty said that in January, 1988, he lived "[i]n Maywood, Illinois," and also lived there in 1981. (R 342, 345). Although he knew that Ventura had been arrested in Chicago in 1981, he claimed that he was not aware that Ventura was on trial in Florida in 1988. (R 342, 345). Natty had no contact with Ventura after 1981, but was available to testify on Ventura's behalf at that time. (R 343, 346). He said that the testimony given at the subject hearing was the same as what he would have given in 1988. (R 343).

Natty and Ventura had worked "for a printing outfit," and the two "would leave that job and we would go to work cleaning furnaces . . ." from 1976 until 1981. (R 343, 347). They did this to make "a better life for our families . . .." (R 344). Natty described both he and Ventura as "churchgoers" who "belonged to a choir" for which Ventura "did a lot of solo work." (R 344). Ventura was a church and YMCA "camp counselor." (R 344).

Natty said that he did not know of any "propensity for violence" which Ventura may have had. (R 344). Through "[t}he Mennonite church," Ventura did volunteer work for a "disaster group." (R 344). Once he worked in Puerto Rico after a hurricane. (R 345). Ventura had "[c]lose ties with the family." (R 345). Nonetheless, Natty claimed that he did not know about Ventura's criminal activities.[1] (R 346).

Natty's family and Ventura's went to the same church. (R 348). The families continued to see each other there after Ventura was arrested on the instant charges in 1981. (R 348). Natty never made any effort to contact Ventura, although he was aware that his brother had made some contact with the family. (R 349, 352).

Natty would not be surprised to learn that Ventura was involved in criminal activity during the time they worked together. (R 349-350). However, he denied knowing about such activity. (R 350). He said that he did not want to know about any criminal

---

[1]Specifically, he did not know of Ventura's use of aliases or of the bank scams he was involved in. (R 349).

activity his brother was involved in. (R 351).

Natty admitted that his motive for testifying was to get Ventura off of death row. (R 351). He said there was nothing physically keeping him from going to Florida to testify in 1988 and admitted knowing that Ventura had been arrested, although he denied knowing that "he was on trial for his life." (R 352, 353). Natty claimed that had he known that Ventura "was on trial for a murder, then I would have been down here." (R 353). Nonetheless, on cross, he admitted that he knew that Ventura had been arrested for murder, and that despite having regular contact with Ventura's children, he made no effort to try to find out where he was. (R 354).

Reverend Lester T. Hershey, a "retired minister," had "served in Chicago as a pastor from 1940 . . . for about 39 years." (R 356). Ventura attended his church . . .." (R 357). He said the Mennonite Church had a 450 year history which "is basically any angelic church," although the belief is "different on some of the doctrines." (R 357). For example, "our young men . . . take up the conscientious objector status, rather than go to the army." (R 357). He said Ventura "had . . . became (sic) a C.O." (R 357).

Rev. Hershey was not contacted about testifying for Ventura at trial. (R 357). If asked, he would have done so. His hearing testimony was the same as he would have given in 1988. (R 358).

Ventura was part of a "family of 10 children." (R 358). He was the "[s]ixth child," and his parents "were very prominent in our congregation . . . they were in the leadership." (R 358). They had come "from Mexico to Texas and then up to Chicago." (R 358). They had "some very hard times the first years." (R 358).

Ventura, "was one of the youth that I worked with . . .." (R 358). Rev. Hershey described Ventura was "[a] very fine young boy. Never did I find him in a fight . . .. He was always very courteous and kind . . .." (R 359). The reverend viewed Ventura as "a very obedient son," who "did a lot of . . . [e]rrands . . .." (R 359). "As a youth, he was nonviolent." (R 360). Ventura was 12 years old at this time. (R 360).

Rev. Hershey saw Ventura in 1958 in Puerto Rico where he worked in a volunteer project through the Mennonite Church. (R 359, 360). Ventura was 22. (R 360). Although such service was "not required . . . some parents would expect it of their children." (R 362).

Rev. Hershey agreed that "taking a human's (sic) being life for money would not be a proper act under a Mennonite teaching . . ." (R 361). He admitted that declaring oneself to be a conscientious objector and then taking another human being's life for money "would be the ultimate hypocrisy." (R 363).

Ventura next called his brother, Frank T. Ventura. (R 366). Frank said that the last time that he saw Ventura "prior to 1988" was when they "were in a choir singing . . . [i]n Chicago." (R 366). He said that he was not contacted in 1988 about testifying for Ventura, and that had be been, he was available and would have

testified then as he did at the instant hearing. (R 366, 667).

Frank described his brother as "a carpenter, a singer . . .." (R 367). He said that Ventura "did a lot of work for the church . . ." and was helpful to others "[w]ithin our family . . .." (R 367, 368). Frank recalled nothing that would lead him to believe that Ventura was violent, and he was shocked to hear that Ventura had been charged with murder. (R 367, 368).

On cross, Frank admitted that he had "a hard time remembering things now at this point in my life." (R 368). He has "Alzheimer's or whatever." (R 370).

Frank described Ventura as "a counselor for swimming, sports, whatever," who "won a lot of awards for swimming." (R 371). He was told that Ventura had been arrested for murder after the trial. (R 372). He lived "in the Chicago area" in 1988. (R 373).

Ventura's next witness was his other brother, Frank. (R 374). Frank M. was the "oldest brother in the family." (R 374). He resided in Val Parezo, Indiana in 1988 and was available to testify on Ventura's behalf, but was not contacted for that purpose. (R 374). He had not seen Ventura since "a family gathering in 1980." (R 378). His hearing testimony was the same as what he would have given in 1988. (R 374).

Frank M. opined that "the most important thing that I can tell you is that Peter was nonviolent." (R 374). "[N]ever once . . . did I ever see Peter fighting. So he is nonviolent." (R 375).

Ventura's church "believes strongly in nonviolence." (R 375). Ventura had registered as "a conscientious objector" and "was very, very active in our church." (R 375). He was President of the Latin Youth for Christ, and "worked as a voluntary person in Puerto Rico . . . excuse me, . . . in Denver, Colorado . . . through or (sic) Mennonite Church." (R 375). Ventura was the only member of their family who participated in the voluntary service. (R 380).

Ventura brought in wood during the winter for an older resident of the apartment building where he and his family lived. (R 376). He also fulfilled a Mexican cultural obligation by escorting his sisters to and from events. (R 376-377). Frank M. opined that Ventura is "as solid a Christian today as he was before he came into the system." (R 377).

Ventura's wife told Frank M. of Ventura's arrest for murder in 1981. (R 380, 381). He also learned from Ventura's wife that Ventura fled the jurisdiction of the courts when out on bond in 1981. (R 380). He claimed that his brother left because "[h]is attorney advised him to leave for "[a]bout two or three years." (R 381, 382). Ventura "just picked up and left" because he was under "fear of his life." (R 383). Frank M. said that *he* "wouldn't have done it . . .." (R 383).

Frank M. and his siblings "are a very close family." (R 387). One of Frank M.'s brothers told him about Ventura's involvement in bank fraud. (R 381). He was unaware of the aliases Ventura had

used. (R 382).

He was also aware that his brother awaited trial in Florida in 1987. (R 384). He and the family talked about Ventura's situation, but "were afraid to make contact" with Ventura. (R 381). They chose not to attend trial because:

> I was afraid of what could happen by people who were alleged to be associated with him. If Peter, in fact, was framed, and people who were supposedly doing the framing did not want witnesses around, or people contacting Peter, they could just simply threaten us.
>
> I had a wife and two children. So I was afraid. I know that some of my brothers and sisters were afraid. We didn't know what the consequences were to be if we were to come. . . .
>
> We knew what he was accused of, and we felt that he was certainly not involved. But the people who were involved in the actual murder would certainly not want the truth to come out. That's how we reasoned.

(R 384, 385). So, they limited their support to "praying for him." (R 381). Frank M. specifically "chose not to" come down and testify. (R 385). He felt that the rest of his family made that same choice as "[t]hey were . . . very, very cautious. (R 385). He remembered speaking to his brothers, Natty, John, and Danny in this regard. (R 386). Natty knew that Ventura was being tried for first degree murder in Florida. (R 386). Frank M. also discussed it with his other brother, Frank. (R 386). When pressed, Frank M. said that he could not say for certain about what the others thought, but the reason he did not get involved at trial was because "I was afraid." (R 386). On redirect, Ventura succeeded in getting Frank M. to state that if defense counsel had asked him to testify "not as to guilt or innocence, but in the mitigation phase," he would have been willing to do so. (R 392).

On cross, Frank M. acknowledged that Ventura's daughter, Debbie, testified at trial. (R 389). He said that Debbie "was afraid," but did it anyway. (R 389). He did not know that Debbie had done so until "after the trial." (R 389).

After Ventura fled the jurisdiction of the courts, his wife, Gloria, stayed in Maywood "for a while." (R 387). Frank M. "gave her money to help with the children . . . about three times . . .." (R 388). The money was for food and shelter. (R 388). Eventually, Gloria "got a job." (R 388).

When Ventura left, he abandoned his four children, who were in the home, as well as his wife. (R 388). Frank M. reluctantly admitted that if Ventura committed the instant murder, that was not the action of "a responsible, Christian human being." (R 391). "[N]onviolent Christians do not take lives." (R 391).

Ventura's next witness was his younger sister, Teresa Hernandez. (R 395, 403). In 1988, Ms. Hernandez lived in Maywood, "[r]ight out of the city suburb." (R 395). She was not contacted and asked to testify in 1988. (R 395-396). Had she been contacted, she would have done so. (R 396). She was not in fear to come to Florida and testify for her brother, and any testimony would have been the same as that given at the hearing. (R 396).

Ms. Hernandez said that Ventura "took care of me . . . always protected us." (R 396). She knew nothing of any tendency for violence. (R 396). She described Ventura as a "[v]ery good Christian brother who took us swimming, took us on retreats, took

us to Mennonite conferences." (R 396-397).

She opined that Ventura continued "to follow the Mennonite beliefs into adulthood" and never abandoned them to her knowledge. (R 397). Ms. Hernandez referenced Ventura's "volunteer work. He took care of summer camp. He was teaching, swimming," and "[h]e helped provide for our high school, which we had to have tuition paid." (R 397). Numerous pictures of Ventura doing "good deeds" were introduced into evidence through her testimony. (R 399-401). She also referenced Ventura's singing in the church choir, and called him a "good provider to his family" who "taught me how to budget . . . and help pay for the younger children in our family." (R 401). Ms. Hernandez "love[s] him dearly." (R 401).

On cross, it was established that Ms. Hernandez last "shared quarters" with Ventura in "1961." (R 403). She affirmed that she and her siblings "had a good family upbringing." (R 403). Their parents provided them with food, clothing, shelter, religious beliefs, and taught them to treat others with kindness and compassion. (R 403). They all came from a good family, received a Christian upbringing, and knew that murder was wrong. (R 412). None of Ventura's siblings have ever been in any sort of trouble like Ventura. (R 412).

Ms. Hernandez did not know of the aliases Ventura used. (R 411). Neither did she know that he had been involved in bank fraud. (R 411).

Ms. Hernandez learned that Ventura had been arrested for first

degree murder in Chicago by reading it in the newspaper. (R 405). This was discussed by Ventura's siblings who "got together to pray . . .." (R 405). She also learned that he had fled the jurisdiction of the court after bonding out of jail. (R 409). She continued to have contact with Ventura's family after he left. (R 410). After Ventura's exit, his family was "[p]robably" on welfare, but the siblings "helped" them as well. (R 410).

She was not aware of any business that Ventura could possibly have had in Volusia County. (R 409). He worked "[i]n the city" doing building "[c]onstruction." (R 409).

Ester Garay, another of Ventura's sisters lived "in Western Springs, Illinois" in 1988. (R 413). Ms. Garay was "five or six years" younger than Ventura, and the last time that she resided with him was "around 1966." (R 417). She was not contacted by Ventura's defense, but would have been willing to testify as to mitigation matters had she been so contacted. (R 413-414).

Ms. Garay said that Ventura "is a very dear brother. He's very creative. He was a role model," and was "a mentor for me as I was growing up." (R 414). He held "leadership positions in my church in my home and in my personal life." (R 414). She, too, was involved in the church choir with Ventura. (R 419). She expressed her belief that her brother's "life should be saved." (R 414).

Ms. Garay said that she knew of no propensity for violence. (R 414). She described Ventura as "kind and supportive." (R 414). She referenced his athletic ability as "a very good swimmer," and

noted that "he received many awards for his swimming." (R 414). He was a youth leader at church. (R 415).

The females "were not allowed to go out very much," but Ventura "took us out." (R 415). In their family, brothers were expected to help sisters. (R 419-420). He showed his sisters "how to enjoy the city . . .." (R 415). Ms. Garay testified that her family provided her, and her siblings, "a good upbringing." (R 419). They were taught right from wrong. (R 419).

Ms. Garay was unaware of any criminal involvement on Ventura's behalf. (R 415). She knew about Ventura's arrest in 1981 - she was told by "[o]ne of the family members . . .." (R 420). Later, she learned what the charge was, and still later, she learned that he was out on bond. (R 420-421). However, she denied knowing that her brother had fled the jurisdiction of the authorities. (R 421).

Ms. Garay said that she had no discussion with her brothers about being afraid to go to Florida and testify for Ventura. (R 421). She said: "They asked if we would come down, and we said that, yes, we would come down and testify to what we knew, yeah. But I didn't -- no, I didn't talk to them about it." (R 421).

She said that she supposed that her brother could have done "some of that," but said that she did not believe that he had. (R 422). She conceded that if he "had been involved in planning and carrying out a calculated murder for hire, that . . . totally violated all of his Mennonite beliefs." (R 422).

Ms. Garay did not specifically remember if she was aware that

her brother was in Florida awaiting trial in 1987; however, she most likely knew it, if other members of the family did. (R 423). Such news would "have been a pretty big deal in the Ventura household, or extended family . . .." (R 423).

Ms. Garay visited her brother "about five or six years ago . . . after the trial." (R 423). However, she never contacted him, or attempted to, when he was in jail awaiting trial. (R 423-424). Ms. Garay testified that had Ventura wanted to contact her, he well knew how to do so. (R 424, 425).

Ms. Garay "love[s] my brother," and thinks "he is just a wonderful person to be with." (R 416). He helped provide the tuition for the "younger group of us" to attend private school, as the family was "very poor." (R 416).

Brother Danny Ventura testified next. (R 426). He was residing "[a]round Chicago" in 1988. (R 426). He was available to testify had Ventura's attorney contacted him, and he would have been willing to do come to Florida and testify for him. (R 426). Had he done so, his testimony would have been the same as he gave at the evidentiary hearing. (R 427).

Ventura was "a caring person and very involved in the community, church, youth groups." (R 429). "[H]e was an athlete . . . a swimmer, . . . a camp counselor . . .." (R 429). Danny "patterned some of my activities after him; swimming, getting involved with youth groups . . .." (R 429). He also credited his "involvement . . . with singing" to Ventura who "was a soloist."

(R 431, 432). He was not aware of any type of violent behavior on Ventura's part. (R 429). Danny is "[a]t least 10 years" older than Ventura, and so, he had less contact with Ventura than with other siblings. (R 435).

This brother testified that when Ventura was arrested in 1981, three of his four children were on their own. (R 430-421). They were "not young children, and they were taking care of themselves." (R 431). Ventura is no longer married. (R 436).

Danny first learned that Ventura was arrested from his brother, Natty. (R 438). Having "trained inmates in the correctional system in Illinois," Danny contacted someone at an institution and asked him to find out the particulars on his brother's arrest. (R 438-439). Danny was told that Ventura was in "[f]or murder" and learned that he "absconded" by "reading that in the newspaper." (R 439, 441). He thought it "unusual" that Ventura had fled rather than face the charges against him. (R 442). He did not know that Ventura was using an alias. (R 442-443). He had no contact with Ventura subsequent to his rearrest, and Ventura did not attempt to contact him. (R 442, 448). Danny made no efforts to contact Ventura or offer assistance at his trial. (R 448).

Danny said that he would never believe that Ventura committed first degree murder. (R 445). However, he knew of no business Ventura had in Volusia County in 1981. (R 445). Ventura was in construction "[i]n the Chicago area." (R 445). Danny well knew that his brother was awaiting trial in Florida in 1987. (R 446).

In fact, "everybody found out at the same time . . . [b]ecause it appeared in the newspaper." (R 440). It was Danny's understanding that everybody in the family knew that Ventura was in jail for first degree murder. (R 440-441). Danny did not post Ventura's bond and did not know who did. (R 441).

Court reporter, Janette Mitchell, testified for Ventura. (R 459). She developed a romantic relationship with Ventura, conveying those feelings to him in letters written to him in prison. (R 465). She wrote and visited Ventura there. (R 463).

Ms. Mitchell was the court reporter in the trial of Codefendant Jerry Wright. (R 459). She "had read two statements from neighbors" who "were witnesses in Jerry Wright's trial." (R 462). She "asked Ray Cass why he had not called them as witnesses in Peter's trial." (R 463). According to Ms. Mitchell, Mr. Cass responded: "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).

Ventura then called Lieutenant David Hudson of the Volusia County Sheriff's Office. (R 466). He had investigated Ventura's case, "along with Investigator Bernard Busher." (R 466-467). Lt. Hudson interviewed Codefendant McDonald "[a] number of times." (R 467). McDonald wrote Lt. Hudson "a letter." (R 468).

In exchange for testifying against Ventura, McDonald was to receive the following benefit: Lt. Hudson would "go in front of his parol commission and advise them of the assistance that he

provided" in Ventura's case. (R 468). This would occur after McDonald "did his federal time." (R 468). Also, "[t]here would be no federal charges in reference to the homicide."[2] (R 470). Lt. Hudson never spoke to the parol board on McDonald's behalf; neither did he have any correspondence with the federal officials and was aware of no one who did. (R 470).

McDonald became a fugitive when he failed to report for federal charges that had nothing to do with the instant case. (R 473). McDonald wrote Lt. Hudson a letter stating that if the State wanted his testimony against Ventura, "it's going to be two for one." (R 473). That letter was introduced into evidence at the hearing, over the State's "best evidence" objection. (R 473-475).

McDonald did not turn himself in, but was apprehended when a call he made to Lt. Hudson was traced to a hotel in Atlanta, and "a marshall . . . arrested him, when he was talking to me on the phone." (R 476). He was arrested "against his will," and the deal McDonald had proposed was not made. (R 477). In fact, McDonald's federal charges were not dismissed; "he did federal time." (R 477). He never received what he was asking for in exchange for turning himself in and testifying against Ventura. (R 478).

The defense next called retired Deputy Edward Carroll. (R 479). He had been employed with the Volusia County Sheriff's

---

[2]There were "some conversations" about an effort to get McDonald "located in a prison . . . closer to his home, if he did receive prison time on the federal charge." (R 471).

Office "[f]rom 1970 to 1995." (R 480). Deputy Carroll responded to the crime scene and "was in charge of the investigation." (R 480).

Defense counsel asked the trial court "to take judicial notice of these witnesses' statements that were given at the Wright trial . . .." (R 484). The State's objection to the attempt "to introduce the testimony in the Wright trial through a witness who didn't give that testimony at the Wright trial" was sustained. (R 484). Defense counsel argued that he was "not offering it for the truth," but "would like the court to take judicial notice of the trial which you presided at and the testimony that was given." (R 485). He asserted that same was relevant to the claim that Trial Counsel Cass "didn't use this critical testimony which is ineffective assistance." (R 485).

Deputy Carroll was also asked about a report he had written after "the Clemente homicide" but before Ventura's trial. (R 487, 488). The information contained in that report "was non substantiated." (R 487). However, "[t]he talk was that two homicides were committed, and there were going to be two more killings . . .." (R 487). The appearance of Clemente's name on the report was "not an indication . . . or a prediction that Clemente was going to be killed." (R 488).

The deputy said that he took a statement indicating that the vehicle in which the victim's body was found "was seen at the victim's home at 4:15 the day of the murder." (R 489). Thereupon, counsel renewed his effort to have the court take judicial notice

of the testimony at the Wright trial. (R 489).

> I'm asking the court at this time to acknowledge . . . that Mr. McDonald at the trial of Mr. Ventura stated the killing which he sat down the road from occurred at one o'clock, and at a different time he said 1:30, and one time he said between 1:00 and 2:00.

(R 490). The judge agreed to take up the issue of judicial notice of the transcript "later." (R 491).

Deputy Carroll investigated all of the leads provided in reference to the murder of Mr. Clemente. (R 493). Included was the allegation that Mr. Clemente's murder was somehow tied into the murder of Marshall Cromm. (R 493). No connection was found. (R 493). Neither did they find evidence to corroborate the statement from the neighbor who claimed to have seen the victim's vehicle at his home at 4:30. (R 493).

When the vehicle was found at the crime scene, "the key was on." (R 494). "There was a noise . . .." (R 494). Deputy Carroll may have touched the vehicle and found it warm. (R 494).

The deputy did not recall interviewing Mercedes Sylvia Magragan. (R 495). He did, however, interview Gerald and Sharon Smith. (R 495). These persons had made the statements regarding the vehicle being at the victim's home. (R 496).

Attorney Ray Stark was an Assistant State Attorney involved in Ventura's prosecution, and, to a lesser extent, the prosecution of Codefendant Wright. (R 497, 498). He was involved "basically because there was a wire involved." (R 499). He was in the case "from 1981 . . . until 1988." (R 499).

As viewed by Mr. Stark, Codefendant McDonald "became the star witness after a while . . .." (R 500). His statement had first been taken in Atlanta, Georgia. (R 500). McDonald "was sentenced in federal court," became a fugitive, and in 1987 was "back in custody." (R 501).

Defense counsel alleged that McDonald had "changed his testimony drastically after giving the first statement to Mr. Stark in 1982 or 1983. (R 501). The change apparently involved "was he present at the murder scene, or did he get a call to tell him the location." (R 501). Citing the 16 years that had elapsed since the first statement, and the 10 or 11 after the second, the witness said: "I can't say specifically . . .." (R 502).

In an attempt to refresh the witness's recollection, a letter dated October 31, 1988 to Louis Galvin was shown him. (R 503). Mr. Stark identified his signature on the letter and recalled writing it. (R 503). Several other letters were also shown to, and identified by, the witness. (R 503). These included:

1. October 5, 1997 letter from Anton Valuckas;

2. January 20, 1988 letter from Mr. Grossman, an Assistant U.S. Attorney involved in prosecuting McDonald;

3. December 19, 1986 letter to Mr. Grossman from Mr. Stark "giving a synopsis of what took place in the case;"

4. March 6, 1987 letter from Mr. Grossman;

5. September 25, 1987 letter "probably after the charges against Mr. Wright were dismissed by the court and it took an

appeal."

(R 503). The letters were received into evidence without objection. (R 504).

Mr. Stark also identified a letter written by McDonald in "1988 or late 1988." (R 505). Mr. Stark said that he agreed to "contact the court and let the court know what he [McDonald] had done, his testimony here, and if need be . . . testify . . . before a federal judge, but I was never called to testify." (R 506). He also agreed to address the parol board on McDonald's behalf, but "was never notified." (R 506). He denied telling McDonald that if he had to do federal time, he would try "to get him in a prison close to his home." (R 506). However, he did write a letter asking that consideration be given to dropping the bond jumping charges against McDonald in exchange for his testimony against Ventura. (R 508). The addressee agreed to do so "as long as he gave truthful testimony." (R 508).

Collateral Counsel said that at trial, McDonald indicated that he had received no benefit whatsoever for his testimony. (R 509). Due to the passage of time, Mr. Stark could not recall that. Neither could he recall whether he had attempted to advise the court of the dismissal of the bond jumping charges. (R 509).

Counsel asked if Mr. Stark turned the three pre-trial letters over to Attorney Cass. (R 510). Mr. Stark could not recall, but stated "Mr. Cass had access to the file." (R 510). He added: "We had an open file policy at the time as far as discovery. . . .

[T]he file was accessible except for my own personal notes." (R 510). The defense would "go through the file and see what they wanted and make a copy of whatever they wanted. Then they would give us the file back." (R 516). To Mr. Stark's recollection, the letters had not been removed from the file at any time.[3] (R 516). During the discovery process, only "a couple pieces of correspondence" were in existence, "[c]ertainly not anything past September of . . . '87 . . .." (R 516).

The witness could not recall whether he had verbally told Mr. Cass about the agreement not to pursue bond jumping charges against McDonald. (R 511). Mr. Stark agreed that if the defense did not have the information regarding the benefit to McDonald "it could possible (sic) hamper what he was doing." (R 512).

On cross, it was established that "[t]here were no guarantees. We never had any guarantees. We . . . didn't have any control whatsoever over the federal government . . .." (R 513). He added:

> I wasn't aware of any reduction of his sentence. I know that they did not pursue the bond jumping charges. But that's not unusual, because that's a relatively minor charge. They just didn't pursue that charge. He already had 15 years of sentence --."

(R 513). McDonald "did not turn himself in." (R 514).

The State's agreement with McDonald was that "I would make known to the federal court what he did in Florida, if he agreed to

---

[3][I]f it was in the file, . . . he would have access to it. . . . As far [as] I know it was in the file . . .. They were all in the file." (R 517).

testify." (R 515). There was no promise that by so doing, McDonald would receive any benefit. (R 515). Mr. Stark would have testified at any parol proceeding "one way or another . . . anyway." (R 515). He was never called upon to testify at any parol proceeding. (R 515).

Ventura's next witness was Gene Johnson, an investigator "for a local law firm." (R 519). He "investigated the Peter Ventura case" as an employee of "an outfit called Investigative Research, Inc." (R 519). He was "retained . . . to investigate the case for the codefendant," Jerry Wright. (R 519, 520).

Mr. Johnson investigated the "similarities between the Clemente murder and that homicide in DeLand" involving Marshall Cromm. (R 520-521). Over the State's continuing hearsay objection, he also said that he spoke with a person who "advised that the pickup truck in which the deceased was found was at the home some time that evening." (R 523, 525). Later, after being shown documents, Mr. Johnson said the witness told him that the truck was seen "in front of the Clemente residence at 4:15 p.m." (R 526). He also "did extensive investigations into the background of Mr. McDonald." (R 527). He learned that McDonald "was involved in several crimes of a federal nature in Chicago." (R 527).

Mr. Johnson also claimed to have interviewed Attorney Cass. (R 527). Allegedly, Mr. Cass

> said that he had very little investigative assistance, and also that he had, . . . three or four murder cases back to back in that trial period. He was having

> difficulty remembering which witnesses went to which specific murder case.

(R 528). He added: "I was able to tell him probably more than he was able to tell me, to express his feelings on McDonald . . .." (R 528). He had no knowledge of any concern on Mr. Cass's part "for his safety based on the outcome of Ventura's trial." (R 529).

Despite Mr. Johnson's efforts, Mr. Wright was convicted. (R 530). Alleged witness Sharon Smith told Mr. Johnson: "It's 4:15 and Bob's truck is in the driveway. I wonder what he's doing home at this time of day." (R 530, 531). Although he testified that he read the transcripts from the Ventura trial, he did not recall the testimony during Ventura's trial "from an actual employee who said, no, that was my truck. I drove it. He borrowed it that day." (R 531-532). Mr. Smith had "said it's Chip's truck." (R 532). Mr. Johnson did not know to whom Mr. Smith referred. (R 532).

Regarding the statement that a black limo with Illinois plates had asked directions on the morning of the murder, Mr. Johnson learned absolutely nothing more about the vehicle in some 16 to 18 months of investigation. (R 532-533). He opined that there was circumstantial evidence in the form of similarities between the murders of Mr. Cromm and Mr. Clemente: "[T]he deceased knew one another. They were both involved in drug trafficking. They lived a short distance from the St. Johns River. They were killed within three days of one another." (R 533). He had no comment on the many dissimilarities the prosecutor recounted. (R 533-534).

Trial Counsel, Ray Cass, was Ventura's next witness. (R 537). Mr. Cass was Chief of the Capital Division of the Public Defender's Office from "[a]bout '88 . . . through '93." (R 538). He became a capital litigator in 1983. (R 538). At the time of Ventura's 1988 trial, Mr. Cass did "[o]nly death penalty cases." (R 539). He was handling "between four and five . . . simultaneous representation." (R 530).

Mr. Cass was concerned that he "had too much work with not enough resources." (R 540). He felt his ability was "decreased." (R 540). "[I]t affected my focus . . .." (R 540). Although he "had an investigator," the man had health problems and "wasn't really active. He couldn't get much done with it" [Ventura's case]. (R 540). So, Mr. Cass investigated, utilizing discovery and going to look at the crime scene. (R 541). He took "a number of depositions" to ascertain the relevant facts. (R 577). He "probably . . . did some other investigation, "but could not" recall specifically what it was. . . my recollection is not all that clear as to exactly what I did." (R 543). His investigation included "expand[ing] on . . . the discovery itself." (R 545). Based upon a letter written by Ventura in March, 1987, Mr. Cass was reminded that he did, afterall, have an active investigator assist him in Ventura's case.[4] (R 581). However, Mr. Cass could not say what that investigator did, or did not do, because CCR had given

[4]On cross, Ventura himself admitted having seen Mr. Cass's investigator "three times." (R 617).

him no access to his trial file. (R 581). He also agreed that all public defenders want more resources to investigate their cases. (R 586). He admitted that it was not unusual for a single attorney to have five murder cases to try at the same time. (R 586).

Mr. Cass was not "a spring chicken trying this case," he had "been at this for a number of years." (R 587). He did the best he could for Ventura. (R 587).

Mr. Cass could remember nothing about how McDonald's testimony implicated Ventura. (R 547). Neither could he remember what he did to try to attack McDonald's credibility. (R 547). He could not remember if he knew whether McDonald received any kind of benefit for his testimony. (R 547). He did seem to recall that McDonald said he had not gotten any benefits at trial, "[b]ut I didn't believe him." (R 547-548). Mr. Cass "was unaware of any communications between the state and the federal prosecutors . . . 'b]ecause I would have liked to ask Mr. McDonald about that . . . [f]or impeachment." (R 549).

Mr. Cass was not aware of the Smiths and their alleged claim that they had seen a vehicle like the one at the crime scene at the victim's home at 4:15 p.m. (R 545). Neither had he heard about a vehicle in Mr. Clemente's neighborhood asking for directions to his home, or of any connection between the Cromm murder and Mr. Clemente's murder. (R 549-550). However, he had "been made aware of a hit list," although he never actually saw it "until well after the trial." (R 550). Further, he "did talk to an investigator"

about it. (R 589). From Mr. Cass's experience, that potential evidence appeared to have "a big problem." (R 590). Further, he had no one who could even say that the document "was, in fact, a hit list." (R 590).

At one point, Mr. Cass "filed a motion to withdraw on the basis of the Atkins case." (R 553). Mr. Cass believed that Mr. Atkins was going to be a witness at Ventura's trial. (R 553-554).

The guilt phase theory of defense was "[r]easonable doubt." (R 554). He discussed the defense strategy with Ventura prior to trial, and "I did get some input, yes." (R 575). Mr. Cass advised Ventura "not to testify," however, he could not remember the reason for that recommendation. (R 554).

In preparation for the penalty phase, Mr. Cass "talked to Mr. Ventura to find out who I could get" for mitigation. (R 555). He asked Ventura who he wanted for mitigation witnesses and contacted those persons. (R 582). Mr. Cass wound up with two witnesses. (R 555). He "didn't know his [Ventura's] family," although he believed that he made attempts to contact them. (R 555). These attempts were based on "whatever lead he gave me." (R 555). Mr. Cass could not remember if he had conferred with any of Ventura's family members prior to the penalty phase. (R 556).

Mr. Cass discussed Ventura's background "with him." (R 556). "It seemed fairly innocuous to me. He seemed to be a hard working man." (R 556). He could not recall whether he called Ventura's daughter, Deborah, at penalty phase, but seemed to remember calling

a prison chaplain. (R 556-557).

However, Mr. Cass recalled that when the prison chaplain began to testify about what other people thought of Ventura and how they were benefiting from him, a hearsay objection was made. (R 557). He did not argue that hearsay is permissible at penalty phase. (R 557). He opined that "I was in error." (R 559).

Mr. Cass agreed with defense counsel that not calling any other family members at penalty phase was not strategy. (R 559). He simply "didn't have them." (R 559). He was not sure that he even knew that Ventura "had a large family." (R 559).

Regarding Mr. Cass's decision to disclose Ventura's prior record during voir dire, Mr. Cass said that it was not a strategy issue, and was something he should not have done, although the decision that Ventura would not testify had not been made at that point. (R 561). Later, on cross, he changed his position, agreeing that a question of prior record to prospective jurors was so unusual, he must have given it considerable thought. (R 587). He testified: "It could very well have been" a strategic choice. (R 587-588). On redirect, he affirmed that testimony, stating that he has used that strategy before, and it proved to be "sound and effective strategy" in "a couple of cases." (R 594-595). Mr. Cass said he decided to mention Ventura's prior record because he was "considering the possibility of it coming in." (R 596).

Regarding his failure to remove some jurors, Mr. Cass said it "was probably an error . . .." (R 562). However, he could not

remember the jurors identified -- Kirby and Purdy -- and was answering based on having read in the Rule 3.850 motion that these jurors said that knowing Ventura had a felony record would prejudice them. (R 562-563). The prosecutor objected, pointing out that "[t]hose weren't the only questions asked of those individuals. They were rehabilitated in some manner." (R 563). He also objected to CCR having taken Mr. Cass's file away years earlier, bringing him to testify that he can not remember what happened, and then leading him to respond to carefully phrased questions in a manner thought to benefit Ventura. (R 564-565). Mr. Cass testified that he specifically discussed the potential jurors with Ventura to get his "input" and "feeling about that juror." (R 574-575).

CCR next sought to get Mr. Cass to confess error in not objecting to certain testimony as hearsay. (R 565-568). Mr. Cass was reluctant to respond generally and reminded defense counsel: "I never had the record of the trial in this matter." (R 569). Defense counsel then asked why Mr. Cass failed to object when Witness Burger testified "about the defendant's collateral crimes." (R 570). The State objected on the basis that the issue was not being put before Mr. Cass in "the context of the entire trial." (R 570). Mr. Cass eventually said that it was error for him to let that testimony in without seeking to bar it on hearsay grounds. (R 571-572). However, on cross, it was established that Mr. Cass did not know what collateral crime evidence was being referred to. (R

577). He last saw his file in 1988. (R 578). Mr. Cass's testimony occurred on June 1, 1998. (R 454). He felt that reviewing his file was essential to determining what strategy decisions he actually made in Ventura's case. (R 578). He had not been extended the opportunity to review that file. (R 578). Further, Mr. Cass opined that his determinations regarding whether a given strategy was appropriate were "far better in '88 than they are now." (R 578). Moreover, in order to determine whether things he did, or did not do, were improper, he would want to examine them in context, something he could not do without his file. (R 578-579).

Regarding the complaints that Mr. Cass should have objected to collateral crimes testimony, Mr. Cass said that he "suspected" and "thought it was very possible" that the evidence regarding the "bank fraud scams" that Ventura and McDonald had been involved in were likely to come into evidence to show how McDonald picked Ventura "to be his hit man." (R 579). Mr. Cass said that he may well have let that information in because he knew the jury would hear it anyway. (R 579). Mr. Cass acknowledged that it is "a tried and true tactic of attorneys everywhere to try to steal the thunder of opposing attorneys." (R 580). He also added: "I find that sometimes it's less successful to be jumping up and down, objecting and objecting in front of the jury. They think I have something to hide." (R 580).

Defense counsel asked Mr. Cass about testimony from Officer Juan Gonzalez wherein he related hearsay from one of the persons to

whom Ventura confessed. (R 572). Mr. Cass was asked if he "ever read this statement that was taken by police." (R 572). Mr. Cass responded: "Yes, I believe I did." (R 572). Defense counsel proceeded to argue with the witness, charging that he had told him otherwise previously. (R 572-573). Eventually, Mr. Cass said that he did not recall the statement. (R 573).

Defense counsel also alleged that Witness Gary Eagen and McDonald testified at trial regarding Ventura's collateral crimes. (R 573). Mr. Cass did not recall whether there was a reason why he did not object to their testimony. (R 573). However, he explained: "I didn't have a specific plan . . . to object or not object. It all would depend on how the answer **sounded to me**. And I do sometimes not object to hearsay, objectionable hearsay." (R 574)(emphasis added).

Mr. Cass "had a complimentary card from Ed Duff who I don't even think was the sheriff in '88." (R 575). He never worked for the sheriff's office,

> never made an arrest . . . never got paid . . . never had an understanding for employment . . .. It was a thing that he did for friends. It's sort of like having a sheriff's bumper sticker on your car. The very same sort of thing, goodwill.

(R 575). "[T]here was a pile of us" that got the cards. (R 590). Mr. Cass had no certified law enforcement status and performed no law enforcement functions. (R 590).

On cross, Mr. Cass testified to the following hypothetical:

> Let's say you had family members that knew Mr. Ventura. And they didn't really know about his involvement in crime. They just knew him to be their brother, and they loved him, and he was a good guy back in the Mennonite church back in his early 20s. . . .
>
> But, of course, when he committed this crime he was 46 . . ..
>
> Let's say those witnesses were going to come in and say that, yeah, back in his youth . . . he was a good church goer, but in conjunction with that testimony there might be something to the effect that when he . . . fled he left his family and his children behind? . . . Would that be something that you would want to consider before you necessarily called those witnesses . . .?

(R 583-584). Mr. Cass responded: "I wouldn't want that testimony." (R 584). The prosecutor continued:

> [Y]ou presented his daughter's testimony that he was, . . . a really loving father and had really done right by her. Now couldn't that testimony have been undercut if, . . . it was demonstrated that rather than face a murder charge that he claims he didn't commit, Mr. Ventura would rather change his name and flee the country leaving his family. Do you think that would undercut maybe that he's a really good daddy argument?

(R 584). Mr. Cass agreed: "It wouldn't be very good." (R 584).

Regarding the implication that critical evidence was omitted, such as the limo seeking directions, the truck at the victim's home, and the allegedly similar circumstances recounted by Mr. Johnson, the prosecutor asked if it would affect his evaluation of that information if he knew that it was placed into evidence at Codefendant Wright's trial, and he was, nonetheless, convicted. (R 586). Mr. Cass replied: "Under those circumstances it doesn't sound as compelling." (R 586). He added that Wright's attorney is an "[e]xcellent" attorney. (R 586).

Regarding Ventura's allegation that trial counsel should have put on more evidence of his devote religious stand, the prosecutor asked: "How much mitigation can there be drawn from a supposedly very religious Mennonite conscientious objector who makes a conscious decision to murder another human being for money?" (R 601). Rephrasing, he asked: "Which person is worse, somebody who's taught right and wrong and ignores it, or someone who's never been taught right from wrong?" (R 601). Mr. Cass said: "Well, I think the one we should cut the slack to is the one who never knew." (R 601). He acknowledged that "[i]t's not necessarily mitigating to be from a great religious background . . .." (R 602).

Ventura's final witness was himself. (R 609). He said that he wrote letters "complaining about my relationship with Mr. Cass." (R 610). He claimed that Mr. Cass only visited him to "tell me that he was going on vacation or that he had continued the case . . .." (R 610). He claimed that they "never discussed my case." (R 610). Later, however, he admitted that Mr. Cass discussed with him that he would be taking depositions of persons from Texas and Chicago. (R 610-611). Ventura said he never discussed "defense strategy" with his attorney. (R 611). However, he admitted that he and Mr. Cass talked about using "a straw man . . . like a scapegoat." (R 611).

Ventura also claimed that he and Mr. Cass never discussed whether Ventura should testify at trial until "[a]fter the State rested." (R 613). At that time "Mr. Cass told me . . . that if

you take the stand, you're only going to bloody the waters." (R 613). He said that Mr. Cass never discussed revealing that he had a criminal past with him. (R 613). However, Ventura made it clear that he did not testify because he "didn't want to testify." (R 617). He indicated that he had no claim that there was ineffectiveness in regard to this matter, only that "the ineffectiveness was the fact that I didn't want him **from the beginning**." (R 617)(emphasis added).

Regarding mitigation witnesses, Ventura complained that "[n]o one was ever called." (R 614). He claimed that Mr. Cass never asked him about his background or family. (R 614). He said that his son, daughter, and "some friends . . . were at the trial," and "they were approached right from the audience."[5] (R 614). Ventura "did not ask them to come." (R 619). He did not tell Mr. Cass to contact any of his family members. (R 619). Indeed, he "didn't want my family here involved with it." (R 619). Ventura opined that had Mr. Cass done his job correctly, he would have contacted them against his expressed wishes to the contrary. (R 619).

Ventura also said that he "felt that there was something between Mr. Cass and Mr. Stark." (R 616). He based this feeling on the allegation that Mr. Stark "said that Mr. Cass and I work well together. So . . . I felt, you know, that I had two prosecutors against me rather than just one." (R 616).

---

[5]Later, he claimed that his wife was with this group. (R 619).

The defense rested from calling witnesses. (R 630, 641). The State announced that CCR had just handed the prosecutor the trial attorney's file. (R 641). Although the prosecutor had been able to give it only "a cursory review," he called Trial Counsel Ray Cass.

The State produced documents from trial counsel's file, had the witness inspect and identify them, and then introduced them into evidence over objection. They included:

(1) "[A] homicide investigation report." (R 642). Mr. Cass relied upon that document in preparing the defense. (R 642). The document listed investigative information on the Ventura case to June 23, 1986. (R 645). Page four of the report "describes an interview on 6-14-86" with Mr. Arview. (R 645). Therein, it is reported "that Mr. Ventura confessed to a murder . . . [n]ot the one in this case. It was in Colorado." (R 646). That document also indicates that Ventura was involved in a violent robbery in California. (R 646, 647). Further included in the report is that Mr. Arview indicated that Ventura made sexual advances to him. (R 647). The report is "basically a synopsis of what Mr. Arview had told authorities in the interview." (R 647). Attached to the report is a copy of a conviction of "a Mr. Juan Godaya." (R 647). Mr. Cass was aware that Ventura, using the name of Juan Godaya, had committed a sexual attack upon a minor in Texas, where he had fled after leaving the jurisdiction of the courts in connection with the instant case. (R 648). Also attached to the report was a presentence investigation report. (R 648-649).

Mr. Cass evaluated and considered this information in deciding whether to recommend that Ventura testify, in determining mitigation strategy, and in deciding what evidence to present. (R 650). He was concerned that this would be admitted during the penalty phase to impeach Ventura's character witnesses. (R 651).

(2) Letter from Mr. Stark to Mr. Cass "dated March 30, 1987, with an attached interview of . . . Timothy Arview . . .." (R 643). Mr. Cass relied upon same in making his strategic decisions and in defending Ventura's case. (R 644).

(3) A document referring to Joseph Pike, which was received and considered by Mr. Cass in plotting strategy and preparing Ventura's defense. (R 657).

(4) The interview of Reggie Smith by Lieutenant Ed Carroll. (R 659). This document was received and considered by Mr. Cass in plotting strategy and preparing Ventura's defense. (R 659).

(5) The interview of Joseph Pike upon which Mr. Cass relied "in the preparation of my case." (R 660).

(6) The deposition of Dave Hudson was received and considered by Mr. Cass in preparation of Ventura's defense. (R 657).

Mr. Cass testified: "Contrary to what counsel for CCR says, I did prepare for the trial." (R 657). Counsel reaffirmed that he considered all of the documents in deciding upon his trial strategy. (R 657).

Mr. Cass elaborated upon his "reasonable doubt" trial strategy:

> [I]t appeared to me from the material and the depositions and the rest of the discovery that . . . he was set up as a patsy by some of the people that he had been working with prior to coming to Florida, and that was essentially what I was going to try to show . . . that he was not the person that . . . killed Clemente.

(R 658). He hoped to show that McDonald, and the others involved in the crime, worked to frame Ventura. (R 658). So, he mentioned Ventura's prior criminal history to the potential jurors because of his "fear that it would all spill out one way or another . . .." (R 659).

Mr. Cass was shown a document which he identified as "a US Department of Justice FBI rap sheet." (R 661). He had learned of Ventura's prior criminal history independently of the federal rap sheet. (R 661). He was well aware of the lengthy criminal history, including the criminal conduct in California and Colorado and the Texas conviction. (R 666-667). Ventura had told him about his record, although he did not disclose his "whole record." (R 663, 666). What Mr. Cass knew was consistent with the information on the federal rap sheet. (R 663). Further, Mr. Cass identified notes, investigative work, and memoranda from the trial file, dating to two years before trial, confirming his awareness of Ventura’s prior criminal history. (R 672-675).

Mr. Cass's investigator told him about Ventura's prior criminal history. (R 688). Also, during a deposition, the "US postal inspector . . . had advised me of a number of charges" against Ventura. (R 689). Mr. Cass reiterated that he mentioned

the prior history to the jury on voir dire "[b]ecause I was concerned with the jury learning of a criminal conviction" and wanted to bring it out first to "[s]often the blow." (R 693, 694).

In investigating his case to present a reasonable doubt defense, Mr. Cass "studied the police reports . . . took depositions . . . had . . . discussions with Mr. Pearl . . .." (R 696, 697). He could not recall all that he had done "off the top of my head." (R 697). He worked on Ventura's case "[a]bout a year and a half" before trial. (R 697). "At one time or another" he read "everything that's contained in [his] defense file." (R 697). He specifically testified that he had read the interview of Timothy Arview prior to trial. (R 700-701).

On redirect, it was established that the 1963 Colorado conviction for fraud was referenced in the investigative interview notes dated June 17, 1986 and contained in trial counsel's file. (R 702). Mr. Cass was very concerned" and believed that Ventura's criminal involvement was going to come out at trial. (R 704). Since his defense strategy was to show a conspiracy to frame Ventura, it would have been necessary to let the jury know that the men were involved in criminal conduct together. (R 704-705). Mr. Cass disclosed the information preemptively "[b]ecause it would have to have been revealed to show that he was being set up as a patsy for this." (R 705).

The State then called former prosecutor Ray Stark. (R 707). Mr. Stark identified the first two documents showed to Mr. Cass

earlier, and testified that they were provided to Mr. Cass "back in '87," "shortly after . . . Ventura was arrested in Texas." (R 708). Included therein were "all the witness statements from Texas . . . [and] a PSI . . .." (R 708). Mr. Stark said that had the defense opened the door to the evidence of Ventura's priors in putting on its mitigation witnesses, the State would have used it. (R 709-710). "As it was the door was not opened." (R 710).

On cross, Mr. Stark explained that the door was not opened because "Mr. Cass . . . did not bring in any testimony, my recollection, of the good character or anything of that nature, working with children or anything like that." (R 710). Later, he said that there may have been enough good character evidence to give him the "option" to put in the prior history, but he did not do so "because I felt I had enough aggravating circumstances to warrant a death penalty at that time anyway." (R 711, 713). However, the former prosecutor maintained that Mr. Cass did not open the door "[a]s to any activity he had had with young children . . .," and so, the State did not introduce Ventura's conviction for pedophilia. (R 711, 712). Had evidence that Ventura "was a wonderful man with children and did such great things with young children" been offered in mitigation, he would have rebutted with Mr. Arview's testimony that Ventura "had a fondness for young boys." (R 712). Finally, Mr. Stark testified that if the defense had put on "a trail of family witnesses" to testify that Ventura "was not a violent person . . . was a wonderful person and worked

as a Mendinite (sic) youth leader and helped children in the church," he would "probably have introduced evidence to the effect that he had been convicted of pedophilia and had been involved in some violent activities in the past." (R 713-714).

Excerpts from Trial Testimony:

1. Joseph W. Pike testified that he lived near Ventura in the Chicago area and knew him for "sixteen or seventeen years." (DAR 494, 495). Mr. Pike met McDonald "in 1980." (R 496). He was closer to Ventura than to McDonald. (R 496).

Mr. Pike was involved in, and charged with, a bank fraud scheme. (R 496-497). Both Ventura and McDonald were also involved in it. (R 497). McDonald "was one of the key people." (R 519). Mr. Pike was indicted on federal charges in connection with the bank fraud and was convicted of three offenses. (R 497). "Everybody pleaded guilty . . .." (R 517).

Mr. Pike became involved with U.S. Postal Inspector Berger in connection with the bank fraud investigation. (R 496). In 1981, Mr. Pike told Investigator Berger about a homicide. (R 498).

Ventura told Mr. Pike about "a crime, or scheme" that "had been completed" when he told Mr. Pike about it on May 6, 1981.[6] (R 498). The plan revolved around "an insurance policy on a man's life . . . a keyman insurance policy and they were going to collect

[6]The only part of the plan that was not complete was that they had not yet collected the money. (R 500).

the insurance and the way they were going to make the crime look." (R 498-499). "They" were McDonald "and some acquaintance or friend of Jack McDonald . . . [a]s well as Mr. Ventura." (R 499). "[T]hey were going to make it look like a drug related murder." (R 499). Mr. Pike asked Ventura "what his part in it was. He said he handled the extermination." (R 499). Ventura was to be paid "thirteen thousand dollars" for his part in the crime. (R 499-500).

The next day, May 7, 1981, Mr. Pike contacted Inspector Berger "and related the information to him." (R 501, 509). Mr. Pike said that he received no benefit from his report to the inspector as the "matters that I was working with Inspector Berger on were pretty much completed at that point in time," although he had not yet been sentenced.[7] (R 501). He reported the Ventura crime because "there was a violent crime that I had found out about. I think anybody's responsibility is to tell about it or do what is necessary to bring the people to justice . . .." (R 502).

Mr. Pike testified that the phrase "handled the extermination" meant that Ventura either found someone to kill the man, or did it himself. (R 504). "[F]rom what Pete told me, . . . he either committed the murder himself or he had taken care of arranging to make sure the murder was committed." (R 506). Ventura indicated to

[7]Mr. Pike's sentence was not entered until 1983 when he "pleaded guilty to three counts of mail fraud" and "served thirty days in the Federal Correctional Center in Chicago and five years probation." (R 510). His probation was due to expire the same year as his testimony. (R 511).

Mr. Pike that "his part . . . was to take care of the murder, and . . . he was working for McDonald." (R 507). He told Mr. Pike "[h]e was getting paid to handle the extermination." (R 512).

Mr. Pike "was aware that [Ventura] had been to Atlanta . . . to Florida, and . . . to California" just before meeting with Mr. Pike. (R 513). He learned where Ventura was from "people who were in contact with Pete, had conversation with him recently." (R 515). This included "people in the neighborhood, [and] other people that I know, and Pete knows." (R 515).

2. Reginald Barrett had known Ventura for "[t]wenty years." (R 521). He and Ventura lived near each other and socialized. (R 521). Mr. Barrett knew McDonald, having first met him in 1978 or 1979. (R 522). However, he only saw him twice. (R 523).

Mr. Barrett was brought into the investigation headed by Inspector Berger by Mr. Pike. (R 521). Mr. Barrett was not charged with any crime. (R 521-522). He worked undercover, and in "May or June" of 1981, he gave the inspector information relevant to a homicide in Florida. (R 522, 523).

In February, 1981, Ventura asked Mr. Barrett if he would contact Midwestern Life Insurance Company and "inquire about a certain insurance called 'keyman insurance.'" (R 525). Specifically, Ventura wanted Mr. Barrett to ask "if an employee . . . was insured under a keyman policy, but was to leave the place of employment, would this insurance policy still cover him after he

had left." (R 525). Another question was "how long it would take to pay out on the insurance claim." (R 525). Mr. Barrett did not make the call. (R 525).

In late February or early March, Ventura "indicated that a person from Atlanta wanted to have a pistol, or a gun, and he asked if . . . I could provide one . . .." (R 525). "[T]here was a discussion of putting a silencer on, or making a silencer for a gun, and he said that the gun was for Mr. McDonald in Atlanta." (R 526). Mr. Barrett provided Ventura with "[a] Colt 357 Magnum . . . a Python." (R 526).

Later, Ventura said he needed to "go to Atlanta to meet with Jack" [McDonald]. (R 526). Mr. Barrett helped Ventura obtain a job to earn the money for the trip. (R 526-527). After completing the job, Ventura told Mr. Barrett he "was on his way to Atlanta." (R 527). Ventura "specifically said that Jack wanted him to come down and burn someone." (R 527). Mr. Barrett understood that to mean "to murder someone." (R 527).

"[A]round the 10th or 11th of the month [April]," Ventura called Mr. Barrett and "left a message for me to call him back." (R 527). He returned the call at the number Ventura left, and "discovered . . . it was in Daytona or DeLand." (R 527-528). Ventura "said he was still doing the business he was supposed to do . . .." (R 528). A week later, Ventura called again, stating "he'd be going to California as soon as his job was finished." (R 529). Still later, Mr. Barrett found a letter from Ventura in his

mailbox. (R 529-530). Therein, Ventura said "he was in Atlanta . . . and . . . was concerned . . . that his safety might be in jeopardy" and indicated that he feared McDonald. (R 530-531). Upon his return, Ventura indicated "that he would be getting his payment in about thirty days." (R 534). The payment "was coming from Jack who was going to collect it from someone who had an insurance policy" -- the "keyman" policy earlier testified to. (R 536).

On cross, it was established that Ventura used Mr. Barrett on two occasions "as a refuge," indicating that "he apprehended danger from Mr. McDonald." (R 545-546). Ventura was involved in the bank fraud scheme with McDonald and others. (R 539-540). Ventura did not return the gun he borrowed from Mr. Barrett. (R 543). Mr. Barrett had known Ventura to use an alias. (R 535).

3. U.S. Postal Inspector Gary Eager testified that on March 24th, while he was working undercover in Missouri, he met Ventura. (R 548). In June, 1981, he met Ventura a second time. (R 549). During that meeting, Ventura said that he "could possibly sell me a 38 caliber revolver, 357 Magnum, or a 32 caliber revolver, and we had made arrangements to meet . . . that day." (R 549). Ventura "indicated he had these guns and he would be willing to sell them to me." (R 551). He was arrested prior to the meeting. (R 549).

4. Timothy Arview testified that in December 1985 or January 1986, he met Ventura, who was using the name "Juan Gadaya" in Austin, Texas. (R 677). Mr. Arview, who was sixteen, worked for

Ventura in construction as "his helper." (R 678). One day, when he and Ventura were "wrestling, playing around," Ventura "got upset and started playing roughly." (R 679). They stopped, and Mr. Arview asked "what was wrong." (R 679). Ventura then told Mr. Arview that he killed a "[m]ale" in "Florida," in "May or April," some "five years ago." (R 679, 680). Ventura said that he did it because of a "[c]ontract." (R 679). Thereafter, Mr. Arview told the authorities that Juan Gadaya was a wanted fugitive from justice. (R 681).

On cross, it was established that Mr. Arview and Ventura had had "[a] slight difference" about wages owed the boy. (R 682). He admitted that "[a]t first," he was interested in collecting a reward. (R 682). However, his motive was: "If somebody kills somebody, they should pay for it." (R 682).

POINT I

THE TRIAL COURT DID NOT ERR IN REJECTING APPELLANT'S CLAIM OF *BRADY/GIGLIO* ERROR.

In his first point on appeal, Ventura alleges that the State violated *Brady v. Maryland*[8] when it failed to apprise trial counsel of the "deals" and "negotiations going on between the prosecutor and . . . Jack McDonald." (IB at 35). To establish a *Brady* violation, Ventura must show that the State withheld exculpatory evidence which has been newly discovered. He must then show that "there is a reasonable probability that 'had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Medina v. State*, 573 So. 2d 293, 296 (Fla. 1990)(*citing Duest v. Dugger*, 555 So. 2d 849, 851 (Fla. 1990)).

Ventura also asserts a *Giglio v. United States*[9] violation because the State permitted McDonald to testify that no promises whatsoever had been made to him concerning his testimony against Ventura. (IB 36). To establish a *Giglio* violation, Ventura must show: (1) The testimony was false; (2) the prosecutor knew it was false; and, (3) the false testimony was material to the conviction and/or sentence. *Craig v. State*, 685 So. 2d 1224 (Fla. 1996)(*citing United States v. Bagley*, 473 U.S. 667 (1985)).

---

[8]373 U.S. 83 (1963).

[9]405 U.S. 150 (1972).

Brady:

Ventura did not carry his burden to prove that the State withheld exclupatory evidence which was newly discovered. To establish that evidence is newly discovered, it must have been "unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991)[*quoting Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)].

Assuming *arguendo* that the weak evidence of a deal between the State and McDonald is exculpatory (as further impeachment of McDonald), Ventura has not met either of the remaining requirements for a *Brady* violation. He has not shown that the alleged deal could not have been discovered by his trial counsel through the use of due diligence.

The evidence at the evidentiary hearing showed that "Mr. Cass had access to the file" in keeping with the office's "open file policy . . .." (R 510). The defense could "go through the file and see what they wanted and make a copy of whatever they wanted." (R 516). To Mr. Stark's recollection, the letters had not been removed from the file at any time. (R 516). Thus, the evidence indicated that had trial counsel inspected the file, he would have found the letters on which the alleged deal with McDonald is based. Ventura did not carry his burden to establish that his attorney

could not have learned of the alleged deal with due diligence. Thus, he cannot meet the newly discovered evidence prong of a *Brady* claim.

Neither has Ventura shown that there is a reasonable probability that had the evidence of the alleged deal been introduced at trial, the outcome of either the guilt or penalty phase would have been different. The evidence at trial overwhelmingly established that Ventura was guilty of the murder of Mr. Clemente. Without consideration of the damaging evidence Mr. McDonald gave against Ventura, it includes:

Joseph W. Pike testified that he was involved in, and charged with, a bank fraud scheme in which both Ventura and McDonald were also involved. (R 496-497). In connection with the federal government's investigation of that scheme, Mr. Pike became involved with U.S. Postal Inspector Berger. (R 496). In 1981, Mr. Pike told Investigator Berger about a contract murder for insurance benefits committed by Ventura, McDonald and Wright in Volusia County, Florida. *Ventura*, 560 So. 2d at 217. *See* R 498.

Ventura told Mr. Pike about the crime on May 6, 1981. (R 498). The plan revolved around "an insurance policy on a man's life . . . a keyman insurance policy and they were going to collect the insurance and the way they were going to make the crime look." (R 498-499). Ventura and company "were going to make it look like a drug related murder." (R 499). Ventura told Mr. Pike that his part

in the plan had been "the extermination." (R 499).

The next day, May 7, 1981, Mr. Pike contacted Inspector Berger "and related the information to him." (R 501, 509). He received no benefit from his report to the inspector as the "matters that I was working with Inspector Berger on were pretty much completed at that point in time."[10] (R 501). Mr. Pike reported Ventura's crime because "there was a violent crime that I had found out about. I think anybody's responsibility is to tell about it or do what is necessary to bring the people to justice . . .." (R 502).

Mr. Pike testified that the phrase "handled the extermination" meant that Ventura either found someone to kill the man, or did it himself.[11] (R 504). Ventura indicated to Mr. Pike that "he was working for McDonald." (R 507). He told Mr. Pike "[h]e was getting paid to handle the extermination." (R 512). Mr. Pike also testified that Ventura "had been to Atlanta . . . to Florida, and . . . to California" just before meeting with Mr. Pike. (R 513).

Reginald Barrett, who had known Ventura for "[t]wenty years," also testified at trial. (R 521). He and Ventura lived near each other and socialized. (R 521).

Mr. Barrett was brought into the investigation headed by Inspector Berger by Mr. Pike. (R 521). Mr. Barrett was not charged

---

[10] *See, supra,* at 41 n.8.

[11] "[F]rom what Pete told me, . . . he either committed the murder himself or he had taken care of arranging to make sure the murder was committed." (R 506).

with any crime. (R 521-522). He worked undercover, and in "May or June" of 1981, he gave the inspector information relevant to the Clemente homicide in Florida. (R 522, 523).

In February, 1981, Ventura asked Mr. Barrett if he would contact Midwestern Life Insurance Company and "inquire about a certain insurance called 'keyman insurance.'" (R 525). Specifically, Ventura wanted him to ask "if an employee . . . was insured under a keyman policy, but was to leave the place of employment, would this insurance policy still cover him after he had left." (R 525). Another question was "how long it would take to pay out on the insurance claim." (R 525). Mr. Barrett did not make the call. (R 525).

In late February or early March, Ventura sought to obtain a gun from Mr. Barrett. (R 525, 526). Mr. Barrett provided him with one. (R 526).

Later, Ventura said he needed to "go to Atlanta to meet with Jack" [McDonald]. (R 526). Ventura "specifically said that Jack wanted him to come down and burn someone." (R 527). Mr. Barrett understood that Ventura intended "to murder someone." (R 527).

"[A]round the 10th or 11th of the month [April]," Mr. Barrett returned Ventura's call at a number Ventura left for him, and "discovered . . . it was in Daytona or DeLand." (R 527-528). Ventura "said he was still doing the business he was supposed to do . . .." (R 528). Upon his return, Ventura indicated "that he would be getting his payment in about thirty days." (R 534). The payment

"was coming from Jack who was going to collect it from someone who had an insurance policy" -- the "keyman" policy earlier testified to. (R 536).

U.S. Postal Inspector Gary Eager met Ventura on March 24th while working undercover in Missouri and met him a second time in June, 1981. (R 548-49). At the later meeting, Ventura said that he "could possibly sell me a 38 caliber revolver," or other guns, "and we had made arrangements to meet . . . that day." (R 549). Ventura "indicated he had these guns and he would be willing to sell them to me." (R 551). He was arrested prior to the meeting. (R 549).

Timothy Arview met, and worked for, Ventura, who was using the name "Juan Gadaya," in Austin, Texas in December, 1985 or January, 1986. (R 677, 678). While the two were wrestling, Ventura "got upset and started playing roughly." (R 679). He told Mr. Arview that he had killed a "[m]ale" in "Florida," in "May or April," some "five years ago." (R 679, 680). Ventura said that he did it because of a "[c]ontract." (R 679). Thereafter, Mr. Arview reported Ventura to the authorities. (R 681).

On cross, it was established that Mr. Arview and Ventura had had "[a] slight difference" about wages owed the boy. (R 682). Mr. Arview admitted that "[a]t first," he was interested in collecting a reward. (R 682). However, his motive in reporting Ventura was: "If somebody kills somebody, they should pay for it." (R 682).

Ventura has not carried his burden to establish the third

prong of a *Brady* claim. The overwhelming evidence of his guilt, as outlined above, makes it clear that he cannot meet that burden. There simply is no reasonable possibility that the evidence of an alleged deal with the State regarding the bond jumping charge or advising the federal authorities of McDonald's cooperation in the Ventura proceeding would have overcome the overwhelming evidence of Ventura's guilt and the appropriateness of the penalty imposed upon him. Thus, he has utterly failed to establish a *Brady* violation.

Giglio:

In his initial brief, Ventura admits that "[i]t is conceivable that McDonald meant what he said when he testified that he had received no deals 'whatsoever.'' (IB at 39). He explains that McDonald "conceivably regarded dropping the bond jumping charge and promises of future assistance at federal parol hearings as too insignificant to consider." (IB at 39). Yet, he complains, as he must in asserting a *Giglio* claim, that this testimony was false, the prosecutor knew it was false, and the false evidence was so material as to have probably caused a different result at trial had it been disclosed. The State submits that just as McDonald might have regarded the discussions about the bond jumping charge and parol assistance too insignificant to consider a "deal," the prosecutor might have done so as well.[12]

In fact, the evidence adduced at the hearing below well

[12]Such reasoning also applies to the jury.

supports precisely that determination. Prosecutor Stark testified that "[t]here were no guarantees," and the State officials "didn't have any control whatsoever over the federal government."[13] (R 512, 513). Although the federal government apparently did not pursue a bond jumping charge against McDonald, "that's not unusual, because that's a relatively minor charge," and McDonald "already had 15 years of sentence . . .." (R 513). Although Mr. Stark told McDonald he would make any cooperation known to the federal parol officials, if asked, he would have done so "one way or another . . . anyway." (R 515). Thus, it is clear that the prosecutor, too, regarded these discussions as too insignificant to consider.

Ventura has failed to carry his burden to prove that the "none whatsoever" testimony of McDonald was false or that the prosecutor knew that it was false. Neither has he established that it was material to the outcome.

Ventura claims that the value of the alleged "deal" was to impeach Mr. McDonald's testimony at trial. At trial, it was made clear that McDonald had prior convictions and had served time in prison, including receiving a 15 year sentence on the bank fraud scheme. (DAR 648-649, 650-651, 675). It was also brought out that McDonald had jumped bail and fled from the authorities. (DAR 648). Additionally, it was made clear that McDonald had been charged with

[13]Further, as Ventura admits, the prosecutor's letter to the federal official made it clear that no promises had made to McDonald to procure his testimony. (IB at 40).

the instant murder and had gotten off on a "technicality," i.e., speedy trial. (DAR 646). He also admitted having been involved in other illegal activities." (DAR 652). Moreover, Mr. Cass impeached Mr. McDonald with prior deposition testimony and sought, and got, a concession from Mr. McDonald that he had lied during same. (DAR 664-666). Mr. Cass further raised the spector of a revenge motive against both Ventura and Codefendant Wright. (DAR 669, 674). Given the considerable impeachment as outlined above, it seems obvious that evidence that the prosecutor had asked the federal authorities to consider not prosecuting McDonald for jumping bond and/or had offered to advise federal authorities of McDonald's cooperation in Ventura's case pales in significance. Thus, there is no reasonable possibility that the failure to bring out the alleged "deal" during McDonald's trial testimony was material to the verdict or sentencing recommendation.[14]

Moreover, the allegedly false testimony was not material to the conviction or sentence due to the overwhelming evidence of Ventura's guilt. That evidence, as outlined above, makes it clear that additional impeachment of McDonald (especially something as weak as the alleged "deal") would not have changed the outcome.

---

[14]Indeed, Ventura claims that McDonald's "rot in hell" letter was dated September 3, 1987 (IB at 48) and acknowledges that in his letter written on January 20, 1988, "the prosecutor stated that 'there were no promises made to Mr. McDonald in return for his testimony' . . .." (IB at 40). Thus, despite have McDonald's demand for "a deal" in return for his surrender and testimony, the prosecutor made no promises to McDonald.

Thus, Ventura has failed to carry his burden to establish a *Giglio* violation.

In a desperate attempt to do an end run around the overwhelming evidence of his guilt, Ventura cites "evidence from the trial of co-defendant Jerry Wright." (IB 49). However, contrary to the defense contention, McDonald did **not** testify that Ventura killed Mr. Clemente around noon. (*See* IB 49). Rather, at trial, defense counsel tried in vain to get Mr. McDonald to testify that the murder occurred "around one or two o'clock in the afternoon -- something like that." (DAR 664-666).

Mr. McDonald testified that he picked Ventura up from the Days Inn in Daytona Beach "[v]ery late morning, early afternoon" on April 15th. (DAR 638). The men than "took off for DeLand," a town some twenty minutes to the west. (DAR 638). Upon arrival in DeLand, the men went to Barnett Bank and Ventura "made a phone call to Mr. Clemente on his job at the marina and he was to meet him in the back of the Barnett Bank." (DAR 639). Mr. Clemente left the Daytona Beach marina "at 1:00 p.m. on April 15 to run some errands and to meet a potential customer at the Barnett Bank in DeLand." *Ventura v. State*, 560 So. 2d 217, 217 (Fla. 1990).

Later, Ventura met Mr. Clemente at the bank, and the two men proceeded in Mr. Clemente's vehicle to "a spot where the killing was to take place." (DAR 639). The men left DeLand and drove to "an abandoned gravel pit" in a remote area on Route 44 where

Ventura said that he had an urgent need to relieve himself. (DAR 640, 641). Approximately "ten minutes" later, "Ventura came across the field into my car." (DAR 640). Thus, it is crystal clear that McDonald did not testify that the killing occurred around noon. Ventura's repeated misrepresentations to the contrary do nothing to detract from the overwhelming evidence of Ventura's guilt of the murder of Mr. Clemente.

Neither does the alleged evidence from the Wright trial regarding the sighting of Mr. Clemente's vehicle in his driveway at 4:15 p.m. weaken the strong case against Ventura. As this Court recounted the evidence in its decision on direct appeal, Mr. Clemente did not leave his Daytona Beach place of employment until 1:00 p.m. At that time, he left to run some errands before meeting the purported customer at the bank in DeLand. According to Ventura, the murder occurred after 4:15, as the truck containing Mr. Clemente's body "was still warm at some point between 5:00 and 6:00 p.m. (IB at 49). Given the distance from Daytona Beach to the Barnett Bank in DeLand and the distance from that bank to the murder scene on State Road 44, Mr. Clemente may well have left his home at, or shortly after, 4:15 p.m. and ended up at the murder scene at the time advocated by Ventura.

Finally, the alleged evidence from the Wright trial relating to Mr. Wright's financial condition has absolutely no relevance to the instant *Brady* or *Giglio* claims. Accordingly, same should be

disregarded. However, even if considered, and even if it is true that Mr. Wright's financial condition was not as poor as Mr. McDonald believed it to be, that does nothing to detract from the overwhelming evidence of Ventura's guilt as outlined above.

Neither does the alleged evidence from Mr. Clemente's ex-wife at Mr. Wright's trial undercut the strong case against Ventura. Ms. Clemente said only that she had seen Ventura around the Daytona Beach store a couple of times a couple of months prior to the murder. (SR 126, 128). There is no indication that Ventura could not have used the alias "Alex Martin" in placing the call requesting the meeting with the victim. Neither is there any evidence that the caller spoke with Mr. Clemente, much less that Mr. Clemente could have recognized Ventura's telephone voice.

Moreover, it is not true that "Ventura's guilt and the CCP and pecuniary gain aggravators could only be established by unquestioned acceptance of McDonald's testimony in its entirety." (IB at 51). Laying aside Mr. McDonald's testimony that the conspirators' plan called for Ventura to receive $22,000 for killing Mr. Clemente, (DAR 654), the trial evidence clearly established a well thought out, cold, calculated, and premeditated plan to murder Mr. Clemente for financial gain. Mr. Pike testified that Ventura told him the murder plan revolved around "an insurance policy on a man's life . . . a keyman insurance policy and they were going to collect the insurance . . .." (DAR 498-499). Ventura himself told Mr. Pike that he was responsible for "the

extermination," and that he was to be paid "thirteen thousand dollars" for his part in the crime. (DAR 499-500). Specifically, "[h]e was getting paid to handle the extermination." (DAR 512).

Mr. Barrett testified that a couple of months prior to the murder, Ventura asked him to make inquiries about a keyman insurance policy. (DAR 525). Later, Ventura told Mr. Barrett that he was going to "burn someone" -- a phrase which Mr. Barrett well understood to mean "to murder someone." (R 527). Upon Ventura's return from Daytona or DeLand, he indicated "that he would be getting his payment in about thirty days." (DAR 527-528, 534).

As is readily apparent, neither Ventura's guilt, nor the existence of either aggravator, depended upon Mr. McDonald's testimony. Neither do Ventura's appellate attempts to make Mr. Clemente's murder look like it was drug-related in an effort to downplay the overwhelming evidence of his guilt succeed. Mr. Pike expressly testified that Ventura told him that the plan was to kill Mr. Clemente in a manner "to make it look like a drug related murder." (R 499).

Ventura has utterly failed to carry his burden to establish either a *Brady* or a *Giglio* violation. He is entitled to no relief.

POINT II

APPELLANT FAILED TO CARRY HIS BURDEN TO PROVE THAT HIS TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE.

Ventura has the burden to prove that his counsel rendered him ineffective assistance. *Kennedy v. State,* 546 So. 2d 912 (Fla. 1989); *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983). To show same, he must demonstrate that his attorney's performance fell outside the wide range of reasonable professional assistance. *Kennedy*. There is a strong presumption that counsel rendered effective assistance. *Id.* The distorting effects of hindsight must be eliminated and the action, or inaction, must be evaluated from counsel's perspective at the time. *Id. See Strickland v. Washington,* 466 U.S. 668, 690 (1984). Even if the defendant shows deficient performance, he must also prove that the deficiency so adversely prejudiced him that there is a reasonable probability that except for the deficient performance, the result would have been different. *Id.*; *Gorham v. State*, 521 So.2d 1067, 1069 (Fla. 1988)(*citing Strickland*, 466 U.S. at 687).

Reasonable strategic decisions of trial counsel will not be second-guessed. *Haliburton v. Singletary*, 691 So. 2d 466 (Fla. 1997). "'Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected.'" *Rutherford v. State*, 727 So. 2d 216 (Fla. 1998),

quoting, State v. Bolender, 503 So. 2d 1247, 1250 (Fla. 1987), *cert. denied*, 484 U.S. 873 (1987). "To hold that counsel was not ineffective[,] we need not find that he made the best possible choice, but that he made a reasonable one." *Byrd v. Armontrout*, 880 F.2d 1, 6 (8th Cir. 1989). Trial counsel "cannot be faulted simply because he did not succeed." *Alford v. Wainwright*, 725 F.2d 1282, 1289 (11th Cir.), *modified*, 731 F.2d 1486, *cert. denied*, 469 U.S. 956 (1984). A defendant is "not entitled to perfect or error-free counsel, only to reasonably effective counsel." *Waterhouse v. State*, 522 So. 2d 341, 343 (Fla. 1988).

Throughout this point, Ventura claims that Mr. Cass conceded that he made nonstrategic errors or was ineffective. However, it should be noted that these alleged "admissions" were made by an attorney who had not had his trial file for some ten years and who had not been offered the opportunity to examine it prior to testifying. (R 578). Mr. Cass eventually said that he felt that reviewing his file was essential to determining what strategy decisions he actually made in Ventura's case. (R 578). He opined that determinations regarding whether a given strategy was appropriate were "far better in '88 than they are now." (R 578). Moreover, "[B]ecause ineffectiveness is a question which we must decide, admissions of deficient performance by attorneys are not decisive." *Harris v. Dugger*, 874 F. 2d 756, 761 n.4 (11th Cir. 1989). Indeed, Judge Hutcheson specifically found that "Attorney

Ray Cass, did not perform unreasonable . . .." (R 305). Moreover, had he done so, "there was not actual prejudice to the defendant." *Id.* The court specifically found "that the evidence of guilt . . . was so overwhelming that even if there was a deficient performance . . . there is no reasonable probability that the results would have been different . . .." *Id.*

Ventura's counsel decided upon a trial strategy which it was hoped would net a favorable result. That the strategy did not succeed does nothing to render counsel's performance in pursuing it deficient. *Alford v. Wainwright*, 725 F.2d at 1289. Thus, Ventura has not met the first prong of the *Strickland* standard.

Neither can he establish prejudice. As the trial judge said in his order denying Rule 3.850 relief, the evidence of Ventura's guilt in this case was truly overwhelming. Having utterly failed to establish either prong of the *Strickland* standard, Ventura is entitled to no relief.

Findings of fact made after an evidentiary hearing are presumed correct. *See Jones v. State*, 446 So. 2d 1059 (Fla. 1984). The evidence adduced below well supports the trial judge's conclusions based on his factual findings.

A. Investigation:

1. Ventura complains that Attorney Cass failed "to investigate and present evidence of the deals and negotiations between the state and Jack McDonald." (IB 59). Citing evidentiary hearing

testimony that the State "had an 'open file' policy" and "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," Ventura claims that "the reason for non-disclosure was simply negligence on the part of defense counsel." (IB 60-61). However, he proceeds to knock down his own claim, stating that the prosecutor "did not know whether the letters in question were in the file" and that Mr. Cass testified "that he had problems with what he termed the 'so-called' open file policy." (IB 61). He further admits that in addition to the routine discovery demands and information, Mr. Cass's file shows that he took some "fifteen discovery depositions." (IB 61). Indeed, he opines that "it is far more likely that this information was concealed by the state rather than that it was overlooked by defense counsel." (IB 62). Nonetheless, talking out of both sides of his mouth, Ventura alleges: "[T]o 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 . . . counsel was ineffective and the prejudice caused . . . is manifest." (IB 62). In support of this claim, he says that had Mr. Cass known of the letters, "he would have used them for impeachment, so this claim cannot be dismissed as a strategic move . . .."[15] (IB 63).

[15]As he does repeatedly throughout his brief, Ventura gives absolutely no record citation to the alleged testimony.

The "letters" at issue are between Prosecutor Stark and an Assistant U.S. Attorney. (R 510). Therein, Mr. Stark asked that consideration be given to not prosecuting McDonald on a bond jumping charge. (R 508). The attorney agreed not to prosecute on that charge "as long as he [McDonald] gave truthful testimony." (R 508). Thus, as Mr. Stark testified "[t]here were no guarantees," and the State officials had no control over the federal authorities. (R 513). Indeed, the decision not to pursue bond jumping charges is "not unusual, because that's a relatively minor charge. . . . He already had 15 years of sentence . . .." (R 513).

The alleged "agreement" with McDonald was that Mr. Stark "would make known to the federal court what he did in Florida . . .," something that Mr. Stark would have done "one way or another . . . anyway." (R 515). There was no promise that by so doing, McDonald would receive any benefit. (R 515).

Moreover, McDonald was impeached at trial. The little additional impeachment value of a forbearance to prosecute on a bond jumping charge - which would most likely have not been done in any event - is negligible. Certainly, it was not such as to undermine confidence in the outcome of Ventura's trial.

2. Ventura claims that Mr. Cass should have presented the testimony of Tina Clemente, the victim's widow. (IB 63). This witness testified at Codefendant Jerry Wright's trial that the victim knew Ventura and that the person who "set up the phony boat

sale" called himself Alex Martin. (IB 63). According to Ventura, this "is totally inconsistent with . . . McDonald's testimony, that Ventura was the man who set up the meeting about buying a boat . . .." (IB 63-64). There is no such inconsistency. Certainly, when he placed the call, Ventura could have been using an alias, as he was shown to have done on other occasions.

Moreover, the evidence from Ms. Clemente was that she had seen Ventura twice at the place where both she and the victim worked. (SR 79). She saw him around the victim "about two or three times," at the tire store "a couple of months" prior to the murder. (SR 126, 128). There is no indication that the victim could recognize Ventura's voice over the phone while he utilized an assumed name. Indeed, there is no indication that the victim took the phone call from his killer. Thus, that Ms. Clemente could have testified that the victim had met Ventura once or twice does nothing to exonerate Ventura, muchless rise to such a level as to make it probable that the result of the trial would have been different had she so testified.[16] Indeed, that Mr. Clemente had some acquaintance with Ventura explains why he was willing to let the man enter, and be transported in, his vehicle.

B. Cross Examination:

1. Ventura complains that Attorney Cass was ineffective in his

[16]Of course, this testimony was presented at Codefendant Wright's trial, and he was convicted nonetheless.

cross examination of Lt. Sgt. Juan Gonzalez, who testified that Timothy Arview reported that he knew a man using the name of Juan Contras who was wanted for homicide in Florida. (IB 66). He claims that Lt. Sgt. Gonzalez said that "Arview did not tell him that Ventura admitted to committing a homicide, but only that Ventura admitted to being wanted for a homicide." (IB 66). Again, Ventura misrepresents the record to this Honorable Court. At trial, Lt. Sgt. Gonzalez was not asked whether Mr. Arview told him that Ventura admitted the crime, and he did not volunteer any information on that subject. Rather, he testified that Mr. Arview "wanted to talk to somebody about a person that was wanted for the homicide out of Florida." (DAR 686). He then described how he verified that Ventura was, in fact, wanted in both Florida and Chicago, Illinois, ascertained Ventura's address, and effected Ventura's arrest.[17] (DAR 686-689). Thus, Ventura's claim that this officer said that Mr. Arview did not say that Ventura said that he killed someone is utterly without merit, and Mr. Cass can hardly be ineffective for not exploring that nonexistent subject in depth.

Regarding Mr. Arview, Ventura complains that Attorney Cass should have impeached the witness 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

[17]Ventura first gave his name as "Juan Contras," and showed an ID with that name on it. (DAR 689). Mr. Arview also knew Ventura to use the alias "Juan Gadaya." (DAR 677, 678).

police . . . [and] 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 . . .." (IB 69). Mr. Cass opened his cross examination questioning Mr. Arview about a difference he had with Ventura regarding wages not paid to the boy. (DAR 682). He followed that with questioning about the boy's interest in "collecting a reward." (DAR 682-683). Mr. Cass pressed further, obtaining testimony indicating that one of the boy's motivations for testifying against Ventura may have been to get to visit the beach -- a place he had never been before. (DAR 683). This examination was all geared at defeating the "good citizenship," as collateral counsel terms it, motive. That collateral counsel would have phrased it differently, or would have tried a slightly different angle, does nothing to demonstrate that Mr. Cass's examination was ineffective. "The object of an ineffectiveness claim is not to grade counsel's performance." *Strickland*, 466 U.S. at 697. Rather, it is merely "to determine whether counsel's performance impaired the defense . . .." *Daugherty v. Dugger*, 839 F.2d 1426, 1428 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 187 (1988).

Further, the claim that Mr. Cass should have impeached Mr. Arview's testimony regarding Ventura's admission that he murdered a man in Florida "because of its vagueness, because of the

circumstances in which it was allegedly made" is without merit. The State submits that the testimony was not vague, and the circumstances merely explained the very reasonable manner in which the admission came out. Although current counsel indicates that he would have examined Mr. Arview somewhat differently, such is not the test for ineffective assistance. *See Card v. Dugger*, 911 F.2d 1494, 1507 (11th Cir. 1990).

Finally, Ventura complains that his admission to Mr. Arview could, and should, have been attacked because the boy stated that the admission described the murder as having occurred at night. (IB 69). He asserts, without record citation, that "the killing took place during the day . . .." This is apparently a reference to Ventura's oft repeated, incorrect claim that at trial McDonald testified that the murder occurred between 1:00 and 2:00. However, when it suits him to do so, he also argues that it occurred between 5:00 and 6:00 p.m.[18] (IB 49). The State submits that there is no

---

[18]Another example of Ventura's repeated misrepresentations of the record is found in his claim that McDonald testified that he and Ventura got "to the bank where Ventura was to meet Clemente 'very late morning, early afternoon,' (Dir. 63)." (IB 49). However, at the page cited, the evidence was that the two men "**took off for** DeLand . . . [v]ery late morning, early afternoon." (DAR 638)(emphasis added). The record establishes that after driving the considerable distance to DeLand, the men located a telephone and Ventura made the phone call setting up the meeting with the victim at a DeLand bank, the men then drove to the bank, and waited for the victim to leave the Daytona Beach store, drive to DeLand, and meet Ventura at the bank. Then, Ventura and the victim drove in the victim's truck for a considerable distance to a secluded area on Route 44. McDonald, trailing them, parked his vehicle a "safe" distance from the previously picked out murder site, and

significant impeachment to be had in this regard, and Mr. Cass's failure to try to manufacture something from little, or nothing, is not deficient performance.

C. Prior Record:

Ventura complains that Mr. Cass, "during voir dire disclosed to the jury venire that Mr. Ventura was a convicted felon." (IB 70). He complains that because a couple potential jurors indicated that it would prejudice them, that "naturally had the effect of prejudicing the remaining jurors." (IB 70). Of course, he gives no citation or support of any kind for this later opinion. Neither does he give citation or support for his conclusion that evidence of Ventura's "prior felony convictions would not have been admissible" at trial. (IB 70). The State submits that such barebones, unsupported, pleading is a nullity and should not be considered. Afterall, it is Ventura's burden to establish both deficient performance by his trial attorney and significant, resultant prejudice.

Moreover, nothing about Mr. Cass's trial strategy renders it defective, muchless so deficient as to constitute ineffective assistance. It is clear that he carefully considered the matter before deciding "to reveal to you that [which] is normally not revealed." (DAR 104; R 587). He did so "to get to the total truth

---

waited for Ventura, who came across a field to him some ten, or so, minutes later. Thus, it is clear that the murder did not occur until late afternoon.

here" as the defense sought to present it. (DAR 104). Mr. Cass and Ventura discussed the guilt phase theory of defense and decided on "[r]easonable doubt." (R 554, 575). Ventura's prior record was mentioned because Mr. Cass was "considering the possibility of it coming in." (R 596). Indeed, he let it in because he knew the jury would hear it as part of the proof of how Ventura became McDonald's hit man. (R 579). He was correct. (DAR 497). Mr. Cass invoked a tried and true attorney tactic known as stealing the opposing attorney's thunder. (*See* R 580).

Moreover, Mr. Cass sought to convince the jury that McDonald had set Ventura up as his patsy to take the rap for McDonald's murder of Mr. Clemente. In so doing, Mr. Cass had to tie McDonald to Ventura, and the most convincing way to do that was to reference the prior criminal dealings the two men had - primarily the Chicago bank scam which resulted in 13 federal felony convictions for McDonald. (DAR 651). Indeed, he sought to establish that McDonald had "some feeling of rancor towards Mr. Ventura as a result of the Federal bank scam that resulted in [his] convictions." (DAR 669. *See* DAR 674). Through other witnesses, he sought to establish McDonald as the kingpin or main figure in the bank scam in which Ventura was his underling, and that McDonald was angry at those he thought responsible for his indictment for the bank scam crimes. (*See* DAR 516-517, 519). He also adduced testimony indicating that Ventura was afraid that McDonald might harm him, (DAR 541, 545-

546), and this fear was grounded upon their relationship in the bank scam. (R 540, 546). Thus, Mr. Cass had a sound, strategic reason for asking the potential jurors how they would treat Ventura in light of the fact that he had previously committed felonies. That current counsel might have made a different strategic choice is irrelevant in consideration of an ineffective assistance claim. *Card*, 911 F.2d at 1507.

D. Objections at Trial:

Hearsay Evidence

1. Ventura first complains that Mr. Cass failed to make a hearsay objection to the Medical Examiner's testimony wherein he said "I was told bullets were recovered . . .." (IB 70).

2. a. He complains about the lack of a hearsay objection to Inspector Berger's testimony that two trial witnesses had indicated that Ventura was the source of their information and that "Carroll" had advised that "they were setting up an insurance payoff to Jerry Wright.

b. He also complains that there was no hearsay objection to Inspector Berger's testimony that McDonald "indicated . . . he was dying of cancer . . .[and] was kind of clearing his conscience. He confessed to being a mastermind over a million dollar fraud scheme." (IB 71). It is obvious that Mr. Cass would not want to object to the testimony regarding McDonald's confession to the bank scam, as he hoped to use information regarding McDonald's and

Ventura's connection with each other through the bank scam to help establish that McDonald used Ventura as a patsy, framing him for the murder which McDonald himself committed.

3. Likewise, Mr. Cass wanted to elicit the evidence from Inspector Berger and Mr. Pike that Ventura was involved with McDonald in a bank fraud scheme, as that was a key component of the chosen defense.

4. Ventura also complains about the lack of a hearsay objection to Officer Hudson's testimony identifying the source of the telephone number for the motel in which Ventura stayed while in Daytona for the murder. (IB 73). He likewise complains about Officer Hudson's identification of the source for the information regarding when the insurance proceeds were due to be paid. (I 73-74). From Mr. Barrett's trial testimony, it is clear that he was the source of both items of information. Thus, counsel was not ineffective for failing to object to this cumulative evidence. Moreover, Ventura has failed to establish ineffective assistance and cannot do so because there is no evidence of prejudice. *Cf. Kormondy v. State*, 703 So. 2d 454, 458-59 (Fla. 1997)[heresay verification of defendant's identity as triggerman].

5. Ventura complains that Mr. Cass did not object to Officer Gonzales' testimony that Mr. Arview "told me that there was a person by the name of Ventura." (IB 76). He adds that hearsay objections should have been made to the identification of Mr.

Arview as the source for the area where Ventura was residing and Ventura's telephone number. (IB 76). Of course, Ventura does not complain about this witness's testimony as it relates to Mr. Arview's turning him in to the Texas authorities -- because he seeks to use it to his advantage. *See* IB 69. Neither does he mention that since Mr. Arview testified at trial, the information would have inevitably been admitted.

At no time does Ventura state whether the complained-of hearsay testimony was cumulative to other properly admitted evidence at trial, and he utterly fails to explain how the admission of this testimony prejudiced him. Such barebones pleading falls woefully short of that required for Ventura to carry his burden to show ineffective assistance in the failure to object to the hearsay nature of the evidence. Further, at the evidentiary hearing, Mr. Cass testified that it was his practice to forego a hearsay objection at times, depending on how the answer "sounded to me." (R 574). Another consideration for the experienced Public Defender was that he has found "that sometimes it's less successful to be jumping up and down, objecting and objecting in front of the jury. They think I have something to hide." (R 580). Thus, Mr. Cass articulated sound, tactical reasons for not objecting to the complained-of hearsay, and again, Ventura has failed to carry his burden to deficient performance, muchless, prejudice.

Collateral Crimes Evidence

1. Regarding Ventura's complaint that Mr. Cass did not object to Inspector Eager's testimony that Ventura discussed the sale of firearms with him, it is clear that same was admissible given the selected defense. Mr. Cass repeatedly sought to show that Ventura did not like, or use, firearms, (DAR 542), and therefore, it was less likely that he was the killer since the victim was killed with a gun. There is nothing unreasonable about Mr. Cass's failure to object when it is considered in the context of the overall defense strategy, and therefore, it does not constitute deficient performance, much less, prejudice.

2. Ventura next complains that Mr. Cass "failed to object to inadmissible collateral crime evidence . . . by . . . McDonald." (IB 74). The complained-of testimony is that establishing the illegal business venture between McDonald and Ventura in regard to the bank scam. (IB 74-75). He also complains that Mr. Cass "reinforced" his involvement in collateral crimes. (IB 75). Again, Mr. Cass did so because it was key to the defense strategy.

Ventura has utterly failed to prove that the subject collateral crimes evidence would not have been admissible to show the scheme out of which the connection between McDonald and his "hit man," Ventura, arose and which resulted in Mr. Clemente's murder. Such evidence may also been relevant to motive and opportunity.

In *Williams v. State*, 621 So. 2d 413 (Fla. 1993), this Court

explained that:

> [E]vidence of other crimes, whether factually similar or dissimilar to the charged crime, is admissible if the evidence is relevant to prove a matter of consequence other than bad character or propensity.

Id. at 414. For example, where such evidence is offered to prove motive there is **no** similarity requirement. *Finney v. State*, 660 So. 2d 674, 681-682 (Fla. 1995). The State submits that the subject evidence was admissible, and therefore, a *Williams* Rule objection would have properly been overruled.

Finally, Ventura has neither alleged, nor shown, any specific prejudice resulting from the admission of the evidence. In fact, the record shows that the defense used the complained-of evidence in Ventura's defense. Thus, trial counsel did not render deficient performance, much less prejudice Ventura's case, by not objecting to the subject evidence.

E. Voir Dire & Jury Selection:

1. Here, Ventura complains that Mr. Cass was ineffective because he "failed to challenge, either preemptorily (sic) or for cause," Jurors Kirby and Dixon who "said they would recommend death even if the mitigating factors outweighed the aggravating circumstances." (IB 76).

The record shows that the trial judge asked each potential juror whether there were "any circumstances under which you would refuse to recommend the death penalty, or any circumstances under which you would automatically refuse to recommend life

imprisonment." (DAR 159-160, 162-163). Both persons responded with an unequivicable "No." (DAR 160, 163). Ms. Kirby made it clear that she would consider both the aggravators and the mitigators. (DAR 161). The complained-of question to Ms. Kirby was: "And if you felt that the mitigators outweighed the aggravators, would it be pragmatic to recommend life?" (DAR 161). Ms. Kirby replied: "No, I don't think so." (DAR 161). The State suggests that the phrasing and wording of this question may have been confusing to Ms. Kirby. In any event, considering her responses to the voir dire questions in their entirety, it is apparent that she would follow the law as given her by the trial judge at the appropriate stage of the trial.

Ms. Dixon expressed that in the past, she had had "religious, moral, or conscience objections" to the death penalty, but said that as of "today," she had no objections to the death penalty. (DAR 162). It is rather apparent why Mr. Cass wanted Ms. Dixon, especially given that the answer complained-of on appeal was given to an in artfully worded question and is out of sync with the other responses of this potential juror. Further, from Ms. Dixon's responses to the voir dire questioning, it is clear that she would follow the law as given her by the court at the appropriate time.

2. Ventura next complains that Mr. Cass "stipulated that jurors Burdick . . . and Hopkins . . . were subject to a challenge for cause." (IB 77).

a. He claims that "Mr. Hopkins clearly stated that he could apply the law regardless of his religious beliefs," but as he has done throughout his brief, Ventura fails to provide any record citation for this claim. According to Ventura, "failing to object to Mr. Hopkins improper recusal from the jury" constituted ineffective assistance. (IB 78). To support his claim, he points to the prospective juror's response when asked "would you return a verdict of guilty knowing the death penalty was a possibility?" which was: "I think I could." (IB 77). Also, when asked if he could put aside his religious and philosophical beliefs and vote for the death penalty, Mr. Hopkins said: "I feel that I could do that." (IB 78).

Regarding the Juror Hopkins issue, the trial judge wrote in his order:

> Mr. Hopkins was somewhat across the boards in his responses at times stating specifically that his opposition to the death penalty would affect his ability to fairly evaluate the evidence and follow the law and at other times, he indicated he would try to follow the law and not let his opposition to the death penalty interfere.

(R 307). The State submits that Juror Hopkins well qualified for a dismissal for cause in that he refused to affirm that he **would** be able to return a guilty verdict if the death penalty was a possibility. The very best rehabilitative response gleaned from this potential juror was the wishy-washy "I **think** I **could**" -- a far cry from an assurance sufficient to dispel his earlier

pronouncements of opposition to the death penalty.

Moreover, as Judge Hutcheson noted in his order, Mr. Cass had a legitimate strategic reason for permitting the challenge for cause. "Mr. Hopkins clearly indicated that he would give greater weight to the testimony of a police officer simply because he was a police officer." (R 307). *See* DAR 120, 126. Not opposing the dismissal for cause permitted the defense to keep the peremptory it would otherwise have had to expend to remove Juror Hopkins. Thus, even had Ventura showed that Mr. Hopkins was sufficiently rehabilitated, he has failed to establish that the decision not to object was not a strategic call made by trial counsel.[19]

b. Ventura claims that "Mr. Cass was ineffective in making no effort to rehabilitate Ms. Burdick, she stated she could follow the law regarding the first phase." (IB 78). That is his entire presentation of this issue. Such barebones pleading is wholly insufficient on which to base any relief on appeal from a Rule 3.850 proceeding after evidentiary hearing. As the trial judge wrote in his order denying the 3.850 claim, "[J]uror Burdick . . . clearly indicated her objections to the death penalty would affect her ability to return a verdict of guilty if the evidence warranted." (R 307). Ventura has cited no authority for the

[19]In fact, the State submits that had this juror not been dismissed, Ventura would be complaining loud and long, and with considerable more likelihood of success, that Mr. Cass was ineffective when he failed to remove Juror Hopkins based on the credibility issue.

proposition that failing to attempt to rehabilitate a juror, much less one who stated such strong opposition to the death penalty, constitutes ineffective assistance. Neither has he alleged or established that Juror Burdick could have been rehabilitated had Mr. Cass made such an effort. Thus, he has failed to carry his burden to show ineffective assistance. The State contends that the failure to try to rehabilitate such a juror does not constitute ineffective assistance.

Moreover, Mr. Cass joined in the State's request for excusal for cause. (DAR 181). This indicates a tactical choice was made by defense counsel. Such choices should not be second-guessed. *See Foster v. Dugger*, 823 F.2d 402, 408 (11th Cir. 1987).

F. Mitigating Evidence:

In this issue, Ventura claims he is entitled to relief because "[t]here is no evidence that Ventura actively hindered Mr. Cass from investigation mitigation." (IB 81). The first problem with this claim is that it is Ventura's burden to prove ineffective assistance; thus, it is up to him to prove that he did not so hinder Mr. Cass. Secondly, "it just ain't so."

At the evidentiary hearing, Mr. Cass testified that he discussed mitigation with Ventura "to find out who I could get." (R 555). He contacted the persons Ventura indicated. (R 582). He also made attempts to contact Ventura's family based on "whatever lead he gave me." (R 555).

Ventura himself testified, stating that he did not tell Mr. Cass to contact any of his family members. (R 619). Indeed, he "didn't want my family here involved with it." (R 619). "[T]rial counsel . . . is still only an assistant to the defendant and not the master of the defense."[20] *Milligan v. Kemp*, 771 F.2d 1436, 1441 (11th Cir. 1985), *cert. denied*, 107 S.Ct. 1359 (1987).

Mr. Cass presented three mitigation witnesses at trial, to-wit: A prison minister, Ventura's daughter, and a 40 year friend of Ventura. (R 308). At the evidentiary hearing, Ventura presented four brothers, two sisters, and a former pastor to testify in mitigation. Judge Hutcheson summarized this testimony:

> [T]he defendant called several relatives or family friends . . . to show that Mr. Ventura was a hard worker, did volunteer work for his church, and was a law abiding man, and helped his brothers and sisters while they were younger and that the defendant was a good family man to his own family.
>
> . . . Ventura was in his late 30's or early 40's when this murder was committed and . . ..
>
> . . .
>
> This Court finds that the witnesses called by Mr. Cass at the penalty phase covered the same matters [as] the witnesses the defendant presented during the evidentiary hearing and that had these additional witnesses been called, they would have had nothing additional to add beyond those actually testifying before the jury . . . and that there is no reasonable probability that the result would have been different.

---

[20]Moreover, "in evaluating strategic choices of trial counsel, we must give great deference to choices which are made under the explicit direction of the client." *Mulligan*.

(R 308).

The record of the evidentiary hearing well supports Judge Hutcheson's conclusions. *See* Statement of the Facts, *supra*, at 1 - 14. The evidentiary hearing witnesses all testified to Ventura's actions and manner as known to them when he was in his early teens through mid twenties. The witnesses Mr. Cass presented included that time period but expanded it to forty years. *See* R 308. Ventura has utterly failed to carry his burden to establish that Mr. Cass's performance in the investigation and presentation of mitigation witnesses was deficient; neither has he demonstrated prejudice in the investigation or presentation of such witnesses. Thus, he is entitled to no relief.

Finally, for the first time on appeal, Ventura claims that "defense counsel made no effort to investigate potential mental mitigation." (IB 82). As usual, he provides no record citation indicating that he asserted this issue below, much less any record evidence in support of such a proposition. Certainly, he did not question Mr. Cass about it at the hearing, and therefore, has waived any such claim. This issue is procedurally barred because it was not presented to the lower tribunal and was waived at the evidentiary hearing.

At trial, Mr. Cass asked McDonald whether he had "some feeling of rancor towards Mr. Ventura as a result of the Federal bank scam that resulted in your conviction?" (DAR 669, 674). Clearly, he

hoped to impeach McDonald's testimony against Ventura by showing the men to be at odds with each other over the bank scam. Thus, the information regarding Ventura's prior criminal history, presented in a general sense was a reasonable strategic move.

Contrary to the claim repeatedly made by Ventura in his appellate brief, McDonald did not testify at trial that the murder occurred between one and two o'clock in the afternoon. The only reference to the time of day occurred when Attorney Cass was impeaching Mr. McDonald with a prior deposition statement on the issue of whether McDonald was present near the murder scene or merely received a telephone call from Ventura when the job was done. (DAR 664). In reading the relevant passage of the deposition, Mr. Cass read McDonald's answer to the question regarding the time of his receipt of a call from Ventura. He said "[i]t was around one or two o'clock in the afternoon -- something like that." (DAR 664). At trial, McDonald candidly admitted that he did not tell the truth in his deposition statement,(DAR 664-666), as he specifically intended "to leave some clouds in the issue." (DAR 666).

POINT III

VENTURA FAILED TO SHOW THAT THE LETTERS ALLEGED TO CONTAIN A DEAL FOR MCDONALD'S TESTIMONY CONSTITUTE NEWLY DISCOVERED EVIDENCE.

Ventura claims that "the letters revealing that the state brokered and then concealed a deal for Jack McDonald's testimony constitute newly discovered evidence." (IB at 82). Contrary to Ventura's appellate claim, the evidence adduced at the hearing below does not show deliberate concealment of the letters by the prosecutor. Indeed, none of it does. However, what it does indicate is that had trial counsel exercised due diligence, he could have discovered the subject letters long before trial.

Ventura did not carry **his** burden to prove that the letters constituted newly discovered evidence. To establish that evidence is newly discovered, it must have been "unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991)[*quoting Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)].

The evidence at the hearing showed that "Mr. Cass had access to the file" in keeping with the office's "open file policy . . .." (R 510). The defense could "go through the file and see what they wanted and make a copy of whatever they wanted." (R 516). To Mr. Stark's recollection, the letters had not been removed from the

file at any time. (R 516). Thus, the evidence indicated that had trial counsel inspected the file, he would have found the letters on which the alleged deal with McDonald is based. Ventura did not carry his burden to establish that his attorney could not have learned of the alleged deal with due diligence. Thus, he cannot meet the initial prong of the newly discovered evidence test.

Neither can he establish the prejudice required for relief. The alleged "newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial" or a life, rather than a death, sentence would have been imposed. *Jones v. State*, 591 So. 2d at 915. Ventura has failed to show that had the letters been known to him at trial, the result of his trial and/or sentence would have been different. In fact, due to the overwhelming evidence of Ventura's guilt of the murder and the aggravators, there is no reasonable possibility, much less probability, that the alledgely impeaching nature of the information in the letters would have resulted in either an acquittal or a sentence less than death. *See* Point I, *supra*, at 48 - 51.

Ventura proceeds to complain that his sentence should be mitigated to a life sentence. His claim that the evidence of Codefendant McDonald's sentence, or lack thereof, should be considered "in mitigation" of his death sentence in this case is procedurally barred because it could, and should, have been raised

on direct appeal. Certainly, Ventura well knew at trial, and on direct appeal, that McDonald received no sentence for his part in the instant murder. Thus, this claim is procedurally barred. Moreover, that a codefendant is released from responsibility for a murder, as was McDonald on the speedy trial rule, does not mitigate the sentence of the remaining Codefendants. *See Larzelere v. State,* 676 So. 2d 394 (Fla. 1996).

Moreover, although Codefendant Wright received a life sentence, he was not the triggerman in this case -- Ventura was. The law is well settled that a death sentence imposed on a triggerman is not rendered inappropriate because the nontriggerman received a life sentence. *See, Johnson v. State*, 696 So. 2d 317, 325-26 (Fla. 1997)[in murder-for-hire case, defendant triggerman's death sentence not disproportionate to Codefendant's life sentence].

Moreover, the State submits that under the facts of this case, the life sentence imposed upon Codefendant Wright does not qualify as newly discovered evidence. In the case Ventura cited, *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992), this Court held "that in a death case involving equally culpable Codefendants the death sentence of one codefendant is subject to collateral review under rule 3.850 when another codefendant subsequently receives a life sentence." 604 So. 2d at 469. As stated above, Ventura was the triggerman, who mercilessly dispatched Mr. Clemente singlehandedly.

Thus, Codefendant Wright's subsequent life sentence does not provide a cognizable basis for Ventura's instant claim of newly discovered evidence. He is entitled to no relief.

POINT IV

APPELLANT IS ENTITLED TO NO RELIEF BASED ON HIS CLAIM THAT THE STATE'S RESPONSE TO THE AMENDED 3.850 MOTION WAS UNTIMELY.

Ventura complains that the State's response to his amended 3.850 motion was untimely filed. (IB at 86). He points out that the response was not filed within twenty days of the filing of the amended motion, and claims that the trial court was without the power to enlarge that time period. (IB at 86-87). He claims that "[t]he appropriate remedy" is to declare the response "a nullity and . . . remand this case for an evidentiary hearing on those claims which were summarily denied on the urging of the state's untimely response." (IB at 87).

Ventura cites *Hoffman v. State*, 613 So. 2d 405 (Fla. 1993) for the proposition that when a mandate is received "'with specific instructions, the lower court is without discretion to . . . disregard the instructions.'" (IB 86-87, *quoting Hoffman*, 613 So. 2d at 406). He claims that this Court directed that the State was to file its response to the amended 3.850 motion within twenty days after the amended motion was filed, and that it failed to do so. (IB at 86). The instructions at issue are:

> We remand this case with the following directives. Within thirty days from the date the mandate in this cause is issued, the trial judge shall conduct a hearing . . .. Ventura shall have sixty days from the date of compliance or sixty days from the trial judge's order finding that no public records requests remain unfulfilled to file an amended rule 3.850 motion. The State shall have twenty days to file a response. The

> trial judge shall then schedule a hearing on the rule 3.850 motion within ninety days from the date of the State's response.

Ventura, 673 So. 2d at 482. The State did not file a response to the motion within twenty days of the filing of the amended motion.

It should be noted that Ventura did not complain about the State's failure to file its response within the twenty days immediately upon, or even shortly after, the expiration of that time period, or even at the hearing held on February 6, 1997, almost five months after the expiration of the period. Rather, he filed two *pro se* motions objecting to the enlargement of time for the State's response - one on February 10, 1997 and the other on January 21, 1998.[21]

Well after the State's Response had been filed in accordance with the time limits set by the trial court (SR 184), Ventura's counsel apparently attempted to adopt his client's *pro se* motions. Counsel argued that this Honorable Court directed the State to file a response and set a deadline for same. Allegedly, that the State missed that deadline entitled Ventura to skip a *Huff* hearing and awarded him an evidentiary hearing on all issues. (SR 188-189). After hearing, the trial court denied the "adopted" motions and

[21]The State submits that both of these motions were nullities because they are pro se filings made when Ventura was represented by counsel. An attempt to adopt null pleadings accomplishes nothing because nothing is viable for adoption. Thus, there was no proper presentation of this issue in the lower court, procedurally barring it on appeal.

proceeded to hold a *Huff* hearing. (SR 190-191).

Assuming *arguendo*, that the motions were properly before the trial court, Ventura is entitled to no relief. The trial court's obligation in ruling on the claims raised in a 3.850 motion is to schedule a hearing on all of the issues deserving of same under the law. Its resolution of these claims does not rest on whatever the State had to say in its response. It rests on the law. Thus, the striking of the State's response as requested by Ventura would not provide a basis for the granting of his request for an evidentiary hearing on every claim raised in his amended motion. Thus, even if the State's response was untimely, and even if striking it was appropriate, the result would not be an evidentiary hearing on any claims other than already ordered, and held, by the trial court in this cause.

Moreover, the State does not read this Honorable Court’s order as requiring a response, but merely as authorizing one. However, if it had such an obligation, the time in which to file was triggered by Ventura’s filing of an amended 3.850 motion within 60 days after compliance with all public records demands. As late as August 19, 1996, when Ventura's amended 3.850 motion was filed, Ventura maintained that he had only "received <u>some</u> of the public records he requested." (R 2)(emphasis in original). He specifically asked to be permitted to make further amendment to his motion. (R 3). Indeed, he claimed to be entitled to add claims,

facts, and "provide a memorandum of law" in support of any such later raised claims. (R 3). Since, according to Ventura, compliance with his public records demands had not been achieved, and therefore, his final amended 3.850 had not then been filed, the State's obligation to file a response within a specified time had not ripened.

Finally, this Honorable Court has decreed that *Huff* hearings will be held in capital cases. *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993).

> Henceforth the judge must allow the attorneys the opportunity to appear before the court and be heard on an initial 3.850 motion. This does not mean that the judge must conduct an evidentiary hearing in all death penalty postconviction cases. Instead, the hearing before the judge is for the purpose of determining whether an evidentiary hearing is required and to hear legal argument relating to the motion.

622 So. 2d at 983. The *Huff* hearing was appropriately held in this case. Ventura is entitled to no relief.

POINT V

THE TRIAL COURT DID NOT VIOLATE APPELLANT'S RIGHT TO REMAIN SILENT IN SENTENCING HIM.

Ventura claims that in his amended 3.850 motion (claims VII and XI), he complained that the "sentencing judge relied upon Ventura's failure to present his version of the offense to find aggravating circumstances . . ." and added "that counsel was ineffective for failing to address these errors." (IB at 87). On appeal, however, he claims that "[a]t sentencing, Mr. Ventura reasserted his innocence . . .." (IB at 87). He complains about the judge's "reaction" to his "declaration of innocence." (IB at 87). The State submits that Ventura's statements to the court do not assert innocence, although they are worded so as to imply such a claim. (*See* DAR 910-911).

The trial judge's complained-of comment is directed toward Ventura's implied claim of innocence not aggravation.[22] There is nothing to suggest that the judge in any manner considered Ventura's statement, or his silence at any point, in aggravation. He has utterly failed to establish any basis in the record for this claim.

Moreover, since there was no consideration of Ventura's silence, or any statement he made, in aggravation, there was

[22]The trial judge was not commenting on the effect of Ventura's failure to testify or explain his version of events. The same comment made about Ventura "[a]pparently you know what happened," was also made about Mr. McDonald who **did** testify. (DAR 912).

nothing for trial counsel to object to. Thus, counsel can hardly be deemed to have rendered deficient performance. Further, although it's not necessary to reach the second prong of the *Strickland* ineffective assistance analysis because the deficient performance prong is not met, there is no reasonable possibility that the sentence would have been different had counsel made the objection or argument raised on appeal. The evidence of existence of both the pecuniary gain and cold, calculated, and premeditated murder aggravators was overwhelming, *see* DAR 1047-1049, and there is no reasonable possibility, much less probability, that any consideration of what Ventura said, or of any silence he held, would have affected the finding of these aggravators. Having met neither the performance, nor the prejudice, components of the *Strickland* standard, Ventura is entitled to no relief.

POINT VI

APPELLANT HAS SHOWN NO ERROR IN THE TRIAL JUDGE'S FINDING OF NO MITIGATION.

In this point, Ventura claims that the trial court erred in failing to find alleged mitigation which he claims was "set out in the record." (IB 89-90). It is axiomatic that a claim alleging that a trial judge failed to find such mitigation could, and should, have been raised on direct appeal. Ventura's failure to so raise them procedurally bars consideration of this issue in the instant proceeding. *Provenzano v. State*, 739 So. 2d 1150, 1154 (Fla. 1999)[mitigation issues "should have been argued on direct appeal"]; *White v. State*, 729 So. 2d 909, 911 n.4 (Fla. 1999).

Moreover, there was no reasonable quantum of competent, uncontroverted evidence establishing the four nonstatutory mitigating circumstances Ventura urges. Ventura claims his daughter's testimony established that he "is a caring family person." (IB at 92). However, on cross, it was established that Ms. Vallejo's testimony regarded her father as she knew him some **ten years earlier**. (DAR 873-874). She had not seen him in many years and had rarely spoken to him by phone. (DAR 874).

The State submits that the trial judge was free to conclude that Ms. Vallejo's testimony did not establish that Ventura was a caring family person at the relevant time. Moreover, her testimony did not distinguish Ventura's fatherly character from that which is

normal. *Cf. Mendyk v. State*, 592 So. 2d 1076, 1080 (Fla. 1992)[Rejecting Mendyk's claim that mitigating evidence should have been presented,[23] this Court said: "Although an abusive childhood, a history of alcohol and drug abuse, and mental impairment can clearly constitute mitigating factors, in this case we do not find serious deprivations distinguishing this case from the norm of children from broken homes. Thus, Mendyk has not proven he was prejudiced . . .." (citation omitted)]. Thus, there was no reasonable quantum of competent, uncontroverted evidence that Ventura "**is** a caring family person." Moreover, the instant record shows that there is substantial evidence to the contrary. For example, Ventura deserted his wife and children, moved to a far distant State, changed his name, and never contacted, or attempted to contact, his wife and children or his brothers and sisters during the seven years prior to the penalty phase presentation. Neither did he send any financial support to his wife and children during that time, even though he was gainfully employed in Texas. Thus, it is clear that even were this issue back before the trial court, this alleged mitigator would not be found.

Neither is Ventura's appellate claim that the trial judge should have found that he "had a good employment history and

---

[23]This included: "[T]hat his mother was beaten by an alcoholic father; that he spent most of his childhood in his bedroom, reading; that he was a loner and pushed himself to do his homework "perfectly"; and that he had a history of alcohol and drug use and was mentally impaired."

positive character traits" supported by a reasonable quantum of competent, uncontroverted evidence. Mr. Zotas testified that he worked with Ventura "fifteen or sixteen years ago."[24] (DAR 879). He had rarely seen Ventura since 1981 or 1982 and did not associate with him. (DAR 879). Further, Mr. Zotas testified on cross that although he had earlier considered Ventura to be a law abiding citizen, he had heard "off and on that he got in a little bit of trouble here and there . . .." (DAR 879). This outdated testimony of a single job Ventura held at some much earlier point in his life hardly constitutes a reasonable quantum of competent, uncontroverted evidence of "a good employment history." Neither does the reputation testimony established on cross support a finding that Ventura had "positive character traits." Thus, the trial judge was free to conclude, as he did, that the evidence was insufficient to establish such a mitigator.

On appeal, Ventura next asserts that the trial judge should have found that he "was a model prisoner." (IB 92). Apparently, he thinks that the judge should have reached this conclusion based on the testimony of a minister, Mr. Gainly. Mr. Gainly had been involved with this prison ministry for "the past two years," although he had been visiting the prison, and knew Ventura for 14 or 15 months. (DAR 861-63). In that capacity, he worked with

[24]He later indicated it might have been 10, 11 or 12 years. (DAR 880).

Ventura "once or twice a month."[25] (DAR 863). On cross, it was established that the time spent with Ventura was in a group setting. (DAR 868).

The State asserts that this testimony does not provide a reasonable quantum of competent, uncontroverted evidence that Ventura was "a model prisoner." Further, as the judge was well aware, Ventura jumped bail in this case, used an alias, committed crimes under that name, and was a fugitive from justice for several years immediately preceding his rearrest and present incarceration. Thus, no error has been established in the trial court's rejection of this alleged "model prisoner" mitigation.

Finally, Ventura claims that the trial judge should have found in mitigation that "he developed and evidenced strong spiritual and religious standards." (IB 92). It is true that Mr. Gainly testified that he believed that Ventura had accepted Jesus as his Savior during the preceding few months and that he thought Ventura was "worth saving" because he had expressed his desire to help others find their way to the Savior.

On cross, Mr. Gainly admitted that during the brief time that he had been going to the prison and counseling with inmates, at least two of those who had professed religious beliefs had not followed them when released. (DAR 869). More importantly, as Rev. Hershey, Brother Frank M., and Sister Garay testified below, if

[25]He later claimed that he met with Ventura once or twice a week. (DAR 868).

Ventura committed the murder he was convicted of, he was not evidencing strong spiritual and religious standards. (*See* R 361, 391, 422). Thus, there is no reasonable quantum of competent, uncontroverted evidence establishing the alleged mitigator, and there is no error in the finding of no mitigating circumstances in this case. Moreover, since there were no established mitigators, counsel can hardly have been ineffective for not arguing that the trial court "was required to find" some.

POINT VII

APPELLANT HAS FAILED TO DEMONSTRATE ERROR IN REGARD TO HIS CLAIM OF ALLEGED "BURDEN SHIFTING."

Ventura complains that the jury instructions improperly stated that the mitigation had to outweigh the aggravation in order to recommend a life sentence. This issue is procedurally barred because trial counsel did not object to the jury instructions on this basis. *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982). Further, it is also procedurally barred because the issue could, and should, have been raised on direct appeal, but was not. *Young v. State*, 739 So. 2d 553, 555 n.5 (Fla. 1999); *Diaz v. Dugger*, 719 So. 2d 865, 868 n.6 (Fla. 1998). Moreover, even if not procedurally barred, the claim is without merit. *Shellito v. State*, 701 So. 2d 837, 842-43 (Fla. 1997). Trial counsel can hardly be deemed to have rendered ineffective assistance in failing to object to the standard instruction specifically approved by this

Court in *Shellito*. *See Downs v. State*, 740 So. 2d 506, 518 (Fla. 1999).

Finally, any error in the phrasing of the jury instruction was harmless beyond a reasonable doubt. There can be no harmful error where, as here, there were no mitigating circumstances to weigh. It is also harmless because even had all four of the nonstatutory mitigators Ventura claims the trial judge should have found (Point VI) been established and weighed, there is no reasonable possibility, much less probability, that the resulting sentence would have been different.[26] The two strong aggravators far outweigh the alleged nonstatutory mitigation. Thus, again, there can be no ineffective counsel in regard to this issue.

POINT VIII

APPELLANT HAS FAILED TO ESTABLISH *ESPINOSA* ERROR.

Ventura claims that the trial court improperly instructed on the aggravating circumstances. (IB 96). This claim is procedurally barred because it was raised on direct appeal. *Ventura v. State*, 560 So. 2d 217, 221 (Fla. 1990). Therein, this Court found a procedural bar because the issue was "never presented to the trial court." *Id.* Ventura claims that *Espinosa* should be retroactively applied to his case, or, in the alternative, trial counsel should

[26]The jury vote was 11 to 1. *Ventura*, 560 So. 2d at 218. The judge found two weighty aggravators - committed for pecuniary gain and cold, calculated and premeditated murder. *Id.* at 218-19.

be declared ineffective for the failure "to properly preserve the issue for appellate review. (IB 97).

This Court has considered, and decided, this issue contrary to Ventura's position in *Downs v. State*, 740 So. 2d 506 (Fla. 1999).

> Accordingly, Downs argues that his sentence should be reversed because the judge and jury considered vague and invalid aggravating factors in violation of *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) (finding reversible error where either judge or jury considered invalid aggravating factor in determining sentence of death). We find this claim to be procedurally barred.
>
> [14] *Espinosa* was not decided until after Downs' direct appeal. Thus, to take advantage of its ruling in a postconviction proceeding, Downs must establish: (1) that trial counsel preserved the issue for appellate review by objecting to the jury instructions on vagueness grounds or by submitting an alternative instruction and (2) that appellate counsel raised the issue on appeal. *See State v. Breedlove*, 655 So.2d 74, 76 (Fla. 1995); *Lambrix v. Singletary*, 641 So. 2d 847, 848 (Fla. 1994); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993). Because defense counsel did not object to these instructions during trial (FN16) or propose alternative instructions and did not challenge these claims on appeal, any challenges to the jury instructions themselves are procedurally barred from being raised for the first time in this postconviction proceeding. *See Harvey*, 656 So. 2d at 1258 (rejecting on procedural grounds claims alleging *Espinosa* error, including unconstitutionally vague penalty-phase jury instructions).
>
> [15] However, within this claim, Downs also argues counsel rendered ineffective assistance by not objecting to the various jury instructions. At the time of Downs' resentencing, the trial court used the

> standard jury instructions, which had been approved by this Court. *See Brown v. State*, 565 So. 2d 304, 309 (Fla. 1990) (affirming instruction on cold, calculated and premeditated aggravating factor), abrogated by *Jackson v. State*, 648 So. 2d 85 (Fla. 1994); *Lightbourne v. State*, 438 So. 2d 380, 385 (Fla. 1983) (upholding validity of aggravating and mitigating statute challenged on vagueness grounds). Thus, trial counsel cannot be deemed ineffective under the standards set forth in *Strickland* for not objecting to the constitutional validity of these instructions. *See Harvey*, 656 So. 2d at 1258 (holding that counsel may not be deemed ineffective under *Strickland* for failing to object to jury instructions where this Court previously upheld validity of those instructions); *Mendyk*, 592 So. 2d at 1080 ("When jury instructions are proper, the failure to object does not constitute a serious and substantial deficiency that is measurably below the standard of competent counsel."). Accordingly, we find no error in the trial court's summary denial of these claims.

(footnote omitted) 740 So. 2d. at 517-18. For these same reasons, Ventura is entitled to no relief.

POINT IX

APPELLANT FAILED TO DEMONSTRATE ENTITLEMENT TO REIEF ON CUMULATIVE ERROR GROUNDS.

Ventura claims that relief can be had on "cumulative error." He claims this Court established that basis for relief in *Jones v. State*, 569 So. 2d 1234 (Fla. 1990).

In *Jones*, this Court found numerous penalty phase errors, and after explicating four of them, ruled that a new penalty phase was in order. This Court said:

> In summary, we have found that the trial court erred by instructing the jury that the murder was especially heinous, atrocious, or cruel; by admitting testimony in violation of *Booth*; by preventing the jury from considering the potential sentence of imprisonment; and by permitting the state to introduce evidence of lack of remorse. We conclude that these penalty phase errors require a new sentencing hearing before a new sentencing jury. Accordingly, we find it unnecessary to reach Jones's ninth claim, that the trial court improperly denied defense counsel's request to withdraw during the penalty phase due to a conflict of interest.

569 So. 2d at 1240. Thus, the holding was not, as Ventura characterizes it, a cumulative error holding. Rather, this Court indicated that it needed go no further into the penalty phase errors because reversible error had already been established.

In *Bedford v. State*, 589 So. 2d 245, 252 (Fla. 1991), this Court rejected a claim of "fundamental cumulative error" which "resulted due to a number of alleged errors" which had not been objected to at trial. Since none of the errors "either individually or in combination resulted in fundamental error," the cumulative error claim was procedurally barred. *Id.* Ventura has not even alleged fundamental error. His cumulative error claim was not raised below, and neither were the alleged errors preserved below. Thus, assuming *arguendo* that a cumulative error claim is appropriate in a 3.850 proceeding, the instant one is procedurally barred. *Id.* Ventura is entitled to no relief.

CONCLUSION

Based upon the foregoing arguments and authorities, Ventura's conviction and sentence of death should be affirmed in all aspects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
Fla. Bar #438847
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Mark S. Gruber, Assistant CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33609-1004 this ._____ day of January, 2000.

_____
Of Counsel