IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,839

PETER VENTURA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT ABOUT REFERENCES

The form of references employed in the initial brief is maintained here. In addition, the initial brief of appellant and the answer brief of appellee are referred to with the letters IB and AB.

Prejudice and materiality

There is undisputed evidence in this case that the prosecutor[1] brokered a deal between his star witness, Jack Mcdonald, and the U.S. Attorney's office in exchange for McDonald's cooperation and testimony against Ventura. The prosecutor then elicited false trial testimony from McDonald that he had received no deals "whatsoever" and that his only motivation for testifying was remorse and a desire to provide some peace of mind to the victim's widow. Pages 47 through 50 of appellee's answer brief detailed the evidence against Ventura apart from the testimony of Jack McDonald. This portion of appellee's argument relied heavily on the testimony of Reginald Barrett and Joseph Pike. The express purpose was to show that the evidence, aside from McDonald's testimony, was strong enough

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[1]Appellee's answer brief contains the following statement:

> 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).

This apparent minimization of Mr. Stark's role in Ventura's trial is puzzling. A quick look at the index to the trial transcript shows that a Rob Bobek examined two relatively minor witnesses (Mr. Stark conducted the redirect examination of witness Rathman) and Mr. Stark did all the rest.

Also, Mr. Stark departed the state attorney's office and was in private practice at the time of Jerry Wright's trial (this information comes from the deposition given by Mr. Stark in codefendant Wright's case).

to support the conviction under Brady and Strickland materiality and prejudice requirements. Later, at pages 53 and 54 of the answer brief, appellee made the same argument about the Giglio issue, although, as pointed out below, the appellee used the wrong materiality standard in this portion of its brief.

The following factual point is somewhat buried in the initial brief, so it is emphasized here. At trial, Postal Inspector Berger testified as follows:

> Q. Where was McDonald at this time?
>
> A. Volusia County Jail.
>
> Q. Did Ventura's flight affect Mr. McDonald's prosecution?
>
> A. Yes, sir. It was our position that we could not successfully prosecute one without the other.
>
> That is why we were so careful in effecting the arrest within thirty minutes of each other in Chicago and Daytona. (Dir. 572).

Of course, events bore this assessment out: McDonald was discharged on speedy trial grounds due to nonprosecution when Ventura was not available, and Ventura was convicted and sentenced to death when McDonald testified against him. The point here is that the information which originally led to the arrest of Ventura and McDonald was that received by Inspector Berger from Reginald Barrett and Joseph Pike in connection with the federal bank scam case. (Dir. 467-470). In other words, the

testimony that appellee now relies on to show that evidence apart from McDonald's testimony is sufficient to preclude relief because of materiality and prejudice requirements is the same information which Berger already knew when he concluded that the evidence available was insufficient to obtain a conviction against either defendant, unless one flipped against the other. It is respectfully submitted that it would be difficult to sit back and dream up a better circumstance from which to show prejudice and materiality.

It is also interesting to read these pages in the answer brief describing the state's case (apart from McDonald's testimony) with a motion for judgment of acquittal in mind. The appellee characterized this evidence as "overwhelming;" the undersigned submits that the case would not have made it to the jury. As noted in the initial brief, the trial prosecutor obviously was concerned about that as well. With the trial imminent, in other words knowing what he would be able to present apart from McDonald's testimony, the prosecutor described McDonald as a "crucial witness" whose "cooperation is essential." (Letter to SAO, September 25, 1987, Defense exhibit 3 at evidentiary hearing).

With regard to the argument that McDonald was impeached at trial and that evidence of a deal would have been merely cumulative, (AB 52, 53) consider United States v. Rivera Pedin, 861 F.2d 1522 (11th Cir.1988):

> This is not a case in which the witness' bias becomes irrelevant because the witness' testimony is fully corroborated, nor is this a case in which the witness' testimony has been thoroughly impeached and proof of his bias would be merely cumulative. See, e.g., McCleskey v. Kemp, 753 F.2d 877, 885 (11th Cir.1985) (en banc), aff'd 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); United States v. Antone, 603 F.2d 566, 571 (5th Cir.1979). Rather, as in Napue and Giglio, the Government's case against the accused turned on the testimony of a single witness, Ream. We have stated that the prosecutor's failure to correct a witness' false testimony will warrant a reversal where, as here, the "estimate of the truthfulness and reliability of the given witness may well be determinative of guilt or innocence." United States v. Cole, 755 F.2d 748, 763 (11th Cir.1985) (citations omitted). *We acknowledge that Ream's credibility had been eroded due to the testimony the defense elicited from him on cross-examination. The disclosure of Ream's conversation with Miller, however, would not have been merely repetitious, reinforcing a fact that the jury already knew; instead, "the truth would have introduced a new source of potential bias."* Brown v. Wainwright, 785 F.2d 1457, 1466 (11th Cir.1986). See also United States v. Sanfilippo, 564 F.2d 176, 178 (5th Cir.1977) (*"A jury may very well give great weight to a precise reason to doubt credibility when the witness has been shown to be the kind of person who might perjure himself.*"[see infra]). [Emphasis added].

Berger testified that McDonald was dying of cancer and just wanted to “clear the air”(Dir. 489) when he gave a 1983 statement to the authorities. This testimony was echoed by McDonald himself in his grieving widow speech at the end of redirect examination. The complaint in these proceedings is not merely

that the existence of a deal on bond jumping charges was not disclosed, but rather that all of the letters should have been disclosed and the court should not have been lied to. In any case it would be a stretch to argue that there is no reasonable possibility that the judgment of the jury would not have been affected by additional evidence that the state's star witness lied to the jury about receiving no deal whatsoever, that he had earlier said he would "rot in hell" before he gave any testimony if he did not get a deal, that a deal was in fact made, that the state had promised to provide future assistance in the witness's federal parole process, and that the state covered the whole thing up. More to the point, the impeachment that did occur at trial, which the appellee now cites to show that evidence of a deal would be merely cumulative, contained nothing about any deal with the authorities. It was mainly a description of McDonald's shady past. The only impeachment directed specifically to McDonald's trial testimony was described by the appellee as follows: "Mr. Cass further raised the spector [sic] of a revenge motive against both Ventura and Codefendant Wright."

(AB 53).[2] Any time a prosecutor uses a flipped codefendant, a jailhouse informant or the like, the prosecution is wise to draw a distinction between the credibility of the witness and the credibility of the witness's testimony. This distinction is reflected in the reasoning of the cases cited above. The same situation exists here: the undisclosed evidence in this case would have shown a "new source of potential bias," and it would have provided the jury with a "precise reason to doubt credibility" in light of the impeaching evidence that was adduced which showed McDonald to be "the kind of person who might perjure himself." See also: United States v. Sanfilippo, 564 F.2d 176 (5th Cir.1977):

> The Government argues that Mori's prior convictions sufficiently impeached his credibility so that the plea agreement would add nothing. The fact that the history of a witness shows that he might be dishonest does not render cumulative evidence that the prosecution promised immunity for testimony. A jury may very well give great weight to a precise reason to doubt credibility when the witness has been shown to be the kind of person who might perjure himself. Had the jury known of the Government's promise regarding the Ellswick case, conditioned as it was on Mori's testifying against Sanfilippo, it might well have reached a different decision as to whether Mori had fabricated testimony in order to protect

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[2] Q. (Mr. Cass): I would ask you, sir, did you or did you not have some feeling of rancor towards Mr. Ventura as a result of the Federal bank scam that resulted in your conviction?

A. (McDonald): None whatsoever. (Dir. 669).

> himself against another criminal prosecution. Id 177.

Also see Brown v. Wainwright, 785 F.2d 1457 (11th Cir.1986) (habeas appeal) ("We reject the state's contention that the false testimony was not material because it was merely cumulative of Floyd's possible bias. In the normal evidentiary sense cumulative evidence is excluded because it is repetitious. The testimony here did not merely reinforce a fact that the jury already knew; the truth would have introduced a new source of potential bias.").

As noted in the initial brief, defense counsel did not cross examine Jack McDonald about whether he had received any deals in exchange for his testimony. Earlier in the trial, Postal Inspector Berger had testified that McDonald had given a pretrial statement without making any deals. Also, the "none whatsoever testimony" had already been elicited by the state during direct examination.

The undersigned agrees with the factual observations made by Justice Marshall in Bagley:

> Second, the court's statement that Bagley did not attempt to discredit the witnesses' testimony, as if to suggest that impeachment evidence would not have been used by the defense, ignores the realities of trial preparation and strategy, and is factually erroneous as well. Initially, the Government's failure to disclose the existence of any inducements to its witnesses, coupled with its disclosure of affidavits stating that no promises had been made, would lead all but the most careless

> lawyer to step wide and clear of questions about promises or inducements. The combination of nondisclosure and disclosure would simply lead any reasonable attorney to believe that the witness could not be impeached on that basis. Thus, a firm avowal that no payment is being received in return for assistance and testimony, if offered at trial by a witness who is not even a Government employee, could be devastating to the defense. A wise attorney would, of necessity, seek an alternative defense strategy. Marshall, J. dissenting, Id 473 U.S. 667, 689, 105 S.Ct.3375,3387.

Indeed, as argued in the initial brief, additional efforts by defense counsel to probe this area, given the denials by Berger with regard to the pretrial statement and then by McDonald in response to a direct question from the prosecutor, would have probably constituted ineffective assistance of counsel.

Giglio materiality

The Appellee argues that:

> [Appellant] complains, as he must in asserting a *Giglio* claim, that this testimony [that McDonald had received no deals "whatsoever"] 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. (AB at 51).

This is not an accurate statement of the Giglio materiality standard. The Giglio standard was set out by this Court in Routly v. State, 590 So.2d 397 (Fla. 1991):

> If there is a reasonable probability that the false evidence may have affected the judgment of the jury, a new trial is required. Giglio, 405 U.S. at 154, 92 S.Ct.

> at 766 (quoting Napue v. Illinois, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959)). "The thrust of Giglio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury." Smith v. Kemp, 715 F.2d 1459, 1467 (11th Cir.), cert. denied, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699 (1983); Id 400.[3]

The distinction between Bagley materiality and Giglio materiality is illustrated by a comparison of the majority and dissenting opinions in Craig, infra. In contrast to the factual scenario presented in the Craig dissent, this case contains record exhibits proving that a deal for testimony was made and flatly false trial testimony: “none whatsoever.” The point was made in the initial brief that:

> As noted by this Court in Craig v. State, 685 So.2d 1224 (Fla. 1996), citing Giglio: “If there is a reasonable possibility that the false evidence may have affected the judgment of the jury, a new trial is required.” It would be difficult to argue that the false evidence in this case could not have reasonably affected the judgment of the jury given that it was elicited,

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[3]Note United States v. Alzate, 47 F.3d 1103, 1110 (11th Cir.1995) (ruling that standard of materiality [for such claims] is equivalent to the Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967), 'harmless beyond a reasonable doubt' standard." Also: United States v. Bagley (1985) 473 U.S. 667, 679, 680, fn. 9, 105 S.Ct. 3375, 3382, fn. 9, 87 L.Ed.2d 481: "The Court in Chapman noted that there was little, if any, difference between a rule formulated, as in Napue, in terms of ' whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction, ' and a rule ' requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained”.

> exploited and dramatized precisely for that purpose. IB, 38.

The deal[4]

The appellee argues that the deal with McDonald not to pursue a federal bond jumping charge was de minimus. At page 52 of the answer brief appellee argues:

> 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 [sic] 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. Id.

McDonald failed to surrender himself to serve a sentence that had already been imposed. At least at present, prosecution for failure to report to serve a sentence would proceed under 18 USCA s 3146, which in this case apparently provides for a sentence of up to five years to run consecutive to the underlying sentence. USSG, § 2J1.6 , 18 U.S.C.A. provides that failure to

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[4]Footnote 13 of the answer brief states: "Further, as Ventura admits, the prosecutor's letter to the federal official made it clear that no promises had been made to McDonald to procure his testimony." This completely misrepresented the argument made in the initial brief. In fact, the undersigned discussed that letter in light of the other evidence in the case and argued on the next page that it was a "fraud." (IB 41). Ibid AB footnote 14.

report to serve a sentence is a base 11 offense, rather than level 6 which would be the case for other failures to appear. Note 3 to this section states that:

> 3. In the case of a failure to appear for service of sentence, any term of imprisonment imposed on the failure to appear count is to be imposed consecutively to any term of imprisonment imposed for the underlying offense. See § 5G1.3(a). The guideline range for the failure to appear count is to be determined independently and the grouping rules of §§ 3D1.1- 3D1.5 do not apply.

USSG, § 4A1.2, 18 U.S.C.A. provides that "For the purposes of § 4A1.1(d) and (e), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence." A conviction for failure to report is also a negative factor for parole consideration. 28 CFR s 2.20.

In any event, appellee argues that the deal was de minimus because the federal authorities do not often pursue bond jumping charges. This argument somehow overlooks the fact that the federal authorities threatened to do just that. In fact, the letter confirming the deal sent by the US Attorney contains both a carrot and a stick – and expressly warns that charges would be pursued in McDonald's case if he did not cooperate with the state:

> Pursuant to your request, my office will not pursue bond-jumping charges against Jack McDonald as long as he cooperates fully with your office in the upcoming murder case referred to in your letter of September 25, 1987. Should Mr. McDonald fail to testify

> truthfully in that case or in some other way fail to cooperate with your office, we will then be free to pursue bond-jumping charges.

Letter from Mr. Valukas of the United States Attorney for the Northern District of Illinois to Mr. Stark dated October 5, 1987, (Defense exhibit 3 at the evidentiary hearing). It might be noted that the likeliest reason for reducing this deal (and threat) to writing was to have something to show McDonald.

Actual knowledge under Giglio

Appellee argues that in asserting a Giglio claim the proponent must prove actual knowledge on the part of the prosecutor:

> [H]e complains, as he must in asserting a Giglio claim, that. . . the prosecutor knew it [McDonald's "none whatsoever" testimony] was false. . . .The State submits that just as McDonald might have regarded the discussions about the bond jumping charge and parol [sic] assistance too insignificant to consider a "deal," the prosecutor might have done so as well." (AB 51).

The undersigned addressed this potential argument in the initial brief as a factual matter and, given the totality of circumstances shown on this record, characterized it as "absurd." That stands. Nevertheless, even if appellee is right in arguing that the existence of the deal that the prosecutor had formally requested in writing from the US Attorney's Office had somehow slipped his mind during the trial, or that brokering a quid pro quo agreement by the federal authorities not to pursue felony

bond jumping charges in exchange for testimony somehow does not constitute a “deal,” or that a prosecutor trying a first degree murder case seeking the death penalty did not know Giglio.[5] or that the prosecutor thought the whole thing was too trivial to consider, the prosecutor is charged with constructive knowledge.

A prosecutor is held to know of perjury if he should have known of its existence; by this standard, even if the false testimony relates only to the credibility of a Government witness and other evidence has called that witness' credibility into question, a conviction must be reversed when there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Spicer v. Warden of Roxbury Correctional Institute, (US Dist. Ct. Md. 1998) 31 F.Supp.2d 509

The government's duty to disclose this evidence encompasses not only material that is in the possession of the prosecutor, but also material that is "known to others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490 (1995); see United States v. Sutton, 542 F.2d 1239, 1241 n. 2 (4th Cir.1976) (imputing F.B.I. agent's knowledge to federal prosecutor for Giglio purposes (quoting Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964) ("The police are also part of the

[5]At the evidentiary hearing the prosecutor replied to a question about his obligation to correct false information that he had knowingly elicited by saying, “Where you have an obligation.”(R. 511).

prosecution, and the taint on the trial is no less if they, rather than the [prosecutor], were guilty of the nondisclosure.")); Stano v. Dugger, 901 F.2d 898, 903 (11th Cir.1990) (if detective was part of prosecution team, his knowledge would be imputed to prosecutor's office); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)(The government may be responsible even if the prosecutor did not actually know the testimony was perjured, but should have known). Id, 427 U.S. 97 at 103, 96 S.Ct. at 2397.

Giglio makes clear that it is irrelevant whether the particular attorney who tried the case was aware of the deal: "(W)hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." 405 U.S. at 154, 92 S.Ct. at 766.

It stands to reason that knowledge of Mr. Stark's actions can be imputed to Mr. Stark, whether he remembered them or understood their significance or not.

The prosecutor's obligations

Giglio

It was flatly improper for the prosecutor to elicit the false "none whatsoever" testimony and then reemphasize, exploit

and dramatize it with McDonald's grieving widow speech. This is true in this case regardless of whatever defense counsel knew, did not know, did or did not do about it. The federal courts permit an exception to the prosecutor's obligations where it is shown that defense counsel had actual knowledge of a government witness's perjured testimony and where the prosecutor did not exploit that testimony. On the other hand, the Eleventh Circuit considered a case where defense counsel knew about a government witness's perjured testimony[6] and did nothing:

> The issue in this appeal is whether the failure of the prosecutor to correct the perjured testimony of the government's essential witness, and her capitalizing on it in her closing argument, when defense counsel is also aware of the perjury and does not object to it, requires a new trial. The district court denied the defendant's motion under §28 U.S.C. 2255. We disagree and vacate the judgment of conviction.

DeMarco v. United States, 928 F.2d 1074 (11th Cir.1991). The DeMarco court distinguished its case from those where knowledge by defense counsel relieved the prosecution of its burden:

> While the prosecutor concedes that she should have asked for a bench conference to note the existence of the Vance agreement, the government insists that its failure to correct the false evidence should be excused because defense counsel had been given the discovery letter informing him of the prosecutor's promises made to Vance and was

[6]The witness falsely denied the existence of a promise not to prosecute for past perjured testimony and to make known his cooperation in a post trial motion to mitigate.

> therefore in a position to correct the false evidence by asking specific questions on cross-examination and by introducing the letter into evidence. To support its position it relies on United States v. Iverson, 648 F.2d 737 (D.C.Cir.1981); accord Ross v. Heyne, 638 F.2d 979 (7th Cir.1980), and United States v. Meinster, 619 F.2d 1041 (4th Cir.1980) holding that there is no violation of due process resulting from prosecutorial non-disclosure of false testimony if defense counsel is aware of it and fails to object. The government also submits that the principle of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) was not violated because there was no suppression by the government of evidence favorable to DeMarco since his counsel had knowledge of the perjury.
> C. The Government's jury argument. Distinguishing this case from those relied upon by the government is the added important factor that in the prosecutor's summation to the jury, she not only adopted Vance's perjured testimony, but capitalized on it. Id, 1076.

In the cases where no due process violation was found to exist because defense counsel knew of the perjured testimony and failed to object to it, defense counsel was always shown to have had actual knowledge by reference to some statement or other pretrial event demonstrating the fact on the record. E.g. Iverson(“[T]he right of the defendant to disclosure by the prosecutor is deemed waived if defense counsel with actual knowledge of the plea agreement or sentencing status information chooses not to present such information to the jury”); Heyne ([A]lthough defense counsel knew that codefendant's testimony denying that he was testifying pursuant to a plea agreement was false, petitioner had not waived

her claim by failure to object at trial where she was unaware of such fact and failure of counsel to correct such false testimony was not part of a conscious defense strategy); Meinster (“Thus, defendants had information from the very office that made the "deal" with Purvis, yet were content to accept until after trial the denials of the North Carolina prosecutor.[Footnote omitted] We think appellants waived their objection to Purvis' testimony by waiting until after trial to bring the question to the attention of the trial judge. *N.8 The authorities upon which appellants rely are premised on the defense's ignorance of the undisclosed deal*“ [emphasis added]); also Routly v. Singletary, 33 F.3d 1279, 1285(11th Cir.1994) (“Routly first argues that the prosecutor knew that O'Brien was testifying falsely when she stated during trial that she had not been charged or arrested in connection with the death of Bockini. [Record citation omitted] [Id n.6:] Defense counsel was also aware, however, that O'Brien's testimony concerning this matter was subject to impeachment. During O'Brien's deposition taken on July 9, 1980, defense counsel asked O'Brien "[h]ad you recently been charged with second degree murder in reference to the death of Anthony Bockini?" to which she responded "Yeah." Deposition of Colleen O'Brien, July 9, 1980, at 52, lines 14-17. There is no violation of due process resulting from prosecutorial non- disclosure of false testimony if defense counsel is aware of it and fails to

object"). Sub judice, defense counsel did not have actual knowledge that the "none whatsoever" testimony elicited by the state was false, and, as in DeMarco, the prosecution, instead of either correcting the false testimony or at least just letting it pass, reemphasized and exploited the false testimony by eliciting the grieving widow speech. Moreover, although the prosecutor here did not expressly argue that McDonald had not made any deals with the state in exchange for testimony in his closing argument, he did argue McDonald's credibility (specifically the credibility of his testimony) in a general way throughout the argument. (E.g. Dir. 796 to 799). And, as pointed out by the undersigned here and in the initial brief, the obvious reason for the grieving widow speech (and its location at the end of redirect) is credibility. According to the authorities cited, a prosecutor might be excused a Giglio violation if it could be shown from the record that defense counsel had actual knowledge of the perjured testimony and did not act on it for strategic reasons, although even that exception would not apply here because the prosecutor reemphasized and exploited the false testimony with the grieving widow speech. The record here is clear and indisputable that defense counsel did not have that knowledge. See also, Mills v. Scully, 826 F.2d 1192, 1195 (2d Cir.1987) (Even where defense counsel is aware of the falsity, there may be a deprivation of due process if the prosecutor reinforces the deception by capitalizing on it in closing argument, United States v.

Valentine, 820 F.2d 565 (2d Cir.1987); United States v. Sanfilippo, 564 F.2d 176, 178 (5th Cir.1977), or by posing misleading questions to the witnesses, United States v. Barham, 595 F.2d 231, 243 n. 17 (5th Cir.1979)); Commonwealth v. Gilday, 382 Mass. 166, 177, 415 N.E.2d 797, 803 (1980) (stating that "the prosecutor was not excused from his duty of disclosure by the lack of a formal agreement with the witness, nor is it dispositive that [the witness] was less than fully informed of any benefit to be gained"); Gilday v. Callahan, 59 F.3d 257, 269 (1st Cir.1995) (disclosure of "understanding" between defense counsel and prosecutor "would have permitted the jury reasonably to infer that, even if the 'wink and nod' deal had not been explicitly communicated to [the witness], he must have been given some indication that testimony helpful to the government would be helpful to his own cause"), cert. denied, 516 U.S. 1175, 116 S.Ct. 1269, 134 L.Ed.2d 216 (1996); People v. Lester, (Mich. App. 1998) 591 N.W.2d 267 (the prosecutor's due process duty to report to the court whenever government witnesses lie under oath is not vitiated when defense counsel is or should be aware that the testimony is false and does nothing. U.S.C.A. Const.Amend. 14.);

> When a state witness answers questions on either direct or cross examination falsely, the district attorney general, or his assistant, has an affirmative duty to correct the false testimony. See Giglio v. United States, supra; Napue v. Illinois, supra; Blanton v. Blackburn, 494 F.Supp. at 900 ("it is the responsibility of the prosecution to correct the evidence"); Hall v. State, 650

> P.2d at 896 ("[d]ue process ... imposes an affirmative duty upon the State to disclose false testimony which goes to the merits of the case or to the credibility of the witness"). Whether the district attorney general did or did not solicit the false testimony is irrelevant. United States v. Barham, 595 F.2d 231 (5th Cir.1979). However, if the prosecution fails to correct the false testimony of the witness, the accused is denied due process of law as guaranteed by the United States and Tennessee Constitutions. Giglio v. United States, 405 U.S. at 153-154, 92 S.Ct. at 766, 31 L.Ed.2d at 108; Napue v. Illinois, 360 U.S. at 269, 79 S.Ct. at 1177, 3 L.Ed.2d at 1221. In Napue the Supreme Court said:
>
> > First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.... The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.... (Citations omitted).
> >
> > Id.
>
> This rule applies when the false testimony is given in response to questions propounded by defense counsel for the purpose of impeaching the witness. Giglio v. United States, supra; Napue v. Illinois, supra; Campbell v. Reed, 594 F.2d 4, 7 (4th Cir.1979)

State v. Spurlock, 874 S.W.2d 602, 612 (Tenn.Crim.App.1993).

Brady

Appellee also argues that the Brady claim fails in part because the evidence of a deal could have been obtained through due diligence on the part of defense counsel. AB 46.

The record on direct appeal contains a demand for disclosure, which in turn contains a general request for exculpatory material, filed June 24, 1986, (Dir. 919), and the state's answer to the demand filed March 31st, 1987. (Dir. 927). The answer listed Jack McDonald with "address unknown." It also contains a list of papers and tangible objects, which does not contain any of the letters at issue here. The answer also has "None" checked at line (k): "Information tending to negate guilt of the accused." It authorizes defense counsel to make an appointment to inspect and copy the documents disclosed by the state. The record does not contain any other discovery pleadings; in particular, it does not contain any amendments to the answer or additional discovery notices.

The prosecutor testified at the evidentiary hearing that the letters at issue here, presumably including the October 5, 1987 letter confirming that bond jumping charges had been dropped pursuant to his request, would have been kept in his (the state attorney's) file, and that the state at the time had an "open file policy." This he described by saying that their file was available for copying and inspection whenever defense counsel made an appointment to do so. (R. 515, 516). As he put it, ". . . if it was in the file, it was in the file, and he would have had access to it." (R. 517). On the other hand, Mr. Stark said that he did not know whether the letters had been in the file or not:

A. All I'm saying is that if it was in the file, it was in the file, and he would have had access to it.

Q. Can't testify that it was?

A. As far as I know it was in the file, unless somebody got it out of the file. I didn't squirrel them away and hide them. They were all in the file.

Q. I'm not saying you did either inadvertently or intentionally, but you don't know if Mr. Cass got those letters, and we don't know if they were even accessible to him.

You can't testify to that today in court, can you, with certainty or anything else?

A. What I can testify to is that we had the open file policy. Exactly when Ray may have looked at the file and got his discovery, when he subsequently came back and got more discovery, I can't tell you what dates he was there, unless I can see in the file where he might have written when he got the discovery.

Then we'd have to check the dates as to what may have been or not been in the file at that time.

Q. I understand that you have an open file policy. But you cannot today testify that the letters that are in question –

* * *

Q. You cannot testify today that those letters were in fact in the file that was accessible to Mr. Cass prior to the trial.

A. I don't know what was in the file at that time. (Dir. 517, 518).

On the other hand, defense counsel stated that he had problems with what he termed the "so-called" open file policy of the state, that what he needed to get out of them wasn't there. (R. 584). He also testified unequivocally that he was not aware of any communications between the state and federal authorities at all, or of any deals or negotiations. Both counsel for the state and defense said at the evidentiary hearing that their memories had faded due to the passage of time. In Ventura v. State, 673 So.2d 479, 481 (Fla. 1996) this Court stated: "This case has been extensively delayed, primarily due to the failure of governmental entities to provide public records requested pursuant to chapter 119, Florida Statutes (1993)." As discussed in the initial brief, the trial court made no specific findings as to any Brady nondisclosure issues.

A prosecutor has a constitutional duty to disclose material, exculpatory evidence to the defense, regardless of whether defense counsel makes a specific request. United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The duty extends not only to information relevant to guilt, but also to evidence that would tend to impeach the prosecution's witnesses. Bagley, 473 U.S. at 676, 105 S.Ct. 3375; Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

> A breach of that duty violates due process when: (1) the prosecution suppressed impeachment evidence that was actually or constructively in its possession, regardless of the good or bad faith of the prosecutor; and (2) the suppressed evidence was material. Brady, 373 U.S. at 87, 83 S.Ct. 1194; see also Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Paradis v. Arave, 130 F.3d 385, 392 (9th Cir. 1997). Evidence is material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682, 105 S.Ct. 3375. A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." Id. The effect of the omitted evidence must be evaluated on the basis of the record as a whole. Bagley, 473 U.S. at 683, 105 S.Ct. 3375; see also United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). And the effect of the undisclosed evidence must be considered cumulatively, not item by item. Kyles, 514 U.S. at 436-37, 115 S.Ct. 1555.

Odle v. Calderon, (US District Ct., N.D. Cal. 1999) 65 F.Supp.2d 1065. Also:

> Since the prosecution must bear the consequences of its own failure to disclose (see, e.g., U.S. v. Ellis (4th Cir.1997) 121 F.3d 908, 914 (Ellis); United States v. Consolidated Laundries Corporation, supra, 291 F.2d at p. 570), a fortiori, it must be charged with any negligence on the part of other agencies acting in its behalf (Fero v. Kerby, supra, 39 F.3d at p. 1472, fn. 12; cf. Ellis, supra, 121 F.3d at p. 914 [defense counsel's failure to renew request for witness statements at trial does not discharge prosecution's Brady obligation]; U.S. v. Alvarez (9th Cir.1996) 86 F.3d 901, 905 (Alvarez) [delegating to nonattorney police officer responsibility to determine if officers' rough notes contain Brady material deemed "problematic"]; Walker v. City of New

> York (2d Cir.1992) 974 F.2d 293, 299 ["It is appropriate that the prosecutors, who possess the requisite legal acumen, be charged with the task of determining which evidence constitutes Brady material that must be disclosed to the defense. A rule requiring the police to make separate, often difficult, and perhaps conflicting, disclosure decisions would create unnecessary confusion."]). Accordingly, the risk and consequences of nonreceipt must fall to the prosecution. In Re: Brown (1998) 17 Cal.4th 873,72 Cal.Rptr.2d 698, 952 P.2d 715.

One way or another, the jury in this case was deceived into believing that Jack McDonald had not received any deals in exchange for his testimony when in fact he had. The following argument was made in the initial brief: (1) by any standard, this deception was prejudicial and material, (2) the totality of circumstances, especially in light of the letter in which the prosecutor formally requested that bond jumping charges be dropped and then requested certified copies of McDonald's judgments and convictions so that he could comply with "our discovery rules" (Defense exhibit 3), plus the prosecutor's conduct at trial in eliciting the "none whatsoever" testimony and the grieving widow speech, show that the prosecutor intended to conceal the deal from the beginning, and (3) if nevertheless defense counsel is to blame for failure to exercise due diligence then defense counsel rendered prejudicial ineffective assistance.

This Court stated in Craig:

> The actions of the prosecutor also violated other established rules of conduct which recognize that our adversary system of

> justice has its limitations in the prosecution of criminal cases, and especially capital cases. The resolution of such cases is not a game where the prosecution can declare, "It's for me to know and for you to find out." Id at 1229.[7]

Also, the United States Supreme Court has on more than one occasion urged "the careful prosecutor" to err on the side of disclosure. (Kyles, supra, 514 U.S. at p. 440, 115 S.Ct. at pp.

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[7]In full this portion of the opinion states: "The actions of the prosecutor also violated other established rules of conduct which recognize that our adversary system of justice has its limitations in the prosecution of criminal cases, and especially capital cases. The resolution of such cases is not a game where the prosecution can declare, "It's for me to know and for you to find out." Long ago, the United States Supreme Court made clear the standard we should apply in situations like this:

> The [government] Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful [result] as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). The Oath of Admission to the Florida Bar states, in part, that an attorney "will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law." Rules of the Supreme Court, 145 Fla. 763, 797 (Fla.1941). Under these standards, the conduct of the prosecutor here was clearly improper."

1568-1569; Agurs, supra, 427 U.S. at p. 108, 96 S.Ct. at pp. 2399-2400; Giglio v. United States, supra, 405 U.S. at p. 154, 92 S.Ct. at p. 766.

Appellee argues that defense counsel failed to exercise due diligence and that the Brady claim must therefore fail. In other words, appellee argues a strict due diligence predicate to any Brady claim regardless of what the prosecutor did or did not do and regardless of the nature of the evidence itself, in fact, regardless of anything else. This Court has recognized defense counsel's obligation to exercise due diligence, but has seemed to indicate that the story does not end there:

> In Florida, defendants have the right to pretrial discovery under our Rules of Criminal Procedure, and thus there is an obligation upon the defendant to exercise due diligence pretrial to obtain information. However, we have also recognized, as again made clear by the quoted portions of the United States Supreme Court in Kyles, that the focus in postconviction Brady-Bagley analysis is ultimately the nature and weight of undisclosed information. The ultimate test in backward-looking postconviction analysis is whether information which the State possessed and did not reveal to the defendant and which information was thereby unavailable to the defendant for trial, is of such a nature and weight that confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different. Young v. State, (Fla. 1999) 739 So.2d 553, 559.
>
> * * *

> We take this opportunity to caution counsel for both the State and defendants. In respect to the State, we call attention to the following admonition, which the majority of the United States Supreme Court made after setting out the four aspects of Bagley materiality: "We have never held that the Constitution demands an open file policy (however such a policy might work out in practice)...." Kyles, 514 U.S. at 437, 115 S.Ct. 1555 (emphasis added). This means "the prudent prosecutor will resolve doubtful questions in favor of disclosure." Id at 439, 115 S.Ct. 1555 (quoting Agurs, 427 U.S. at 108, 96 S.Ct. 2392). *In respect to defendants, this should not be read as lessening the requirement of due diligence because information which is available to the defendant through the exercise of due diligence is not a basis for postconviction relief even if undisclosed by the State unless it meets the exacting Bagley materiality standards*. Id n.11. [Emphasis added].

The Bagley materiality standard is a reasonable probability that the result of the proceeding would be different and a reasonable probability is a probability sufficient to undermine confidence in the outcome. It is the same formulation as in Strickland. Bagley, 473 U.S. at 682. A recent decision of the U.S. Supreme Court contains this historical account of Brady materiality:

> The Court speaks in terms of the familiar, and perhaps familiarly deceptive, formulation: whether there is a "reasonable probability" of a different outcome if the evidence withheld had been disclosed. The Court rightly cautions that the standard intended by these words does not require defendants to show that a different outcome would have been more likely than not with the suppressed evidence, let alone that without the materials withheld the evidence would

have been insufficient to support the result reached. See Ante, at 1952-1953; Kyles v. Whitley, 514 U.S. 419, 434-435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Instead, the Court restates the question (as I have done elsewhere) as whether " 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence' " in the outcome. Ante, at 1952-1953 (quoting Kyles, supra, at 435, 115 S.Ct. 1555).

Despite our repeated explanation of the shorthand formulation in these words, the continued use of the term "probability" raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, "more likely than not." While any short phrases for what the cases are getting at will be "inevitably imprecise," United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), I think "significant possibility" would do better at capturing the degree to which the undisclosed evidence would place the actual result in question, sufficient to warrant overturning a conviction or sentence.

To see that this is so, we need to recall Brady's evolution since the appearance of the rule as originally stated, that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Brady itself did not explain what it meant by "material" (perhaps assuming the term would be given its usual meaning in the law of evidence, see United States v. Bagley, 473 U.S. 667, 703, n. 5, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (Marshall, J., dissenting)). We first essayed a partial definition in United States v. Agurs, supra, where we identified three situations arguably within the ambit of Brady and said that in

the first, involving knowing use of perjured testimony, reversal was required if there was "any reasonable likelihood" that the false testimony had affected the verdict. Agurs, supra, at 103, 96 S.Ct. 2392 (citing Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), in turn quoting Napue v. Illinois, 360 U.S. 264, 271, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). We have treated "reasonable likelihood" as synonymous with "reasonable possibility" and thus have equated materiality in the perjured-testimony cases with a showing that suppression of the evidence was not harmless beyond a reasonable doubt. Bagley, supra, at 678-680, and n. 9, 105 S.Ct. 3375 (opinion of Blackmun, J.). See also Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (defining harmless-beyond-a-reasonable-doubt standard as no " 'reasonable possibility' that trial error contributed to the verdict"); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (same). In Agurs, we thought a less demanding standard appropriate when the prosecution fails to turn over materials in the absence of a specific request. Although we refrained from attaching a label to that standard, we explained it as falling between the more-likely-than-not level and yet another criterion, whether the reviewing court's " 'conviction [was] sure that the error did not influence the jury, or had but very slight effect.' " 427 U.S., at 112, 96 S.Ct. 2392 (quoting Kotteakos v. United States, 328 U.S. 750, 764, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). Finally, in United States v. Bagley, supra, we embraced "reasonable probability" as the appropriate standard to judge the materiality of information withheld by the prosecution whether or not the defense had asked first. Bagley took that phrase from Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), where it had been used for the level of prejudice needed to make out a claim of constitutionally ineffective assistance of counsel. Strickland in turn cited two cases

> for its formulation, Agurs (which did not contain the expression "reasonable probability") and United States v. Valenzuela-Bernal, 458 U.S. 858, 873-874, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982) (which held that sanctions against the Government for deportation of a potential defense witness were appropriate only if there was a "reasonable likelihood" that the lost testimony "could have affected the judgment of the trier of fact").

Strickler v. Greene, ___ U.S. ___, ___, 119 S.Ct. 1936, at 1956, 1957, ___ L.Ed.2d ___ (1999) SOUTER, J. concurring in part and dissenting in part. Of note here is the connection between Strickland and Brady, and the focus on the trial as a whole instead of the behavior of the lawyers involved in it.

A commentator has suggested that there are two kinds of Brady claims: (1) “classic” Brady claims where the prosecutor knew of evidence favorable to the accused and failed to disclose it, and (2) “search” Brady claims where the prosecutor fails to gather, or to receive from others, evidence that might be material and favorable to the defense.[8] Hochman, *Brady v. Maryland and the Search for Truth in Criminal Trials*, 63

[8]Actually, distinctions among Brady claims which relate to the respective duties of state and defense counsel might be drawn between (1) favorable evidence which the prosecutor knew and which could not be obtained by defense counsel, (2) favorable evidence which the prosecutor did not know but which some government official did know and which could not be obtained by counsel but which could have been obtained by the prosecutor, (3) and (4), the same except defense counsel might have obtained it through some degree of diligence. The problem is that these distinctions do not address the reliability of outcome, i.e., materiality.

U.Chi.L.Rev.1673 (1996). The writer notes that at some point, Brady issues and ineffective assistance issues become intertwined:

> 4. Availability of the evidence to the defendant.
>
> Sometimes courts suggest that a search Brady claim might succeed or fail depending on how easy it is for the defendant to find the evidence on his own, regardless of how easy it is for the prosecutor to obtain it. Brady is not supposed to shift the job of defense investigation to the prosecution. The defendant will not have a Brady claim, these courts say, if, with "reasonable diligence," he could have uncovered the evidence without the aid of the prosecutor. If the defendant could have uncovered the evidence without the aid of the prosecutor, then the defendant's failure to do so is his own fault and not attributable to the prosecutor. This means that if the defendant knew of the possibility that a government office had exculpatory information and that office was subject to subpoena, then the failure to subpoena the information will negate a search Brady claim.
>
> A broad availability-to-the-defendant rule is inadequate. Such a broad rule would punish the defendant severely for his attorney's incompetence, even in a case of clear prosecutorial impropriety. For example, if the prosecution's key witness has a long criminal record, then the prosecutor must disclose this information to the defendant in the interest of truth and fairness. Why should it matter whether the defense attorney failed, through incompetence, to seek independently the witness's criminal record, even though such an investigation would have been easy? [n.54, infra] Any court ignoring the prosecutor's failure to disclose such information "would be inviting and placing a premium on conduct unworthy of representatives of the United States Government" [Citing United States v Auten,

> 632 F2d 478, 481 (5th Cir 1980).]--unworthy in the sense that it demonstrates indifference to the truth. To be sure, the defense attorney bears responsibility for failing to uncover the evidence, but the defense attorney's failure to do his duty does not relieve the prosecutor of his own duty to seek the truth. Id 1684, 1685, footnotes omitted.
>
> * * *
>
> At this point, the Brady obligation begins to overlap with a claim for ineffective assistance of counsel. See Strickland v Washington, 466 US 668, 686 (1984) ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."). The important point is to ensure that we have rules that can correct for incompetence when it appears, but that do not adversely affect the incentives of good defense attorneys. Here, we need not worry about competent defense attorneys failing to conduct independent investigations. Defense attorneys know that the prosecutor is neither capable of disclosing nor obliged to disclose all relevant evidence favorable to the defense. Prosecutors cannot recognize as well as defense attorneys the significance of a particular item of evidence in the context of the defense's entire case. Further, the materiality standard allows certain favorable evidence that the defense would surely want to obtain to remain undisclosed. Id 1705, n. 54.

Appellee argues that the undersigned is ". . .talking out of both sides of his mouth" on this point. (AB 61). Be that as it may, the prejudicial and material deficiency in this trial would have been prevented had the appropriate information been disclosed.

Timeliness of the state's response

In the initial brief, the undersigned argued that the state's response was filed outside the twenty day period authorized by this Court in its remand and should therefore have been regarded as a nullity, citing Hoffman v. State, 613 So.2d 405, 406 (Fla.1992) ("When a lower court receives the mandate of this Court with specific instructions, the lower court is without discretion to ignore that mandate or disregard the instructions"). See also: O.P. Corp. v. Village of North Palm Beach, 302 So.2d 130, 131 (Fla.1974); Department of Health and Rehabilitative Services v. Davenport, 609 So.2d 137 (Fla. 4th DCA 1992); Marine Midland Bank Central v. Cote, 384 So.2d 658, 659 (Fla. 5th DCA 1980); Mendelson v. Mendelson, 341 So.2d 811, 813-814 (Fla.2d DCA 1977) ("No principle of appellate jurisdiction is more firmly established that the one which provides that a trial court utterly lacks the power to deviate from the terms of an appellate mandate").

CONCLUSION AND RELIEF SOUGHT

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

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant, which has been typed in Courier 12 Font, has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this ___ day of March, 2000.

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