IN THE SUPREME COURT OF FLORIDA

PETER VENTURA,

Appellant,

vs. CASE NO. 71,975

STATE OF FLORIDA,

Appellee.

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

.ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

(R **633).**

McDonald testified that he had approached appellant in the first part of **1981** concerning participating in this scheme; McDonald testified that he intended to split his half of the insurance money with Ventura (R **633, 653). At** about the same time, McDonald set up a meeting in Chicago between appellant and Wright (R **634).** After this meeting, appellant announced his willingness to murder Clemente **(R 634).** Eventually, a plan was worked out wherein appellant would travel to Volusia County in April of **1981** to carry out the job (R **635).** McDonald met with

appellant beforehand in Atlanta and gave him some expense money; Ventura later called him from Volusia County, claiming that he needed more money, and McDonald wired further funds **(R 635-6).** McDonald also stated that he had joined appellant in Daytona Beach on April **13, 1981,** staying at the Indigo Inn (R **637).** Appellant was staying nearby at the Days Inn and the two met at a restaurant to "set up the details of the murder of Mr. Clemente." (R **638).**

McDonald stated that on April **15, 1981,** appellant had checked out of his hotel and that the two had driven to Deland in the late morning or early afternoon (R **638-9).** They stopped at the Barnett Bank and appellant called the victim and asked him to meet him at the bank; Clemente worked at a marina and appellant had apparently called him as a ruse, posing as a potential customer (R **358).** McDonald testified that the two had already picked out the spot where the murder would take place, an area off of Route **44,** near an abandoned gravel pit (R 639-40). The plan was for appellant to get into Clemente's vehicle and, when they got to the spot, Ventura would ask the victim to stop the car so that he could get out and urinate (R **641).**

McDonald watched appellant meet with Clemente and get into the latter's black pickup truck; he followed them as they drove away (R **639).** When he saw them pulling off the road by the gravel pit, McDonald pulled off on to **a** side road and waited for Ventura (R **640).** He stated that after about ten minutes, appellant came running across a field (R **640).** Ventura's only comment was that it had been "more difficult than he

anticipated.'' (R **641).** As they were driving, McDonald told appellant that he should get rid of his boots, and as they neared the interstate, appellant discarded the boots he had been wearing into the woods (R **642).** McDonald then dropped appellant off at the restaurant where they had met earlier and continued on to meet with Wright (R **642).** McDonald advised of what had transpired and Wright was able to obtain $2,000 from another man (R **642-3).** McDonald then drove to the restaurant, gave Ventura a part of this money and then put him on a bus to Atlanta (R **643);** McDonald later met with appellant at a motel in Atlanta, gave him another installment of the money and then drove him to the airport so that he could catch a plane to California (R **643-4).**

Before he left, appellant had asked how long it would take to obtain the insurance money, and McDonald had told him that it would take between thirty and sixty days; at this point, McDonald was still under the impression that the policy was for $93,000, as Wright had told him, although he later learned that the payoff was to be for **$150,000 (R 644).** McDonald and Ventura stayed in contact by telephone as they waited to hear from Wright (R **645-6).** Finally, around June **21, 1981,** McDonald returned to Daytona Beach, following Wright's indication that he was soon to be paid (R **640).** Instead, he was arrested (R **646).**

In addition to McDonald, the state also called Reginald Barrett, an acquaintance of both McDonald and Ventura, who had also acted as a confidential informant for the government (R **520-2).** He stated that in February of **1981,** appellant had asked him to contact the Midwestern Life Insurance Company in Ohio and to

find out whether, under the conditions of a "key man" life insurance policy, it mattered whether the employee insured no longer worked for the person who had insured him at the time of his death (R 525). The witness also testified that in late March Ventura had told him that "Jack in Atlanta" needed a gun, possibly with a silencer, and that he had asked him if he could supply one (R 525-6). Ventura had provided appellant with a Colt .357 magnum (R 526); another witness later testified that appellant had discussed selling to him a .357 magnum or a .38 caliber in June of 1981 (R 549). Later, in the first week of April, appellant had told Barrett that he was on his way to Atlanta, because "Jack" wanted him to come down and "burn someone." (R 527). Barrett stated that he subsequently received a call from appellant on April 10th or llth, 1981, at which time appellant was in Florida (R 527-9); he subsequently received another call from appellant, who told him that he would be going to California "as soon as his job was finished" (R 529). Later, Barrett received a letter from Ventura, postmarked April 17, 1981, which contained the message that if anything happened to appellant, Jack McDonald was responsible (R 531). When Barrett saw appellant in early May, upon the latter's return from California, appellant advised him that he would be getting his payment in thirty days, as McDonald "was to receive some funds from an insurance proceed in Florida" (R 534).

The state also called Joseph Pike, another Chicago acquaintance of Ventura and McDonald; like Barrett, Pike had also supplied the authorities with information (R 498). Pike stated

that he had met with appellant on May 6, 1981 at a Chicago area restaurant (R 498). At that time, Ventura had told him that he had been involved in a murder for hire scheme with Jack McDonald, in which a key man life insurance policy was involved (R 498-9). Appellant had stated that he had "handled the extermination" and that he expected to receive approximately $13,000 (R 499-500). Ventura had said that the victim had no longer been employed by the insurer at the time of the murder (R 512); appellant had likewise stated that the plan had been to make the murder look "drug related" (R 499).[1]

The state also called a number of witnesses who, through business receipts, verified that appellant had indeed been in Florida on the dates in question (R 596, 614); a hotel employee also noted appellant's stay in Atlanta on April 5-7, 1981, April 9-10, 1981 and finally, April 16-17, 1981 (R 602-3). Similarly, a Greyhound ticket agent and Western Union counter clerk from Deland testified that $100 had been wired to Peter Ventura on April 13, 1981 (R 608). A search of appellant's residence had turned up a memo pad which had, "Midwestern Life Insurance Company", written upon it (R 569). An employee of that agency

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[1] The state particularly takes issue with the representation in the Initial Brief, to the effect, "Pike initially testified that the murder was in the planning stages on May 6, 1981" (Initial Brief at 6); appellant also later asserts that this testimony related to appellant and McDonald "planning to commit crimes on or after May 6, 1981" (Initial Brief at 24). While Pike may not have always used consistent verb tenses, the clear import of his testimony is that Ventura related to him details of a murder which he had already committed. While, to some extent, this "murder for hire" conspiracy could be regarded as still ongoing, in that the actors had not yet received the insurance money, it is unrealistic in the extreme to view Pike's testimony as relating to "future" crimes.

testified that on July 2, 1980, Jerry Wright had taken out a key man life insurance policy on his then-employee, Robert Clemente (R 622); such policy would continue in effect even if Clemente left Wright's employment, as long as the premiums were paid (R 622). She also testified that on April 25, 1981, Wright had submitted a claim; on September 14, 1981, he received $153,123.29 (R 623, 626).

Meanwhile, in May of 1981, both Barrett and Pike had contacted the postal authorities in Chicago (R 501, 523); Pike, Barrett and McDonald, apparently, had already been under investigation for various offenses at the time (R 478, 482-3, 523). In any event, Barrett and Pike provided information to the Chicago authorities, who, in turn, passed this information on to the Volusia County authorities (R 470). Accordingly, Volusia County Deputy Carroll traveled to Chicago and met with Pike and Barrett on May 18, 1981 (R 451); their information included the existence of the key man life insurance policy and the identity of its beneficiary (R 452). Barrett and Pike also supplied the names of both Ventura and McDonald, and attempts were made to verify Ventura's presence in Florida in April (R 451-3). Arrangements were made to set up a controlled "payoff" to Wright on June 24, 1981, at which time the insurance proceeds would allegedly be paid (R 454-5). Carroll was advised that McDonald would be in Daytona Beach to pick up his share of the money, and arrest warrants were obtained for both Ventura and McDonald; Ventura was to be arrested in Chicago by Deputy Carroll and Deputy Hudson (R 456-7).

Hudson testified that the arrest occurred at 1:00 p.m. on June 25, 1981 (R 567). The case was presented to the grand jury, which indicted Ventura on June 29, 1981 (R 570). A bond hearing was set in Chicago in July of 1981, and appellant was able to bond out at such time (R 571). Appellant, however, failed to appear for a subsequent hearing in August of 1981 and, indeed, Ventura remained a fugitive until June of 1986 (R 575). Appellant only came to the attention of the authorities after he had told a young man, with whom he worked in Austin, Texas, that he had killed a man in Florida five years before as a "contract" killing (R 679-680). Appellant was then using the name "Juan Gadaya", as well as "Juan Contras" (R 678, 681). This young man, Timothy Arview, related the incident to the Texas authorities, and appellant was arrested on June 11, 1986; at that time, appellant identified himself initially as "Juan Contras" (R 689). After his arrest, appellant divulged his true identity (R 689).

The state also adduced evidence concerning the victim's actions on the day of the murder and the discovery and examination of the body. Denise Jorgenson, owner of the Crow's Bluff Marina, testified that, as of April 15, 1981, Robert Clemente had been an employee of that business for nine months, having previously worked for Jerry Wright (R 357, 363). She testified that Clemente left to go into Deland at about one o'clock in the afternoon on the day of his murder, stating that he had some errands to run, including a meeting with a potential customer at the Barnett Bank (R 358). She likewise stated that Clemente took the business' black pickup truck (R 358).

Later that afternoon, a local fern grower noted the vehicle parked in a wooded area approximately a quarter of a mile north of Route 44 (R 308, 314). Upon approaching the vehicle, he discovered the victim slumped across the front seat, blood and bullet holes visible in his T-shirt (R 309). The police were called, arriving at approximately 5:45 p.m. (R 313). Deputy Hyde testified that when he arrived at the scene, he found the passenger door of the vehicle still open and the key in the ignition, the engine and radio on (R 315). He was close enough to observe powder burns on the back of the victim's shirt where the three bullets had entered (R 315-316). Hyde also noted that a set of footprints led from the passenger side of the vehicle in a northerly direction (R 316). Another officer, Sergeant Burnsed, followed those footprints and found that they led through an orange grove and finally, to a parallel road; this officer similarly noted a wet place in the sand on the passenger's side of the truck (R 323-4, 328, 331). Burnsed also testified that there appeared to be a footprint on the pants and shirt of the victim (R 326-7). Five Smith & Wesson spent .38 caliber cartridges were found in the orange grove (R 328); two spent .38 caliber bullets were found in the truck, one caught between the driver's door and the paneling, another near the door post behind the driver's door (R 376-7).

The medical examiner testified that Clemente had died from a bullet wound to the heart (R 423). He stated that there had been five bullet holes in the victim's body and that three .38 caliber bullets had been recovered (R 425). Dr. Schwartz

identified one entrance wound at the right armpit, which included some powder stains, and a likely exit wound in the left armpit (R **428).** There were three entrance wounds in the victim's back (R **428).** One bullet penetrated the chest, right lung, sac around the heart and the heart itself and was recovered under the skin by the left rib (R **430).** Another bullet penetrated the backbone and was embedded, there while the last penetrated the back muscles and was also recovered in the backbone (R **430).** The doctor hypothesized that the bullets had entered the back from the right side and had taken a general right to left direction, somewhat downward (R **430).** Dr. Schwartz also noted a scalp wound, consistent with a blow with a blunt instrument, and a cut or crushing wound to the index finger (R **426, 427).**

Finally, as to the penalty phase in this case, although the state presented no new evidence, appellant called three witnesses for the defense; these witnesses included appellant's daughter, Deborah Vallejo, a former business associate of appellant, Cleon Zotas, and an unofficial prison "minister" who had worked with appellant during his incarceration (R **861-880).** The jury subsequently returned an advisory sentence of death, by a vote of **11-1** (R **904).** Judge Hutcheson formally imposed sentence two days later, at which time he also rendered his detailed findings of fact (R **909-915; 1046-50).** The judge found two aggravating circumstances - that the homicide had been committed for pecuniary gain, section 921.141(5)(f), and that the homicide had been committed in a cold, calculated and premediated manner, section 921.141(5)(i) - and found nothing in mitigation (R 1046-1050).

SUMMARY OF ARGUMENT

Appellant presents six claims on appeal, four in regard to his conviction of first degree murder and two in regard to his sentence of death. The primary claim relates to the denial of appellant's request to dismiss his attorney, as well as the denial of counsel's motion to withdraw. Appellee suggests that Judge Hutcheson conducted a sufficient inquiry into these matters and that his ruling was correct and should be affirmed. For the most part, appellant's complaints about his attorney simply represented frustration at what he perceived to be unnecessary delays or continuances, in the case. Once the need for such continuances was explained to him, it would appear that his dissatisfaction with counsel ended, inasmuch as he made no subsequent attempt to discharge counsel, although the trial in this case did not occur for another seven months; similarly, the record of this trial contains no indication of a complete breakdown in communication between attorney and client, such that it could be said that an adequate defense was not presented. It is well established that simple loss of confidence or trust standing alone cannot warrant withdrawal of counsel, and appellee further suggests that no actual conflict of interest was ever certified or demonstrated in this case.

While appellant's court-appointed attorney did formally move to withdraw and for appointment of another public defender's office, the fact remains that the assistant public defender never expressly certified a conflict in regard to another client. It

is clear from the record in this case that no such actual conflict of interest existed, in that the person whom appellant alleges gave a statement against him was never called as a witness at trial or even listed on the state's discovery and, from all of the facts in the record, it is clear that this person played absolutely no role in the prosecution of this case. To the extent that any further inquiry was necessary as to this matter, any error would be harmless, given later events.

Appellant also presents two other claims in regard to his conviction, both of which the state would contend are not properly presented. Appellant contends that it was error for the trial court to have instructed the jury on flight; appellee suggests that there was no contemporaneous specific objection to this instruction, and that, even if the point were preserved, no error would exist. Appellant has also raised a claim of ineffective assistance of counsel on direct appeal and has alleged at least nineteen (19) acts of deficient performance. Appellee suggests that the present record is not sufficient to resolve all of these claims and that the entire point on appeal should be denied without prejudice to its re-presentation in the proper forum. Appellee also suggests that a number of the allegedly ineffective acts of counsel, in fact, represent strategic decisions whose purpose is plain even from this record.

Finally, appellant raises two claims in regard to his sentence of death. Neither of these points on appeal is properly presented, in that appellant made absolutely no challenge to Florida's capital sentencing statute, as applied, in the trial

court. Instead, the claims now presented would simply seem to represent concerns of appellant's appellate attorney, as to the manner in which this court reviews capital cases. Given the fact that these claims are clearly procedurally barred, appellee respectfully suggests that not even an "alternative" address on the merits is warranted. As to appellant's own sentence of death, such sentence is premised upon the finding of two valid aggravating circumstances and nothing in mitigation. No reversible error has been demonstrated, in that the finding of these aggravating circumstances - that pertaining to pecuniary gain and that pertaining to the homicide being committed in a cold, calculated and premeditated manner - is perfectly justified based on the facts of this case. This was a cold-blooded "contract" murder and death is the appropriate sentence.

POINT I

AN ADEQUATE INQUIRY WAS CONDUCTED ON ANY REQUEST BY APPELLANT TO DISMISS HIS ATTORNEY, SUCH THAT REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED.

Appellant was taken into custody on this offense in June of 1986, and the Office of the Public Defender for the Seventh Judicial Circuit was appointed to represent him. On June 24, 1986, appellant's counsel filed a demand for discovery, which was not formally answered until April 2, 1987 (R 919, 925-7). In the interim, the defense requested, and received, a number of continuances, on the grounds that investigation had not yet been completed (R 920-4). On May 4, 1987, appellant's counsel filed a motion to appoint special public defender pursuant to section 27.53(3), Florida Statutes (1985), on the grounds that there were adverse and hostile interests between defense counsel and appellant (R 928-9). In such pleading, defense counsel alleged that appellant had filed pro se pleadings without his knowledge and that, in one of them, he had made several allegations against defense counsel which counsel denied; likewise, counsel noted that appellant had written a letter to the court in which he informed the court that he wished to dismiss present counsel (R 987-9). Appellant's pro se pleadings and letter were attached to the motion and incorporated by reference (R 927-945).

These documents included a letter which appellant mailed to Judge Hutcheson on March 12, 1987, in which he requested that the judge remove Assistant Public Defender Cass from his case and

appoint another attorney, preferably one Craig Boda; appellant contended that there were conflicts between himself and Cass, in that the latter had allegedly lied to him and had failed to file any motions, and that, as a result, he did not trust him **(R 943).** The judge wrote back on March 20, **1987,** and advised appellant raised "insufficient grounds" to discharge the public defender's office and to appoint a private attorney; the judge also advised appellant that legally, he had the right to refuse the services of the public defender's office and to either represent himself or hire his own attorney, but urged appellant to retain the public defender **(R 942).** Likewise, the documents included an undated letter from appellant to Cass, in which he discussed his lack of trust (R **944-5);** among the allegations was a contention that a "Mr. Edward Adkins, an informant" has had his sentence reduced because he had made "a statement" against Ventura's case and that a conflict of interest existed, in that the 'public defender's office had allegedly helped him **(R 944).** Appellant likewise complained of the fact that Cass had allegedly failed to file motions on his behalf, except for continuances, and noted that he found Cass's "track record", as far as other cases, not to be good **(R 944-5).**

Also attached was Ventura's pro se petition for writ of prohibition which he had filed in the Fifth District Court of Appeal on or about April **16, 1987** (R **933-941).** In such pleading, appellant contended that his upcoming trial should be prohibited, in that more than **180** days had elapsed since his arrest and that although continuances had been requested and granted, such had

allegedly been done without his knowledge or consent. Appellant argued that he wished attorney Cass removed, in that counsel had allegedly waived his speedy trial rights, and further requested that attorney Craig Boda be appointed to represent him, noting,

> . . . he [Boda] is familiar with YOUR PETITIONER'S case and was to be YOUR PETITIONER'S counsel of record, but after awaiting his retainer, which were (sic) to be provided by YOUR PETITIONER'S friends, relatives, business partners and/or associates in the state of Texas, in the absence of said funds being paid by same, YOUR PRAYERFUL PETITIONER was indigent and had to initiate proper procedures by which he could be found insolvent for purposes of the lower court . . . (R 934).

On May 5, 1987, a hearing was held on the public defender's motion to withdraw (R 1072-1088). At such time, attorney Cass argued that there was an "irreconcilable" conflict of interest, noting that he had been accused of various wrongdoings (R 1076). The judge then asked appellant personally whether he still wished the public defender to be discharged, and appellant answered that he did (R 1076). The prosecutor then presented brief argument, as did appellant's attorney, who reiterated that it was simply impossible for an attorney whose competence had been attacked to provide competent services (R 1077). The following then took place,

> THE COURT: Mr. Ventura, anything else you wish to say, sir?

> THE DEFENDANT: Well, last June or the first part of July, I was told by Mr. Pearl that we would be going to trial in September and we have had numerous continuances. We've had a few meetings that we met and discussed several things that never took place and I feel that, at this point, after almost eleven months of incarceration, that this is something that should have been done.
>
> It took me six and a half months, almost seven months before I got any discovery and all of that discovery that was sent was discovery that was from five years back. The newest discovery I just received was within the last three months. (R **1079-1080)**

Judge Hutcheson then noted for the record that while there had indeed been continuances in the case, it was his standard practice to request the defendant's consent to any motion by his attorney in this regard (R **1080-1).** Appellant agreed that he had indeed been present in court when his attorney had made various motions to continue, and the judge stated that he always asked the defendant if he agreed to a continuance and waiver of speedy trial, and that if the defendant did not, then he would not grant the motion (R **1081).** The judge expressed some doubt as to whether attorney Craig Boda, appellant's obvious first choice for representation, was even on the court-appointed list, and the prosecutor pointed out that Boda had been employed by the State Attorney's Office in **1981,** thus rendering it unlikely that Boda would be able to represent appellant in light of this conflict (R **1081-2).** Judge Hutcheson then announced that he would deny the public defender's motion to withdraw (R **1083).**

Defense counsel then announced that he was not prepared for trial, in that he had ceased all activity at the time that he had concluded that a conflict existed (R 1083); counsel also noted that there were pending depositions set in Texas (R 1083). When the judge asked appellant his views on this matter, and further asked him if he wished to proceed to trial as scheduled without an attorney, appellant answered, "No, I don't want to go to trial on the 18th. I want to be able to have an attorney that is going to be ready, whether it's Mr. Cass or someone else." (R 1084). Appellant did, however, express concern as to the number of continuances, and the judge pointed out that such was not unusual in a first degree murder prosecution (R 1084-5). Although this continuance was granted, appellant was not, in fact, tried until January of 1988. At no time during this interval, or at trial itself, did he ever express any dissatisfaction with attorney Cass or any renewed desire to discharge him. After the judge formally sentenced appellant to death on January 21, 1988, appellant simply noted, during his statement in open court, that the court had received correspondence from him and had denied motions by the defendant for counsel of his choice (R 910-911).

On appeal, appellant presents what would seem to be three interrelated claims. As his first point on appeal, appellant argues that the trial court failed to conduct a sufficient inquiry as to the nature of appellant's allegations of a conflict of interest and request to discharge his attorney, as well as into counsel's motion to withdraw. Appellant also argues that the court erred in not granting appellant's request to discharge

his court-appointed attorney and in denying his attorney's motion to withdraw, in that under all the circumstances, it was impossible to expect counsel to have rendered effective assistance; as an independent argument, appellant contends that he was denied effective assistance of counsel (see, Initial Brief of Appellant, Points II and 111). Appellee will seek to discuss these claims in the order presented, but would, to some extent, reorganize the arguments presented; specifically, any contention of a conflict of interest, as to "Edward Adkins", will be discussed in Point II, infra.

In his brief, appellant contends that he is entitled to relief under such cases as Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), Smith v. State, 512 So.2d 291 (Fla. 1st DCA 1987) and Parker v. State, 423 So.2d 553 (Fla. 1st DCA 1982), in that he alleges that Judge Hutcheson failed to make an adequate inquiry as to his desire to discharge counsel; appellant also cites to such federal precedents as Hudson v. Rushen, 686 F.2d 826 (9th Cir. 1982) and McKee v. Harris, 649 F.2d 927 (2d Cir. 1981). Appellee suggests that appellant's reliance upon all the above precedents is misplaced, and that no reversible error has occurred. For the most part, the above Florida cases represent instances in which the defendant's request to discharge counsel was, if anything, granted to precipitously, resulting in the defendant having to stand trial without any attorney at all. See, Nelson, supra; Smith, supra. Further, in Parker, the defendant had apparently asked to discharge his attorney because he wished to represent himself. In this case, Ventura never

evinced the slightest desire to appear pro se, and simply wished a different attorney; appellant has never asserted any violation of Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), either at trial or on appeal. Additionally, the federal cases, Hudson and McKee, both contain holdings which are directly contrary to appellant's position. McKee recognizes that a trial court's failure to conduct a formal inquiry on this matter can be harmless error, Id. at 933-4, while Hudson states that a court need only hold an inquiry "as comprehensive as the circumstances reasonably would permit." Id. at 831.

The state maintains that Judge Hutcheson held as comprehensive an inquiry as was justified under all the circumstances of this case and that, to the extent that any further inquiry was required, any error therein was harmless. Cf. McKee, supra. First of all, while appellant understandably focuses on the events of the hearing of March 5, 1987, the state suggests that it must be recognized that this encounter was not the only means of communication between judge and defendant. In other words, appellant had already addressed a letter to the court in which he had set forth his bases for disagreement with his attorney. At the hearing of May 5, 1987, the judge simply afforded appellant an opportunity to amplify upon his prior statements in this regard (R 1076, 1079-1081). The fact remains that these "reasons", whenever stated, were simply insufficient to merit relief.

Appellant's primary disagreement with his attorney would seem to relate to the fact that Cass had had the case continued

repeatedly, allegedly without appellant's knowledge or concurrence. Due to this fact, appellant contended that he mistrusted Cass, and additionally complained that the attorney had allegedly not filed any other motions, such motions left unnamed. Appellant also asserted that a conflict of interest existed because the Public Defender's Office had allegedly assisted one Edward Adkins in having his sentence reduced, when Adkins had allegedly given a statement against appellant.[2] Finally, running throughout all of appellant's pleadings is the constant theme that he wished to be represented by Craig Boda, a private attorney whose fees he could not afford to pay. It is, of course, well recognized that while an indigent defendant has an absolute right to counsel, he does not have a right to have a particular lawyer represent him. See, Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983); Koon v. State, 513 So.2d 1253 (Fla. 1987).

Judge Hutcheson inquired, and responded, adequately to appellant's allegations concerning the continuances, not only noting that such occurrences were not unusual in first degree murder prosecutions, but also that, appellant's contentions notwithstanding, it was his practice not to grant any continuance requested by counsel unless the defendant was present or otherwise acquiesced (R 1080-1). Indeed, appellant himself acknowledged that he had in fact been in the courtroom at various times when continuances were requested, and it is clear from the

[2] As noted, this portion of the claim will be addressed in Claim II, infra.

record that these continuances were necessary, in that discovery was still ongoing, and not all depositions had been completed (R 920-4). Appellee would analogize this case to Peede v. State, 474 So.2d 808 (Fla. 1985), in which a similar claim of error was raised. In that case, the defendant and his court appointed attorney had clashed over the need for further continuances, the defendant preferring an immediate trial and defense counsel moving to withdraw based upon this conflict. This court found no grounds for relief, noting that, as here, the defendant had never demonstrated an unequivocal desire to represent himself and, further, that defense counsel's desire for a continuance was premised upon the need for a psychiatric examination and the interviewing of several witnesses. It should be noted that immediately after the denial of the public defender's motion to withdraw in this case, appellant flatly stated that he had no wish to proceed pro se and, indeed, appellant made no further requests to discharge his counsel, despite the fact that the actual trial and sentencing did not occur for another seven months.[3]

Further, while it is regrettable that, at least, at one point relations were not better between appellant and his counsel, a general loss of confidence or trust standing alone will not support withdrawal of counsel, see, Johnston v. State, 497 So.2d 863 (Fla. 1986), and any alleged lack of a "meaningful

[3] Although appellant did file a subsequent pro se demand for speedy trial in September of 1987, he later voluntarily withdrew such demand the next month, without making any further attack upon counsel or request for his discharge (R 964, 969-70, 1096-1103).

relationship" between attorney and client raises no claim under the Sixth Amendment. See, Slappy, supra. Appellee questions whether appellant's pleadings truly reveal a sufficient allegation of incompetence of counsel, thus triggering the need for more extensive inquiry. See, Smelley v. State, 486 So.2d 669 (Fla. 1st DCA 1986) (appellant who alleged that attorney was not "doing his best" did not allege incompetence of counsel and, thus, sufficient inquiry was had as to defendant's desire to discharge counsel). Further, regardless of any pretrial hostility between appellant and Cass, the actual record of the trial and sentencing itself supports no finding that communications between the two completely broke down. As noted, appellant never renewed his attacks upon counsel and evinced no desire not to be represented by him at the time of trial. It would simply seem that appellant wished to go to trial sooner than did his attorney and that once his views had been expressed, and rejected, and he had, perhaps, accepted the need for his attorney to prepare, any "dissatisfaction" dissipated. Cf. State v. Green, 476 So.2d 321 (Fla. 2d DCA 1985).

Two recent precedents are worth discussing. In Scull v. State, 533 So.2d 1137 (Fla. 1988), this court considered a claim of error relating to the trial court's alleged failure to adequately inquire into Scull's motion to discharge counsel for conflict of interest. This court quoted extensively from a colloquy between Scull and the judge, and concluded that an inadequate inquiry had not been held on the motion. This court reached that conclusion after noting that Scull had not

understood English and had had to proceed through an interpreter, that Scull's counsel had not been present at this hearing and, perhaps, most importantly, that Scull had not been given the opportunity to explain why he objected to his present counsel, in that the judge had continuously interrupted him. This court, however, concluded that no relief was warranted because appellant had subsequently stated at trial that he was satisfied with his attorney.

While there would not seem to be comparable stat'ments of satisfaction by appellant sub judice, appellee suggests that appellant's seven month silence should be regarded as something of a waiver, and it must additionally be noted that while appellant did not utilize his opportunity for elocution at sentencing to praise counsel, neither did he avail himself of the opportunity to damn him. Appellant sub judice has proven himself more than capable of filing pro se motions and correspondence with the court, and his subsequent failure to take either one of these steps, which would have evidenced continuing dissatisfaction with his counsel, should be of significance. In any event, given the fact that appellant's primary complaint about his counsel seemed to be the amount of time spent in pretrial preparation, a concern mooted by the time that trial arrived, it is understandable why appellant did not renew his challenges. Additionally, it should be clear from this record that appellant was certainly afforded more of an opportunity than Mr. Scull received in setting forth his complaints against his attorney. Scull does not dictate reversal sub judice.

Appellee especially reaches this conclusion on the basis, inter alia, of the recent decision, Kott v. State, 518 So.2d 957 (Fla. 1st DCA 1988). In that case, the primary issue was the adequacy of the court's inquiry into the defendant's pro se motion to discharge his counsel. Before trial, Kott had moved to dismiss his attorney on the grounds that counsel had rendered ineffective assistance by failing to locate or investigate witnesses, prepare a defense, file pretrial motions or keep the defendant apprised of the developments in the case; Kott likewise alleged a conflict of interest between attorney and client and further noted that counsel had been so ineffective that a complaint had been lodged with the Florida Bar. On the day of trial, the judge acknowledged that he had seen the motion and then asked appellant if he had any other comments which he wished to make in addition to those contained in the motion. When appellant answered in the negative, the judge denied the'motion and appellant then proceeded to trial with his attorney.

The First District held that a trial court's failure to make a thorough inquiry into a defendant's motion to discharge his attorney was not in and of itself a Sixth Amendment violation, and that in determining whether an abuse of discretion in this regard warranted reversal, an appellate court must consider several facts, in addition to the adequacy of the inquiry, including whether the motion was timely made and if the conflict was so great as to result in a total lack of communication preventing an adequate defense. After concluding that the motion had been timely filed, the court held,

> Although the trial court's inquiry as to the grounds stated for discharge was not extensive, the court acknowledged receipt of the motion and gave defendant an opportunity to argue the motion further. When the defendant did not respond, the motion was denied. The most important circumstance militating in favor of affirmance, however, is the fact that the appellant proceeded to trial ***with his court-appointed counsel*** and made no additional attempt to dismiss counsel or request self-representation. Similarly, there is no evidence in the record of any conflict or lack of communication during the ***trial*** between appellant and his attorney that would support a finding that the appellant did not receive an adequate defense. Thus, based on the record at bar, we conclude that the trial court's failure to conduct a more extensive inquiry regarding the merits of the motion to discharge did not violate the appellant's Sixth Amendment right to effective assistance of counsel, and was at most harmless only. Id. at 958 (citations omitted) (emphasis in original).

Finally, in distinguishing Parker v. State, supra, the court wrote,

> The appellant at bar, however, did ***not*** request to proceed pro se, nor was he forced to do so. Instead, after denial of his motion, he accepted court-appointed counsel without any allegation of additional conflict or dissatisfaction. Id. at 959 (emphasis in original).

Appellee suggests that Kott is virtually indistinguishable from the situation sub judice. As in Kott, the judge, by the

conclusion might not be warranted in an instance in which the request to discharge counsel is denied immediately pr'ior to trial, such principle is particularly applicable here, when the appellant's trial did not occur until some seven months had passed. When this much time has elapsed, it should be presumed that the defendant has abandoned whatever initial misgivings he may have had as to his attorney, unless he affirmatively takes steps to demonstrate to the contrary.

In conclusion, Ventura's request to discharge his attorney would simply seem to have been one borne of frustration. The defendant was incarcerated, felt that his case was not progressing fast enough, felt that his attorney was not visiting him enough and decided to vent his spleen. The trial court

conducted a sufficient inquiry as to appellant's request to discharge his attorney, and appropriately concluded after such inquiry that the concerns raised were largely groundless, a conclusion consistent with appellant's subsequent silence on the subject. No relief is warranted as to this claim, and appellant's conviction should be affirmed.

POINT II

DENIAL OF APPELLANT'S REQUEST TO DISCHARGE COUNSEL AND OF APPOINTED COUNSEL'S MOTION TO WITHDRAW WAS NOT ERROR; NO ACTUAL CONFLICT OF INTEREST WAS EITHER CERTIFIED OR DEMONSTRATED.

In this claim, appellant argues that the trial court erred in denying his request to discharge his attorney and, additionally, in denying the public defender's motion to withdraw. Appellant places emphasis upon the alleged conflict of interest involving Edward Adkins, and suggests that due to such alleged actual conflict, prejudice must be presumed. Appellant also argues that under the totality of the circumstances, substitution of counsel should have been allowed, in that "it was impractical and unrealistic to expect trial counsel to render effective assistance." (Initial Brief at **16**). In support **of** his contentions, appellant cites such precedents as Parker v. State, **304** So.2d **478** (Fla. 1st DCA 1974), Foster v. State, **387** So.2d **344** (Fla. 1980), Baker v. State, 202 So.2d 563 (Fla. **1967** and Babb v. Edwards, **412** So.2d **859** (Fla. 1982).

Appellee suggests that appellant's reliance upon the above cases is misplaced, and that no reversible error has been demonstrated. For instance, Parker involved an instance in which the defendant wanted a new attorney to represent him on post-conviction motion, given the fact that the substance of that motion was an attack upon the competence of his present attorney; an obvious conflict was recognized. See also, Adams v. State,

380 So.2d 421 (Fla. 1980). Likewise, Baker, Foster and Babb v. Edwards all involved instances in which a court-appointed attorney was faced with a simultaneous representation of two clients with hostile interests, a situation which, by no stretch of the imagination, existed sub judice.

Appellant's court-appointed attorney moved to withdraw on the grounds that appellant had filed pro se pleadings of his own, while represented by counsel, and that in one of these pleadings he had made attacks upon counsel, which counsel denied (R 928). At the hearing on May 5, **1987**, the only additional argument presented by attorney Cass was to the effect that it was per se impossible for him to represent appellant because appellant had accused him of wrongdoings (R 1076, **1079).** While appellee can understand Mr. Cass' subjective feelings in this matter, the fact remains that this type of "general loss of confidence or trust'' will not support withdrawal of counsel. See, Johnston, supra. As has been argued previously, appellant's pretrial request to dismiss his attorney would simply seem to represent frustration at what he perceived to be unjustified delays in the case. Apparently once the necessity for these continuances was explained to him, appellant's dissatisfaction with counsel ended, given the fact that he never renewed his request over the next seven months and, perhaps most importantly, the record in this case supports no allegation or finding of a breakdown in the attorney/client relationship, such that it could be contended that appellant did not receive an adequate defense. See, Kott, supra. There simply was no reasonable basis for any allegation

of ineffective assistance of counsel, and denial of appellant's request to dismiss counsel, as well as counsel's motion to withdraw, was not error. See, Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Koon, supra; Johnston, supra.

The only matter remaining is that involving Edward Adkins and whether an "actual" conflict of interest existed. Despite appellant's reliance upon Babb v. Edwards, the answer to this question must be in the negative. There has been no showing that Adkins was ever represented by the Public Defender's Office, that, assuming that he was in fact ever a client, his representation continued at the time of Ventura's or that any actual conflict or hostile interests between the two existed. Although appellant personally asserted in his pro se pleadings that the Public Defender's Office had assisted in the reduction of Adkins' sentence on the basis that the latter had made a statement against Ventura's case (R 935, 944), the state suggests that it is of paramount significance that Assistant Public Defender Cass, while filing a motion pursuant to section 27.53(3), Florida Statutes (1985), never expressly certified a conflict involving Edward Adkins. Any suggestion that this certification was accomplished by the incorporation by reference of appellant's pro se pleadings must be rejected, in that only an assistant public defender can certify a conflict of interest for these purposes. See, Babb v. Edwards, supra; Volk v. State, 436 So.2d 1064 (Fla. 5th DCA 1983). It should be noted that when attorney Cass was afforded the opportunity to argue his motion at the hearing of May 5, 1987, he cited only to the personal

difficulties between Ventura and himself as a basis for withdrawal (R 1076, 1079). The state respectfully suggests, that given the gravity of this matter, it is not inequitable to hold that any ambiguity must be construed against the moving party, in that if attorney Cass truly wished to withdraw based upon a conflict between two clients, he need only have included these few words in his motion; similarly, if he felt that the court had misapprehended the nature of the conflict alleged, he need only have re-asserted such at any time during the seven months prior to trial.

This case bears no similarity to those in which this court has granted relief on the basis of a conflict of interest by defense counsel. Thus, in Foster v. State, supra, this court reversed for a new trial where it was clear that defense counsel had had an actual conflict of interest, given his dual representation of both the defendant and the state's chief witness; at trial, the state even nolle prossed its pending charges against the witness after she had given damaging testimony against Foster. In Jennings v. State, 413 So.2d 24 (Fla. 1982), this court reversed for a new trial, when the defense counsel had had an actual conflict of interest, given his representation of the defendant and his office's simultaneous representation of a state's witness, who had overheard certain jailhouse statements made by Jennings when the two were incarcerated. Defense counsel contended that he could not cross-examine the witness on behalf of Jennings, given the existence of the attorney/client privilege as to the witness and, indeed,

simply stood mute during cross-examination. This court found that Jennings had been deprived of the benefit of cross-examination of a vital and material witness.

Conversely, in both Webb v. State, 433 So.2d 496 (Fla. 1983) and Mills v. State, 476 So.2d 172 (Fla. 1985), this court concluded that no relief was warranted. In Webb, the same assistant public defender had represented both the defendant at his murder trial and the defendant's wife in a contempt proceeding. This court concluded that no actual conflict of interest existed, given the divergent nature of the proceedings and the absence of common interests between appellant and his wife; this court defined a "conflict of interest" as a situation in which "one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant which counsel is also representing." Id. at 498. In Mills, the same public defender's office had represented both Mills, on the murder charge, and Ashley his accomplice and former codefendant, on an unrelated charge. This court found no conflict of interest, given the fact that the public defender withdrew from the representation of Ashley at the time that his involvement in the murder case became known; from the opinion, it would appear that defense counsel was able to adequately cross-examine Ashley, although he was precluded from using certain statements which Ashley had made to the public defender investigator, on the grounds that such were still privileged.

Appellee would suggest that, from what little is known about Edward Adkins, it would appear that, under Webb, no conflict of interest existed. Assuming for the sake of argument only that the public defender did assist Adkins in having his sentence reduced, this action would still seem to have had no effect upon the representation of appellant. Adkins never testified for the state and, indeed, made no appearance at the trial whatsoever; in fact, his name is not even listed on the state's discovery response, thus suggesting that it is questionable whether the state even had knowledge of any alleged statement made by him **(R 925-7)**. Given the particular context of this prosecution, it is inconceivable what role Adkins could have played in this case. Peter Ventura was a contract killer "imported" to Florida to do one specific "job". Aside from Jerry Wright, the beneficiary of the insurance policy, there would not seem to be any "local" involvement in this homicide, Appellant was a fugitive for most of the time prior to trial and, in contrast to Jennings, he made no "jailhouse" statements which were then used against him. Further, it is difficult to see how Adkins could have helped "break" this case. As the testimony at trial indicated, this case only began to unravel when confidential informants in Chicago, Illinois, as opposed to Florida, began to leak information to the authorities (R **501, 523)**. It is clear from this record that the Florida authorities were the recipients, as opposed to the "instigators", of information during the investigation (R 470).

The classic "conflict of interest" situation involves an instance in which one attorney is simultaneously called upon to represent two clients with actively hostile interests. For instance, in Foster and Jennings, an attorney who represented one client was called upon to cross-examine another past or present client, and had to weigh the competing duties which he had as to each one. Courts have recognized that this is an impossible task and, accordingly, have not even required a showing of prejudice for reversal. The trial of appellant sub judice presented no comparable scenario. There is nothing in this record to indicate that attorney Cass was anything less than one hundred per cent devoted to the cause of Peter Ventura, and it was not error to deny any request by appellant to dismiss counsel, or a formal motion to withdraw by counsel, predicated upon any alleged conflict of interest. See, Webb, supra; Mills, supra.

Having said the above, the state would candidly recognize that resolution of this point would have been facilitated had further inquiry on this matter been held in the circuit court. Certainly, it would have not been difficult for the prosecutor to have pointed out at the hearing below the fact which later became self evident - Edward Adkins played no role in the prosecution of this case. Nevertheless, appellee would respectfully contend that any failure to further develop the record on this score, or on the part of the judge to further inquire, must be recognized as harmless error, given what subsequently did, and did not, occur at appellant's trial. See, McKee, supra; Kott, supra. To reach any different conclusion would be to reward appellant for

the opacity of his own actions and pleadings. The single most important fact in this case must be that Assistant Public Defender Cass, who would have been in the best position to recognize any actual conflict between two clients of his own office, failed to expressly failed to certify such conflict; assuming Adkins did in fact make any statement concerning appellant, such fact could not have been unknown to Cass, given the fact that it was his investigator who in turn allegedly informed appellant concerning this matter (R 944). Reversible error cannot be predicated upon speculation. See, Sullivan v. State, 303 So.2d 632 (Fla. 1974). The instant conviction should be affirmed in all respects.

POINT III

APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS IMPROPERLY PRESENTED ON APPEAL AND SHOULD BE DENIED WITHOUT PREJUDICE.

In his Initial Brief, appellant contends that attorney Cass rendered ineffective assistance of counsel, under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and Downs v. State, 453 So.2d 1102 (Fla. 1984). It is unclear whether this claim relates to appellant's prior claim of error involving the denial of his counsel's motion to withdraw or whether this is an "independent" claim of error. Appellant recognizes that this matter traditionally is raised by a motion for post-conviction relief, filed pursuant to Florida Rule of Criminal Procedure 3.850, but suggests, in light of this court's decision in Stewart v. State, 420 So.2d 862 (Fla. 1982), that his claim is cognizable on appeal, given the fact that the facts giving rise to it are allegedly apparent on the face of the record. Appellant then proceeds to cite to some nineteen (19) specific sub-allegations of ineffective assistance of counsel, which involve counsel's advising the jury of appellant's prior convictions, counsel's failure to challenge certain jurors or to seek to rehabilitate others, counsel's failure to object to certain hearsay statements, counsel's eliciting testimony concerning appellant's collateral crimes, counsel's failure to object to state-initiated testimony on the same subject, counsel's failure to object to a "key leading question",

counsel's failure to object to certain testimony based upon lack of a predicate, counsel's failure to elicit on cross-examination the fact that certain witnesses allegedly could not identify appellant and counsel's failure to object on the grounds of relevancy to testimony concerning an admission by appellant.

Appellee would suggest that Stewart, which dealt with a claim of ineffective assistance of counsel arising as the result of the denial of a motion for continuance, has proven to be the exception, rather than the rule. Since the rendition of that decision, this court has consistently declined to address claims of ineffective assistance of counsel presented on direct appeal. See, e.g., Perri v. State, 441 So.2d 606 (Fla. 1983); Kelley v. State, 486 So.2d 578 (Fla. 1986). The primary basis for such holdings, which applies here as well, was that the claims of ineffectiveness could not sufficiently be determined based upon the then-present record. Similarly, the other case relied upon by appellant, Gordon v. State, 469 So.2d 795 (Fla. 4th DCA 1985), would also seem to be something of a special case. In such decision, the Fourth District decided to address an ineffectiveness claim presented on direct appeal, given its opinion that the record adequately set forth the facts concerning defense counsel's 104 alleged acts of deficient performance; the court had previously agreed with the state that those claims concerning alleged prosecutorial misconduct had not been preserved due to lack of objection, although it had also noted that the record was "replete" with prosecutorial conduct which it considered to be highly improper. In his concurring opinion, one

member of the panel noted that it was only because of "the gross and patent showing of ineffectiveness virtually conceded by the state on this record" that the court was "taking the highly unusual step of intervening at this stage of the proceedings." Id. at 798 (Anstead, C.J., concurring). Gordon is inapplicable sub judice, and the instant claim should be denied without prejudice to its re-presentation in the proper forum. See also, Antunovich v. State, 491 So.2d 328 (Fla. 1st DCA 1986) (facts supporting appellant's claim of ineffective assistance of counsel not evident from record on direct appeal; claim denied without prejudice to present issue on 3.850).[4]

Some of the sub-allegations of ineffective assistance of counsel represent claims which obviously cannot be resolved without an evidentiary hearing and, specifically, without testimony as to defense counsel's strategy. For instance, it is particularly inappropriate to resolve any claim of ineffective assistance of counsel regarding counsel's failure to challenge certain jurors, or failure to seek to rehabilitate others, based solely upon the "cold" record in this case. As this court noted

[4] The state does not regard this position as inconsistent with that taken in Points I and II, supra, wherein it was asserted that it could be determined, on the basis of the instant record, that denial of appellant's request to discharge his attorney, and/or denial of defense counsel's motion to withdraw, had not resulted in the presentation of an inadequate defense. That conclusion could be reached, based upon a studying of the entire record, given the fact that there was absolutely no evidence of a complete breakdown in communication between attorney and client. As will be argued above, a number of appellant's specific allegations of ineffective assistance of counsel relate to matters of strategy wherein all of the facts were not set forth on the record, inasmuch as such was not adjudged necessary at the time of trial.

in Meeks v. State, 418 So.2d 987 (Fla. 1982), methods of jury voir dire are subjective and highly individualistic with different attorneys; what one attorney, or what one group of attorneys, might consider essential or necessary, another might find to be totally irrelevant. Attorney Cass could quite well have had strong subjective reasons for wishing certain prospective jurors to sit on the jury and/or to wish others not to do *so,* such reasons never revealed for this record. Cf. Wainwright v. Witt, 469 U.S. 810, 105 S.Ct. 844, 83 L.Ed.2d 8841 (1985). For instance, juror Dixon, whom appellant now claims "should" have been stricken, at one point indicated prior reservations concerning the death penalty, although her other answers included a statement that she would not be reluctant to impose it now (R 161-3). It hardly seem equitable to second-guess defense counsel without first affording him a formal hearing, and given the fact that at least some of these'claims should not be resolved on the basis of the current record, it would not seem in the interest of judicial time or economy to proceed piecemeal. Accordingly, this entire claim should be denied without prejudice.[5]

[5] The state would, however, note that it is highly unlikely that appellant could demonstrate prejudice in regard to defense counsel's decision to allow jurors Kirby and Dixon to remain on the jury and/or in regard to defense counsel's decision not to seek to rehabilitate prospective jurors Hopkins or Burdick. Even if those two jurors allegedly predisposed to vote for death had not sat on appellant's jury, no reasonable probability of a different result exists, given the fact that the jury recommendation in this case was by a vote of 11 to 1 (R 904); similarly, even if prospective jurors Hopkins and Burdick had somehow been "rehabilitated", their presence on the jury would likewise have created no reasonable probability of a different result.

Having said the above, the state would, however, briefly note that a number of the allegations of ineffective assistance of counsel simply represent a misreading of the record and/or a misunderstanding of obvious defense strategy and tactics. For instance, as his first allegation, appellant contends that attorney Cass was ineffective for advising the jury during voir dire that appellant had prior convictions and for further failing to strike those jurors who indicated concern on this matter. The record reveals that although four prospective jurors, Adams, Purdy, DeJong and Koneff, all indicated concern as to the fact that appellant had prior convictions, all four of these prospective jurors, as well as the rest of the venire, were specifically advised by the judge that such fact had nothing to do with the presumption of innocence and that it could not be considered as "character evidence", having instead only a limited potential use in impeachment (R 109-111).

Following this instruction, jurors Adams and DeJong, who ended up sitting on appellant's jury, indicated that they could be impartial and properly consider this evidence (R 111-113); in contrast, prospective jurors Purdy and Koneff indicated that they could not be impartial, and both were then stricken for cause, apparently upon defense counsel's motion (R 112, 113-115, 132-3). While appellant now contends that it was "unnecessary" for defense counsel to have advised the jury on this subject, given the fact that appellant did not in fact testify, it is quite possible that the matter of appellant's testifying had not been resolved at the time of voir dire, and that defense counsel

simply reasonably chose to "dampen" the effect of any later revelation concerning appellant's prior convictions. Further, appellee would respectfully suggest that disclosure of appellant's prior criminal conduct was consistent with the overall defense strategy.

This defense strategy, as evidenced by the closing argument, was quite simply to say that appellant had not committed the murder and that he had essentially been "set up" by McDonald (R 774-782, 802-3, 806-8). In establishing McDonald as the "mastermind" of this criminal enterprise, it was in the defense's interest to expose all of McDonald's criminal past, including his involvement in a bank fraud in Chicago. The state respectfully suggests that, in the course of doing *so,* it was a conscious decision by the defense to likewise expose appellant's involvement in that same bank scheme, so that the jury could understand why McDonald might have picked Ventura to implicate; this contention is supported by defense counsel's argument,

> The murder is after the bank scam. Certainly it is. It certainly is and that is one reason that Mr. Ventura was selected to be stalking horse and -- again, don't look at red herrings (R 802).

It is clear that the defense position was that, while Ventura was no angel, neither was he a murderer, inasmuch as defense counsel likewise argued this to the jury,

> And when we talk about revealing who had criminal records, who told you first -- Mr. Ventura told you

> immediately on opening statement. He doesn't profess to be a choir boy. He knows he's done things wrong in his life, but he also did not take the witness stand and regale you with what the state's witnesses did in the manner that they did it. (R 810)

Once one recognizes this defense strategy, it becomes clear that a number of the allegations of ineffective assistance of counsel are simply not well-taken. Specifically, it was, thus, not deficient performance for counsel not to have objected to the testimony of Inspector Berger, Joseph Pike or McDonald, to the extent that they discussed appellant's prior involvement in the mail fraud scheme engineered by McDonald (R 479, 481, 496-7, 630, 651). Further, as noted earlier, Pike's testimony concerning his conversation with appellant on May 6, 1981 did not relate to any "future" crime, but rather to appellant's statements concerning this murder (R 498-9); likewise, there was nothing irrelevant in the testimony of Reginald Barrett concerning appellant's statement that "Jack in Atlanta" had wanted him to "burn someone", inasmuch as this testimony related directly to the murder of Robert Clemente (R 527). Finally, appellant never satisfactorily explains upon what basis defense counsel was to have objected to the testimony of Timothy Arview, who stated that appellant had admitted to him that he had committed a contract murder in Florida in 1981 (R 679-80); it is difficult to credit appellant's present position that this testimony was "irrelevant".

The only matters which remain would seem to represent a number of "technical" objections not made. Appellee suggests that the purpose of an inquiry into the competence of counsel is not to allow later counsel to read the record and to note every point at which he would have interposed an objection. It would not seem that the vast majority of the "hearsay" objections now asserted are well-taken, inasmuch as some of the testimony is not hearsay, the declarants were otherwise present or available, and defense strategy, which involved not "contesting" the fact of the murder, would further explain the lack of objection to certain matters (R **365, 431, 455, 465, 471, 477-9,** 524-7**, 548-50, 552, 558, 560-6, 568, 575, 686-8).** Further, although appellant chastises attorney Cass for not objecting, on the grounds of lack of proper predicate to the introduction of certain business records, there is no indication that any such objection would have had any chance of success; in all instances, the witnesses testified that the document in question had been prepared in the normal course of business (R **595, 601, 611, 614-15).**

Additionally, appellant's further contentions that defense counsel should have cross-examined these witnesses on their alleged inability to recognize appellant at trial are particularly unconvincing. The reason for this omission is made quite obvious during closing argument, when defense counsel reminded the jury that the state, who, of course, bore the burden of proof in the proceeding, had never asked these witnesses to identify appellant, thus clearly implying that the witnesses would have been unable to do so if asked (R **779-780).** In any

event, as previously argued, this claim should be denied without prejudice to its presentation in the proper forum. The instant conviction should be affirmed in all respects.

POINT IV

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON FLIGHT, ASSUMING THAT THIS POINT IS PROPERLY PRESERVED FOR APPELLATE REVIEW.

In his brief, appellant contends that it was reversible error for Judge Hutcheson to have instructed the jury, at the state's request, on the inferences which they could draw from any evidence of flight on the part of appellant; this instruction read:

> You are instructed that when a suspected person in any manner endeavors to escape or evade a threatened prosecution, by flight, concealment, resistance to a lawful arrest or other after the fact indication of a desire to evade prosecution, such fact may be shown in evidence as one of a series of circumstances from which guilt may be inferred. (R 816-17)

Appellant argues that there was insufficient evidence to warrant this instruction, suggesting that the factors set forth by this court in Bundy v. State, 471 So.2d 9 (Fla. 1985), were not present, such factors including an awareness by the defendant of the fact that he was a suspect and, inter alia, whether there was a sufficient time delay from the commission of the crime to the time of the flight. Appellant also argues that the instruction given in this case was improper because it "did not state that evidence of flight is not a presumption of guilt but only a circumstance which may be considered and weighed by the jury." (Initial Brief at 31).

Before proceeding to the merits of this claim, appellee would initially question whether it is properly preserved for review. While not wishing to add to the already plentiful allegations of ineffective assistance of counsel presented in Point **111**, supra, the state would contend that no contemporaneous specific objection was interposed to the giving of this instruction, such objection, of course, necessary to preserve the issue for appeal (R 731-4, 742-3, 812-824). The relevant exchange in this regard would seem to be the following, in which defense counsel identified for the court the leading precedent on this matter, Mackiewicz v. State, 114 So.2d 684 (Fla. 1959):

> THE COURT: As I recall, was flight ever a standard instruction?
>
> MR. STARK [Prosecutor]: No.
>
> MR. CASS [Defense Counsel]: In the Marcowitz (phonetic) case, a 1942 case, Your Honor -- excuse me, Mr. Stark, **I** ,have been through that argument and lost it a number of times.
>
> THE COURT: *So* even though you would not want to have it in there --
>
> MR. CASS: **I** really prefer not to.
>
> THE COURT: But you can't cite any legal authority that would say that **I** should not give it. (R 731).

Appellee respectfully suggests that the above statement of "preference" by counsel cannot be considered a contemporaneous specific objection sufficient to present the arguments now presented on appeal. See, e.g., Castor v. State, 365 So.2d 701

(Fla. 1978); Steinhorst v. State, 412 So.2d 332 (Fla. 1982). This claim is procedurally barred. See, e.g., Straight v. State, 97 So.2d 903 (Fla. 1981); Jones v. State, 411 So.2d 165 (Fla. 1982); Peavy v. State, 442 So.2d 200 (Fla. 1983); Jackson v. State, 522 So.2d 802 (Fla. 1988).

Assuming, in the alternative, that this claim is properly presented, no reversible error has been demonstrated. In this case, the state adduced evidence to the effect that appellant left Florida immediately after the murder, proceeding to California prior to returning to Illinois, that appellant was arrested for this murder in Illinois, that he posted bond and that he later "jumped bond" and failed to appear for a subsequent hearing (R 457, 567-8, 571, 643). Indeed, appellant was a fugitive for five years and was arrested in Texas, while living under an assumed name, and, apparently after altering his appearance (R 575, 677-681). At the time of his arrest in Texas in 1986, appellant initially gave his name as "Juan Contras", and, indeed, when asked for identification by the police, supplied an identification card bearing this name (R 689). The state would respectfully suggest that the above evidence more than warranted an instruction upon flight. See, Maciewicz, supra; Daniels v. State, 108 So.2d 755 (Fla. 1959); Washington v. State, 432 So.2d 44 (Fla. 1983); Bundy, supra; Harvey v. State, 529 So.2d 1083 (Fla. 1988). Appellant's use of a false name at the time of arrest was certainly relevant, see, Weston v. State, 452 So.2d 95 (Fla. 1st DCA 1984), and appellant's prior flight from the authorities would clearly seem to have been motivated by

his arrest in this case. Cf. Shively v. State, 474 So.2d 352 (Fla. 5th DCA 1985).

Given the otherwise overwhelming evidence of guilt, any error in this regard would, in any event, have been harmless. See, Schafer v. State, 14 F.L.W. 37 (Fla. January 19, 1989). Appellant's contention that the instruction as drafted, which would seem to bear great resemblance to the text of Maciewicz and Daniels, somehow "misadvised" the jury as to the weight to which they should afford this evidence is simply incorrect. Appellant's conviction should be affirmed in all respects.

POINT V

APPELLANT'S CHALLENGES TO THE CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY STATUTE AS APPLIED ARE PROCEDURALLY BARRED, IN THAT THEY WERE NEVER PRESENTED TO THE TRIAL COURT; APPELLANT'S SENTENCE OF DEATH IS PROPER AND SHOULD BE AFFIRMED.

In his brief, Ventura's appellate counsel has basically presented a soliloquy and/or harangue as to what he thinks is wrong with the manner in which Florida's death penalty statute is applied. While conceding that the statute has been found to be facially constitutional, see, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), appellant contends that this court has simply not been doing its job in narrowly construing the aggravating circumstances. Appellant points to what he perceives to be inconsistency in this court's rulings regarding the applicability of that aggravating circumstance involving a defendant's prior convictions, section 921.141(5)(b), that aggravating circumstance involving great risk of death to others, section 921.141(5)(c), that aggravating circumstance involving the homicide being especially heinous, atrocious or cruel, section 921.141(5)(h) and that aggravating circumstance involving the homicide being cold, calculated and premeditated, section 921.141(5)(i); appellant also complains of this court's allegedly inconsistent handling of the matter of lack of remorse. Appellant suggests that this court cannot adequately review capital cases without also reviewing all other cases in which a

life sentence has been imposed, and states that, as to the existence of mitigating circumstances, this court is apparently in a better position, than the trial court, to "find and consistently apply aggravating and mitigating circumstances." (Initial Brief at 43).[6]

Whatever the surface appeal of the above arguments, the simple fact remains that no claim of error has been preserved in this regard, in that appellant made no challenge to the constitutionality of Florida's death penalty statute on any basis in the trial court. This court has consistently held that claims such as this, regarding the alleged unconstitutional application of a statute, must be first presented to the trial court before being raised on appeal. See, e.g., Trushin v. State, 425 So.2d 1126 (Fla. 1982); Eutzy v. State, 458 So.2d 755 (Fla. 1984); Swafford v. State, 533 So.2d 270 (Fla. 1988). Accordingly, this claim is procedurally barred, and, in light of the 'recent decision by the Supreme Court of the United States, Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038 (1989), appellee would respectfully urge this court to expressly apply the procedural bar in its opinion in this case. Under Harris, unless the last state court to hear a claim expressly finds the existence of procedural default, no federal court will subsequently honor

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[6] This argument by appellant,' to the effect that this court should in effect, be the sentencer in all capital cases and actually find the aggravating and mitigating circumstances is difficult to square with the claim presented in Point VI, infra, in which he contends that the death penalty is unconstitutionally applied in Florida because the jury does not make these same findings (Initial Brief at 45-50). Apparently, in appellant's view, everyone is to have a role at sentencing in Florida except the trial judge.

these independent state grounds and rules of procedure. Appellant sub judice is particularly undeserving of any "right to review'' as to this claim, given the fact that this point on appeal is solely the creation of appellant's appellate attorney, and the trial court was afforded absolutely no opportunity to correct any error in this regard.

Further, the claims presented on appeal, in addition to being procedurally barred, are largely inapplicable to the death sentence in this case. If appellant's appellate counsel truly wishes to challenge this court's application of those aggravating circumstances involving the defendant's prior convictions, the existence of great risk of harm to others and the homicide being especially heinous, atrocious or cruel, he should present such arguments in a case in which these aggravating circumstances are found. Inasmuch as appellant's sentence of death is instead premised upon two other aggravating circumstances, that the homicide was committed for pecuniary gain, section 921.141(5)(f), and that it was committed in a cold, calculated and premeditated manner, section 921.141(5)(i), with nothing being found in mitigation, appellant simply lacks standing to contest the application of those aggravating circumstances not found as part of his sentence. Cf. Clark v. State, 443 So.2d 973 (Fla. 1983). Similarly, appellant's complaints regarding this court's handling of "lack of remorse'' are irrelevant, given the fact that no allegation has been made that such was allegedly improperly considered in this case, and the record would fail to support any such allegation. Appellant's complaints regarding the alleged

need for this court to consider noncapital cases as well was rejected in Copeland v. State, 457 So.2d 1012 (Fla. 1984), and his arguments regarding the manner in which this court reviews death sentences would seem totally contrary to prior precedent. See, e.g., Hudson v. State, 14 F.L.W. 41 (Fla. January 19, 1989).

The state would also contend that any claim of "vagueness" as to the death sentence in this case is particularly unwarranted. As noted, this sentence is premised upon the finding of two aggravating circumstances, those relating to pecuniary gain and the cold, calculated and premeditated manner nature of the homicide, and a finding of nothing in mitigation. In his findings of fact, Judge Hutcheson set forth with exemplary detail the bases for these findings (R 1046-50). This murder was a "contract" killing or "murder for hire". This court has expressly held that the cold, calculated and premeditated aggravating circumstance was intended to apply to exactly such an offense, see, e.g., McCray v. State, 416 So.2d 804 (Fla. 1982); Cannady v. State, 427 So.2d 723 (Fla. 1983), and in Rogers v. State, 511 So.2d 526 (Fla. 1987), this court clarified that this aggravating circumstance was properly found where it was clear that the murder had occurred as a result of a "careful plan or prearranged design to kill." See also, Banda v. State, 536 So.2d 221 (Fla. 1988). This court has approved the finding of this aggravating factor under comparable circumstances. See, e.g., Hoffman v. State, 474 So.2d 1178 (Fla. 1985) (contract killing properly found to be cold, calculated and premeditated); Koon, supra (contract killing, in which defendant lured victim from

home on pretext of business meeting, and then executed him with shotgun, which had been expressly secured earlier for such purpose, properly found to be cold, calculated and premeditated).

Similarly, Judge Hutcheson's finding that the homicide was committed for pecuniary gain is in accordance with this court's precedents, in that such finding has been applied in regard to other "contract" killings or murders where the defendant has expected to receive a specific "payoff". See, e.g., Antone v. State, 382 So.2d 1205 (Fla. 1980) (contract killing); Downs v. State, 386 So.2d 788 (Fla. 1980) (contract killing); Byrd v. State, 481 So.2d 468 (Fla. 1985) (victim murdered so that defendant could collect life insurance proceeds); Kelley, supra (victim murdered so that defendant and victim's wife could live on inheritance); Buenoano v. State, 527 So.2d 194 (Fla. 1988) (victim poisoned so that defendant could collect life insurance proceeds and veterans benefits). Additionally, in Echols v. State, 484 So.2d 568 (Fla. 1985), a case involving a contract killing in which the defendant had hoped to benefit from a share of the victim's estate, this court expressly held that the aggravating circumstances of pecuniary gain and cold, calculated and premeditated did not merge or impermissibly double in a situation such as this, where a well-planned contract murder has been committed so that the defendant will receive a monetary benefit. Accordingly, the finding of these two aggravating circumstances sub judice represents anything but a "vague" application of the statute, and appellant's sentence of death should be affirmed.

Appellee would likewise suggest that the trial court's finding of nothing in mitigation is in accordance with this court's decision in Rogers, supra. At the penalty phase in this case, the defense presented three witnesses (R **861-880**). These witnesses included appellant's daughter, Deborah Vallejo, who testified that her father loved children and had been very supportive of her and had counseled her to stay away from criminal activity (R **871-3**); this witness also noted on cross-examination that she had not seen her father in ten years (R **873-4**). The defense also called Cleon Zotas, who testified that he had been appellant's business partner in the past, and that he considered him to be a law abiding sober person (R **876-8** ; again, on cross-examination, this witness indicated that he had not been associated with appellant for up to fifteen or sixteen years (R **879**). Finally, the defense called Larry Gainly, an unofficial prison minister, who had met with appellant during his pretrial incarceration in this case, and who testified that appellant had responded well to religion (R **862-4**). It is clear from his sentencing order that Judge Hutcheson considered all of this evidence, inasmuch as he made specific reference to it, but that he concluded that it was of no mitigating value (R **1049-50**); such conclusion is certainly reasonable, given the fact that none of these witnesses was in contact with appellant at the time that he committed the instant homicide. It was, of course, up to Judge Hutcheson to assign weight, if any, to this testimony offered in mitigation. See, e.g., Daugherty v. State, **419** So.2d 1007 **(Fla. 1982)**; Stano v. State, **460** So.2d **890** (Fla. **1984)**; Johnston, supra.

Finally, it is clear that the death sentence in this case is not disproportionate when considered in light of other comparable cases. See, Garcia v. State, 492 So.2d 360 (Fla. 1986). Judge Hutcheson, after a thorough inquiry, was simply unable to find anything in mitigation. The judge, however, was more than justified in finding the two extremely strong aggravating circumstances that he did. Surely, a "contract killing" must be regarded as cold-blooded in the extreme. In this case, the victim and his murderer were virtually total strangers. There was no ill will or animosity between them. Instead, Robert Clemente was singled out for execution simply because his death would pay "dividends" for others with financial problems or simple greed. Whereas to appellant this may have simply represented another "job", to society this type of conduct merits the severest sanction possible - the death penalty. Appellant's vague and overbroad challenge to Florida's capital sentencing statute is procedurally barred, in that it was never presented to the trial court and is improperly raised on appeal. The instant sentence of death should be affirmed in all respects.

POINT VI

APPELLANT'S CHALLENGE TO HIS SENTENCE OF DEATH, ON THE GROUNDS THAT THE JURY DID NOT EXPRESSLY "FIND" ANY FACTORS IN AGGRAVATION, IS PROCEDURALLY BARRED, IN THAT THIS CLAIM WAS NEVER PRESENTED TO THE TRIAL COURT.

In his brief, appellant presents one final point on appeal, claiming that his sentence of death must be reversed because, under Florida's capital sentencing scheme, the jury does not make express findings in aggravation. As in the preceding point on appeal, the state maintains that this claim is procedurally barred, in that this matter was never presented to the trial court as required by state procedure. This court has consistently held that claims such as this, involving the alleged unconstitutional application of a statute, must first be presented to the trial court before being raised on appeal'. See, Trushin, supra; Eutzy, supra; Swafford, supra. Accordingly, this argument has been waived, and, in light of the recent decision by the Supreme Court of the United States, Harris v. Reed, supra, appellee would respectfully urge this court to expressly apply the procedural bar in its opinion in this case. Under Harris, unless the last state court to hear a claim expressly finds the existence of procedural default, no federal court will honor these independent state grounds and rules of procedure. Appellant sub judice is particularly undeserving of any "right to review" as to this claim, given the fact that this point on appeal is solely the creation of appellant's appellate attorney,

and the trial court was afforded absolutely no opportunity to correct any error in this regard.

While appellee, in light of the above, does not find that this claim "deserves" to be addressed, given its procedural default, the state would simply briefly point out that appellant's argument ignores the clear meaning of the Supreme Court of the United States opinion, Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d **340** (1984), as well as the very existence of other precedents, such as Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). Spaziano not only holds that there is no constitutional mandate that a jury be the sentencer in capital sentencing, but also holds that no Fifth Amendment violation has occurred when a judge overrides a jury recommendation of life, in that the recommendation does not become a "judgment" simply because it comes from the jury. Obviously, Spaziano stands for the proposition that a sentence of death need involve no express findings in aggravation by a jury, inasmuch as Spaziano contemplates a result in which a sentence of death is imposed solely based upon the findings by the sentencing judge, as an "override" of a jury recommendation of life. To the extent that any ambiguity exists, Cabana v. Bullock eliminated such, in that, in such decision, the Court cited to Spaziano for the proposition that it was now clear that a jury's constitutional role in sentencing was not the equivalent of its role in determining guilt or innocence. Id. 106 S.Ct. at 698, n.4.

Finally, although appellant cites to McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), it is difficult to see why, inasmuch as such decision is directly contrary to his argument. In McMillan, the Court held that there was no requirement that a defendant's possession of a firearm be treated as an element of an underlying criminal offense, as opposed to a sentencing consideration, so that a jury finding would be required prior to the imposition of any enhanced sentencing. In language highly pertinent to appellant's point, the Court wrote,

> Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact. See, Spaziano v. Florida, 468 U.S. at ___, 104 S.Ct. at Id. 106 S.Ct. at 2420 (emphasis supplied).

Thus, McMillan, squarely holds that the Sixth Amendment does not require exactly what appellant maintains that it does. Assuming that this claim were not procedurally barred, appellant would still merit no relief.

This claim, or a variation thereof, has, of course, been presented to this court in the past and rejected. See, e.g., Brown v. State, 473 So.2d 1260 (Fla. 1985); Provenzano v. State, 497 So.2d 1177 (Fla. 1986); Hildwin v. State, 531 So.2d 124 (Fla. 1988). It is expected that appellant may argue that this claim

has received new "vitality" in light of a concurring opinion in Burch v. State, 522 So.2d 810, 814 (Fla. 1988) (Shaw, J. joined by Ehrlich and Grimes, J.J., concurring in part, dissenting in part); such argument could only result from a complete misreading of that opinion, which, far from expressing any doubt as to the the current application of Florida's capital sentencing structure, simply underscores its correctness. Additionally, it is also expected that appellant may point to the recent decision of the Ninth Circuit, Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988). It is the undersigned's opinion that Adamson will, in all likelihood, be the subject of considerable controversy, as well as further litigation, and appellee would respectfully submit that its holding as to this claim is directly contrary to Spaziano and McMillan. In any event, as previously argued, appellant sub judice lacks standing to present this issue, given his failure to present it to the trial court below. The instant sentence of death should be affirmed in all respects.

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[7] Indeed, Adamson is an en banc decision, and of the eleven members of the court, only six joined the majority as to this holding; four members specifically dissented on the grounds that the majority had misapplied Spaziano and McMillan. See, Adamson at 1045, 1053-5 (Brunetti, C.J., joined by Alarcon, Beezer and Thompson, J.J.J., concurring in part, dissenting in part).

CONCLUSION

WHEREFORE for the aforementioned reasons, the instant conviction of first degree murder and sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY tha't a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished, by U.S. Mail to Thomas R. Mott, Esquire, counsel for appellant, at **528** North Halifax Avenue, Post Office Box **2055**, Daytona Beach, FL **32018** this 27 day of March, **1989**.

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