IN THE SUPREME COURT OF FLORIDA

PETER VENTURA,

Appellant,

v. Case No.: 84,222

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

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GYPSY BAILEY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #0797200

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904)488-0600

COUNSEL FOR APPELLEE

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Preliminary Statement

Appellee, the State of Florida, the prosecuting authority in the lower court, will be referred to in this brief as the state. Appellant, PETER VENTURA, the defendant in the lower court, will be referred to in this brief as Ventura. All references to the instant record on appeal will be noted by the symbol "PCR"; and all references to the record on appeal in Ventura's direct appeal, Ventura v. State, 560 So. 2d 217 (Fla. 1990), this Court's case number 71,975, will be noted by the symbol "OR." All references will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

In Ventura v. State, 560 So. 2d 217 (Fla. 1990), this Court affirmed Ventura's conviction for first degree murder and sentence of death. In his direct appeal, Ventura raised the following issues: (1) the trial court failed to conduct a full inquiry into (a) the nature of Ventura's claims of a conflict of interest and his request to discharge court appointed counsel and (b) court appointed counsel's motion to withdraw; (2) the trial court erred in not granting Ventura's request to discharge counsel and counsel's motion to withdraw; (3) Ventura did not receive effective assistance of counsel due to multiple errors allegedly committed during the course of his trial; (4) the trial court erred in giving a flight instruction; (5) Florida's death penalty statute did not require the jury to consider the elements that statutorily define the crime for which the death penalty may be imposed; and (6) Florida's death penalty statute did not truly limit the class of persons who are eligible for the death penalty.

On March 2, 1992, Ventura filed a postconviction motion with a special request for leave to amend (R 367-78). In this motion, Ventura listed 11 issue headings without presenting argument:

CLAIM I

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. VENTURA'S CASE IN THE POSSESSION OF CERTAIN STATE AND FEDERAL AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OT THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. MR. VENTURA CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

CLAIM II

MR. VENTURA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. A FULL ADVERSARIAL TESTING DID NOT OCCUR. COUNSEL'S PERFORMANCE WAS DEFICIENT AND AS A RESULT MR. VENTURA'S CONVICTION IS UNRELIABLE.

CLAIM III

MR. VENTURA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL'S PERFORMANCE WAS DEFICIENT AND AS A RESULT THE DEATH SENTENCE IS UNRELIABLE.

CLAIM IV

MR. VENTURA WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED

DEFENSE COUNSEL'S REPRESENTATIVE INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

CLAIM V

MR. VENTURA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO AN ACTUAL CONFLICT OF INTEREST WHICH ADVERSELY AFFECTED DEFENSE COUNSEL'S REPRESENTATION OF MR. VENTURA, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM VI

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. VENTURA'S CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VII

MR. VENTURA'S SENTENCING JUDGE RELIED UPON MR. VENTURA'S FAILURE TO PRESENT HIS VERSION OF THE OFFENSE TO FIND AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM VIII

THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

CLAIM IX

MR. VENTURA'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. VENTURA TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. VENTURA TO DEATH. FAILURE TO OBJECT OR ARGUE EFFECTIVELY RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.

CLAIM X

MR. VENTURA'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE AGGRAVATING CIRCUMSTANCES, AND THE AGGRAVATORS WERE IMPROPERLY ARGUED AND IMPOSED, IN VIOLATION OF MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XI

MR. VENTURA'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

(R 373-75).

On March 30, 1992, the state moved to dismiss this motion on the basis that claims one through six failed to adequately state a claim upon which relief could be granted, and claims seven through eleven could and should have been raised on direct appeal (R 395-96). On April 15, 1992,[1] the trial court granted the state's motion, finding that:

> 1. Claims 1 through 6 of the defendant's motion fail to adequately state a claim upon which relief can be granted in that they lack specificity as to factual allegation[s] and/or legal argument to support relief under Rule 3.850. The conclusory allegations contained within the defendant's motion present nothing more than a mere outline

[1] The order is dated April 15, 1992, but was filed by the Clerk's Office on April 16, 1992 (R 400).

> of potential claims and constitute a sham pleading without adequate detail or specificity to provide substance to the claims. In addition, and more specifically grounds 2 through 6 of the motion fail to meet the standard for specificity in identifying alleged deficiencies of trial counsel and in alleging and demonstrating actual prejudice under the standard of Strickland v. Washington, 466 U.S. 668 (1984). The claims raised in grounds 1 through 6 of the defendant's motion for post-conviction relief are therefore dismissed; however, the court dismisses these claims without prejudice to allow the defendant to present justification or excuse for failure to properly present these claims at a hearing on May 9, 1992, at 1:00 P.M. before this Court.
>
> 2. Claims 7 through 11 of the defendant's motion for post-conviction relief also lack legal and factual specificity and will be dismissed as legally insufficient upon which this court could grant relief. Alternatively, the court finds, as argued by the state, that the claims apparently attempt to raise trial/ appellate issues that could and should have been raised on direct appeal and are therefore procedurally barred in a motion for post-conviction relief under Rule 3.850. Accordingly, claims 7 through 11 are dismissed with prejudice.

(R 400-01).[2] On April 28, 1992, 12 days after the order of dismissal was entered, Ventura filed an objection to the state's proposed order granting the state's motion to dismiss (R 402-04). On May 22, 1992, 36 days after the

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[2] At the bottom of this order was a notation that copies were sent to the state attorney's office and Ventura's counsel (R 401).

order of dismissal was entered, Ventura moved for rehearing, and included amendments to claims seven through eleven of his postconviction motion (R 405-49).

On May 8, 1992, the trial court held the hearing referred to in numbered paragraph one of its order of dismissal. Paul Harvill, a CCR investigator, testified that the records' custodian of the Volusia County Sheriff's Office had represented that "the integrity of that file was secure," but could not vouch for the investigator's file because that was not within her immediate custody (R 57). When Harvill reviewed the files he received, he observed that documents and tapes referred to in those files were not there (R 60-93). The trial court asked the parties to prepare a list of exactly those items which were missing from the sheriff's files (R 94).

On June 8, 1992, the trial court entered an order compelling the production of documents by various agencies pursuant to chapter 119 (R 450-56). Ventura moved for reconsideration of this order (R 457-90). On August 31, 1992, the Florida Parole Commission filed a response to the chapter 119 order, asking the trial court to vacate said order (R 491-505).

On September 21, 1992, Ventura moved to compel chapter 119 disclosure, moved for sanctions, and requested an order

to show cause (R 506-691). Therein, Ventura stated that the Volusia County Sheriff's Office had permitted counsel to review some documents, but that some documents still were being withheld (R 509). On October 2, 1992, Don Reeves and the Medical Examiner's Office responded to this motion and requested denial of same (R 692-95). On October 21, 1992, the Volusia County Sheriff's Office responded to this motion, seeking denial of same (R 696-711).

On May 21, 1993, the trial court conducted a hearing on the chapter 119 issues (R 122-351). Ventura dismissed his motion to compel "insofar as it applie[d] to the Florida Parole Commission, the Florida Department of Law Enforcement . . . ." and the Medical Examiner's Office (R 133, 138, 145). Deputy Sheriff Bernard Buscher testified that he did not have in his possession any photographs taken during the investigation of the Robert Clemente murder (R 160-61); that he did not recall interviewing Stewart Chapman (R 166); that he had no notes in his possession (R 169); that he had no recollection of interviewing Butch Kendrickson and no recollection of whether such an interview was taped (R 178); that he had no bank records in his possession (R 184); that he kept no personal file separate from the sheriff's office (R 185); that any notes or tapes he took would have been placed in the file at the sheriff's office (R 185); that he did not know where the fingerprints and photographs were (R

190); and that he did not recall interviewing a number of people listed in his supplemental reports (R 191-92).

Bobbie Sheets, in charge of the Central Records Division of the Volusia County Sheriff's Office, testified that she had withheld none of the files requested by Ventura (R 214); that, at one time, deputy sheriffs kept personal files separate from the files in the sheriff's office, but that practice had stopped with the election of Sheriff Vogel (R 216-18); and that she had no personal knowledge of whether personal files were kept in Ventura's case (R 219).

Deputy Sheriff David Hudson testified that he kept a personal file, separate from the files in the sheriff's office, in the Clemente and Krom investigations (R 227); that this "personal file" was made up of copies of the originals sent to records (R 227, 280-81); that he had no personal knowledge of whether other deputies engaged in this practice (R 229); that he did not recall taking any notes or taping the deposition of Jerry Wright (R 230); that he did not recall receiving information from Ed Berger (R 231); that he did not have a letter from Edward Adkins in his possession and did not recall what he did with it (R 242); that he had nothing in reference to the Ventura case in his possession (R 252); that tapes of interviews were probably retained after transcription (R 254); and that any materials he possessed on Ventura were turned over in 1988 when he left the criminal investigative division (R 280).

Deputy Sheriff Edward Carroll testified that his role in the Clemente murder investigation was that of supervisor (R 305); that he did not recall whether he took notes at the Thayer interview (R 310); that, although he kept notes before preparing a report, he did not retain them after completing a report (R 311-12); that he had no specific recollection of destroying his notes (R 312); that he had no specific recollection of whether he kept his notes from several interviews (R 312-14, 324-26, 329); that he had no recollection of what happened to the photographs taken by Sgt. Hardy and did not have them in his possession (R 318-19); that he had no independent recollection of obtaining phone tolls on Gloria Ventura's phone (R 323); that he had no knowledge of the whereabouts of the tape of the interviews of Reggie Smith and Joseph Pike (R 329-31); and that he had nothing in his possession relevant to the Ventura case -- "Anything that was developed by [him] during the course of this investigation would have been turned in" (R 334).

Sgt. Randall Burnsed testified that he participated in the investigation of the murders of both Clemente and Krom (R 340); that the inventory list he prepared was placed in the case file (R 341); and that, if he took notes during interviews, he would have incorporated the same information in any reports he prepared (R 344).

Deputy Sheriff William Hyde testified that he participated in the Clemente murder investigation by responding to the initial call (R 346); that he did no further follow up investigation (R 346); and that it was not his "habit to make field notes. Whatever [he] wr[o]te [he] wr[o]te on the initial report at the time." (R 347). Although Ventura had one other witness -- Deputy Sheriff Zarolita -- he released him from his subpoena (R 347-48).

On June 24, 1993, the trial court denied Ventura's motion to compel, motion for sanctions, and request for order to show cause. The court found that the Volusia County Sheriff's Office had not "unlawfully refuse[d] to permit the public records in its possession to be inspected, examined or copied." (R 736).

On May 20, 1994, Ventura filed an amended motion for rehearing and included argument for all eleven issues raised in his postconviction motion (R 738-923). The trial court held a hearing on this motion on May 25, 1994 (R 352-66). On July 15, 1994, the trial court denied this motion:

> The State argues that there is no authority for the defendant to file an amended motion for rehearing raising new issues not raised in his original 3.850 motion or his originally filed motion for rehearing, and that the motion should be procedurally barred.
>
> The State further argues, in the alternative, that if the merits of the

> defendant's amended motion for rehearing are addressed, then it raises nothing new and fails to show any actual prejudice to the defendant and there is no showing that [the] trial outcome would have been any different had the alleged evidence been presented to the jury.
>
> This Court accepts the argument of the State that the defendant's amended motion for rehearing is procedurally barred as there is no authority for filing same and raising new issues.

(R 924).

On August 11, 1994, Ventura filed another postconviction motion, alleging that, although he had received only some of the public records he had requested, he filed the motion in "a gesture of good faith," despite his belief that he had a full 60 days from the date full disclosure under chapter 119 occurred to amend his postconviction motion. Motion at 1-7.[3] On August 12, 1994, Ventura filed his notice of appeal to this Court. On September 26, 1994, the state filed a motion to strike the postconviction motion. On May 8, 1995, the trial court struck this postconviction motion because the court had "lost jurisdiction because of the pending appeal before the Florida Supreme Court."

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[3] This motion is not contained in the record on appeal.

Ventura subsequently moved to have this Court relinquish jurisdiction for the trial court to consider the August 1995 postconviction motion. The state objected, pointing out that the same claims had been presented in the amended motion for rehearing which had been presented to the trial court and was contained in the instant record on appeal. This Court denied Ventura's request for relinquishment.

SUMMARY OF THE ARGUMENT

Issue I

The trial court correctly dismissed Ventura's postconviction motion as facially insufficient and correctly denied Ventura's amended motion for rehearing as improper. The postconviction motion contained no argument or factual support. The motion for rehearing was untimely and improper, as it presented new argument and factual allegations on the procedurally barred issues. The amended motion for rehearing was also untimely and improperly, as it presented new argument and factual allegations on all eleven issues.

Issue II

The trial court properly denied Ventura's motion to compel, motion for sanctions, and request for an order to show cause. Ventura voluntarily dismissed these motions as to all parties except the Volusia County Sheriff's Office. After a full and fair hearing on chapter 119 disclosure by the sheriff's office, the trial court properly concluded that Ventura had not been refused any public records.

Issue III

The trial court was not required to attach portions of the record which demonstrated Ventura was entitled to no

relief. Rule 3.850 requires attachments only when a denial is not predicated on the legal insufficiency of the motion. Here, the trial court dismissed Ventura's motion based strictly on legal insufficiency.

Issue IV

The trial court correctly determined that chapter 119 material had not been withheld from Ventura. Ventura voluntarily withdrew his motion to compel against FDLE, and, in event, failed to request *in camera* inspection. Ventura can show no error in the trial court's conclusion that the Volusia County Sheriff's Office had provided Ventura access to its files, and failed to move for rehearing on this point.

Issue V

The trial court correctly denied Ventura an evidentiary hearing on his claims that trial counsel was ineffective, the state withheld evidence, and newly discovered evidence existed. Counsel cannot be ineffective for failing to present evidence the state allegedly withheld. Further, Ventura has never delineated which of the evidence is newly discovered of Brady material, and has not demonstrated all of the requirements of Brady and Jones.

Issue VI

The trial court correctly denied Ventura's request for an evidentiary hearing on the claim that trial counsel was ineffective in jury selection and presenting mitigating evidence. Kirby and Dixon unequivocally indicated they could base their decision on the evidence presented and law provided by the judge, while Burdick and Hopkins indicated that they could not, despite rehabilitative questions. Further, counsel called three witnesses in the penalty phase which established the mitigation now urged by Ventura.

Issue VII

Trial counsel was not ineffective for failing to object to the errors substantively addressed in Issue IX, X, XI, and XII herein. These are substantive claims cast in ineffectiveness language to avoid the procedural bar. In any event, Ventura cannot establish deficient performance or resulting prejudice.

Issue VIII

The trial court correctly denied Ventura an evidentiary hearing on his claim that trial counsel had an actual conflict of interest based on his status as a law enforcement officer and his overburdened office. This claim was known to Ventura at the time he filed his original

postconviction motion, and should have been presented therein. The claim about counsel's overburdened office is spurious, as an incorrect name of a state witness on a few pleadings in no way establishes deficient performance or prejudice.

Issue IX

The trial court properly found procedurally barred Ventura's claim that the trial court impermissibly commented on his right to remain silent, because Ventura did not raise this issue on direct appeal. In any event, the trial court's remark was not susceptible of being interpreted as a comment on Ventura's right to remain silent.

Issue X

The trial court correctly found procedurally barred the issue concerning the court's consideration of mitigating evidence, because Ventura failed to raise this issue on direct appeal to this Court. In any event, the trial court carefully considered all evidence submitted in mitigation.

Issue XI

The trial court properly found procedurally barred the issue concerning the instruction of the jury as to its role in sentencing, because he failed to raise it in the trial court and on direct appeal. In any event, there is nothing

in this record which reflects that the court applied an express presumption of death or required Ventura to carry the burden of proving that death was inappropriate. Further, counsel was not ineffective for failing to object because the standard jury instructions, as given by the trial court, accurately described the role of the jury under Florida law.

Issue XII

The trial court properly found procedurally barred the issue concerning the jury instructions on the CCP and pecuniary gain aggravating factors, because he failed to object in the trial court and failed to raise this issue on direct appeal.

Issue XIII

Cumulative harmful error did not occur during Ventura's trial. Ventura not only received a fair trial, but was represented effectively by counsel, received accurate jury instructions at the time of his trial, and was sentenced properly by the trial court after careful consideration of all aggravating and mitigating circumstances.

ARGUMENT

Issue I

WHETHER THE TRIAL COURT CORRECTLY DISMISSED VENTURA'S POSTCONVICTION MOTION AS FACIALLY INSUFFICIENT AND CORRECTLY DENIED VENTURA'S AMENDED MOTION FOR REHEARING.

Ventura claims that the state intentionally violated his due process rights by denying him a forum within which to present his claims discovered through the chapter 119 process. As the state's statement of the case and facts presented herein shows, the state has not attempted to deny Ventura due process, but instead has sought to have Ventura present them in a legally sufficient, procedurally correct, and timely fashion.

Admittedly, Ventura filed his March 1992 postconviction motion in a timely fashion. However, the filing was pointless because the motion contained absolutely no supporting factual allegations or argument for each claim. This pleading served no other purpose than to list the issue headings for arguments and facts that presumably would be added in the future. See Appendix. Under the express terms of the rule itself, this pleading was facially insufficient and properly dismissed. See Mitchell v. State, 581 So. 2d 990, 991 (Fla. 1st DCA 1991); Flint v. State, 561 So. 2d 1343, 1344 (Fla. 1st DCA 1990); Tillman v. State, 366 So. 2d 1259, 1260 (Fla. 1st DCA 1979); Jones v. State, 234 So. 2d 379 (Fla. 2d DCA 1970).

Ventura complains that this barebones motion was necessitated by the early filing of his postconviction motion eight months before the two year time limitation of **Fla. R. Crim. P.** 3.850. Ventura had 16 months within which to prepare a facially sufficient postconviction motion, a time period which is longer than the 12 months now allotted to capital defendants under rule 3.850. See **Fla. R. Crim. P.** 3.851(b)(1) Commentary ("There is a justification for the reduction of the time period for a capital prisoner as distinguished from a noncapital prisoner, who has two years to file a postconviction relief proceeding. A capital prisoner will have counsel immediately available to represent him or her in a postconviction relief proceeding, while counsel is not provided or constitutionally required for noncapital defendants to whom the two-year period applies.").

As evidenced by 1994 amendment to rule 3.851 and Porter v. State, 20 Fla. L. Weekly S152 (Fla. Mar. 28, 1995), this Court obviously did not contemplate the stalling of postconviction proceedings in the trial court for indefinite time periods while chapter 119 disclosure occurred. See **Fla. R. Crim. P.** 3.851 Commentary ("postconviction proceedings should proceed in a deliberate but timely manner"). Considering that Ventura had 16 months within which to prepare a sufficient postconviction motion, there

is no reasonable explanation why chapter 119 disclosure was not being vigorously pursued during this 16 month period prior to the filing of the motion. Further, because Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1992), Mendyk v. State, 592 So. 2d 1076, 1081 (Fla. 1992), State v. Kokal, 562 So. 2d 324, 326-27 (Fla. 1990), Provenzano v. Dugger, 561 So. 2d 541, 546-47 (Fla. 1990), existed at the time this Court amended rule 3.851, this Court must have contemplated that chapter 119 disclosure would be sought as soon as postconviction counsel had been assigned to a capital case, i.e., within 30 days after the judgment and sentence become final. **Fla. R. Crim. P.** 3.851(b)(3).

In any event, although the trial court dismissed claims seven through eleven of Ventura's postconviction motion with prejudice due to their being procedurally barred, the trial court dismissed claims one through six without prejudice, allowing Ventura the opportunity to show why they should not be dismissed. Importantly, at no time did the court absolutely preclude Ventura from amending his postconviction motion as he acquired relevant chapter 119 materials. Indeed, implicit in this dismissal without prejudice was Ventura's ability to refile an additional, proper motion. See Eir, Inc. v. Electronic Molding Corp., 540 So. 2d 260 (Fla. 5th DCA 1989); see also **Black's Law Dictionary** Without Prejudice at 825 (5th ed. 1983) ("A dismissal 'without

prejudice' allows a new suit to be brought on the same cause of action. The words 'without prejudice,' as used in judgment, ordinarily import the contemplation of further proceedings, and, when they appear in an order or decree, it shows that the judicial act is not intended to be res judicata of the merits of the controversy."). See also **Fla. R. Crim. P.** 3.851(b)(3) (the "time limitation shall not preclude the right to amend or to supplement pending pleadings pursuant to these rules.").

Despite the court's having left the door open on claims one through six, Ventura did not pursue that potential avenue of relief immediately. Instead, he amended claims seven through eleven, the procedurally barred claims, and submitted argument on these claims in a motion for rehearing. Notably, Ventura did not challenge the finding of procedural bar, but argued these claims on the merits as if there had been no finding of procedural bar. These tactics were both inexcusable and inexplicable: These claims remained procedurally barred; argument on the merits did not change that fact; and chapter 119 materials were not needed to argue these points.

Furthermore, Ventura filed his motion for rehearing untimely, 36 days after the trial court had entered its

order of dismissal.[4] Under **Fla. R. Crim. P.** 3.850(g), Ventura had only 15 days within which to file a rehearing motion. Despite the untimeliness of this motion, Ventura did not seek an extension of time or permission from the trial court to accept his motion as timely filed. See **P. J. Padovano, Florida Appellate Practice** Rehearing & Clarification **§** 15.4 at 254 (1988 ed.) ("An untimely motion for rehearing is likely to be summarily rejected by the appellate court, but that is not always the case. The time limitation on motions for rehearing or clarification is not jurisdictional. Therefore, a belated motion for rehearing could be considered by the appellate court even though the party filing the motion has no *right* to have it considered.") (emphasis in original; footnote omitted).

Although the trial court inadvertently failed to rule on this motion for rehearing,[5] this oversight in no way legitimized Ventura's next tactic. Chapter 119 disclosure

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[4] Ventura claims he never received a copy of the trial court's order of dismissal, but learned of the dismissal on May 8, 1992. Initial Brief at 2 n.4. Although the 15 day time period for a motion for rehearing expired on April 30, 1992, Ventura did not seek an extension at the May 8th hearing or file a motion for rehearing shortly after the May 8th hearing, asking that it be accepted as timely filed. Instead, he waited another two weeks to file his motion for rehearing.

[5] "There is only one way to ensure that a motion for rehearing or clarification will be considered and that is to file the motion within the applicable time period." **P. J. Padovano, Florida Appellate Practice** Rehearing & Clarification **§** 15.4 at 255 (1988 ed.)

was taking place, and a hearing was held at which counsel voluntarily dismissed his motion to compel as it applied to the Parole Commission, FDLE, and the Medical Examiner's Office. In June 1993, the trial court found that the Volusia County Sheriff's Office had not unlawfully refused disclosure. Nevertheless, Ventura waited until a year after this order (and more than two years since the filing of his postconviction motion) to file his amended motion for rehearing which contained facts and arguments as to all eleven issues.

Separate and apart from the untimely nature of his motion for rehearing, Ventura's amended motion for rehearing was untimely in its own right. Under Florida law, an amended motion for rehearing must still be filed within the 15 day time period. Morgan v. Amerada Hess Corp., 357 So. 2d 1040, 1045 (Fla. 1st DCA 1978); Cali v. State, 111 So. 2d 703, 707 (Fla. 2d DCA 1959).

Moreover, arguments cannot be presented for the first time on a motion for rehearing. Sarmiento v. State, 371 So. 2d 1047, 1052 (Fla. 3d DCA 1979), aff'd, 397 So. 2d 643 (Fla. 1981). See also Araujo v. State, 452 So. 2d 54 (Fla. 3d DCA 1984). In an appellate context, motions for rehearing "must state with particularity the points of law or fact the appellate court has 'overlooked or misapprehended.' There is no other proper ground that can

be used to support a request for reconsideration of an appellate decision. The rehearing procedure was not established to allow the unsuccessful party a second opportunity to argue his or her case." **P. J. Padovano, Florida Appellate Practice** Grounds for Rehearing **§** 15.2 at 251 (1988 ed.).

Similarly, in a postconviction context, a rehearing motion should point out those matters that need to be reheard, i.e., points of law or fact overlooked or misapprehended by the trial court in its order. Accordingly, the new arguments provided in Ventura's amended motion for rehearing, intended to supplement the bare issue headings listed in Ventura's postconviction motion, were improperly presented in a rehearing posture. As the trial court found, these arguments could have, and should have, been presented in the postconviction motion itself. See also **Fla. R. Crim. P.** 3.851(b)(3) (permitting the amendment and supplementation of pending postconviction motions); Woods v. State, 531 So. 2d 79, 83 (Fla. 1988) (rule 3.851 "was implemented to further some degree of finality in postconviction proceedings and to bring more order to such proceedings. We do not encourage piecemeal litigation.") (citation omitted).

Ventura's overarching concern in his initial brief is what should he have done, if his March 1992 postconviction

motion was facially insufficient, if his motion for rehearing and amended motion for rehearing were improper fora for the presentation of facts and argument for the first time, and his August 1994 postconviction motion untimely? Clearly, Ventura should have filed a procedurally correct motion within the time period prescribed by rule 3.850. The language in this rule prescribing the contents and time limitations serve a distinct purpose: "[T]o provide for the just determination of every criminal proceeding" and "to secure simplicity in procedure and fairness in administration." **Fla. R. Crim. P.** 3.020. Without the limitations, chaos would reign supreme, with motions being filed at any time without specific factual allegations and argument. Absent the filing of an initially proper postconviction motion, Ventura should have amended his March 1992 postconviction motion prior to dismissal and within the two year time period of the rule, and not placed his substantive arguments in a rehearing motion which, by its own definition, precluded the presentation of new facts and argument.

Moreover, Ventura has evaded the taxing question of what the trial court was supposed to do. The March 1992 postconviction motion could easily be classified as a "sham pleading" and was certainly deserving of dismissal: It gave the court nothing to consider, and presented five claims

which were unquestionably procedurally barred. When Ventura presented the court with a motion for rehearing, which asked that nothing be reheard, but provided argument only on the procedurally barred points, what was the court supposed to do? When Ventura presented a amended motion for rehearing two years after the filing of his postconviction, and argued all eleven points for the first time, what was the trial court supposed to do? The state submits that the court was supposed to have done exactly as it did.

This is especially so, considering that Ventura failed to specify for the trial court, as to his "true" chapter 119 claim,[6] which evidence was newly discovered and which was Brady material.[7] This distinction was a critical one for Ventura to make for the court, as the focuses of these two types of claims are inherently different. As this Court is well aware, a Brady violation occurs when the state suppresses evidence favorable to an accused if that evidence is material to guilt or punishment. Brady, 373 U.S. at 87. Evidence is material, however, "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have different." United States v. Bagley, 473 U.S. 667, 682 (1985). Under a claim of newly discovered evidence, a

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[6] Issue V herein.

[7] Brady v. Maryland, 373 U.S. 83 (1963).

determination should be made by the court as to whether such evidence, had it been introduced at trial, probably would have resulted in an acquittal. Jones v. State, 591 So. 2d 911 (Fla. 1991).

However, considering the lengthy, unwieldy, and overwhelming character of the instant issue five, presented in the amended motion for rehearing as claim two, even if the trial court had overlooked the procedural problems with this motion, the court would have been left in a quagmire as to what to do with these claims on the merits. Thus, the trial court properly dismissed Ventura's postconviction motion. Ventura's motion for postconviction relief was facially insufficient, his motion for rehearing untimely and improper, and his amended motion for rehearing tardy and improper.

Issue II

WHETHER THE TRIAL COURT PROPERLY DENIED VENTURA'S MOTION TO COMPEL, MOTION FOR SANCTIONS, AND REQUEST FOR ORDER TO SHOW CAUSE.

Ventura claims the trial court erroneously denied his motion to compel, motion for sanctions, and request for an order to show cause, because "[c]learly records existed and clearly Mr. Ventura was entitled to those records."[8] Initial Brief at 28. The record on appeal belies this claim.

On June 8, 1992, the trial court entered a seven page order on Ventura's request for the production of documents pursuant to chapter 119, Florida Statutes, ordering various persons and agencies to provide copies of various listed documents (R 450-56). On June 12, 1992, Ventura requested reconsideration of this order, asking the court to consider his proposed order which contained a finding that state agencies had not complied with 119 requirements to date and a statement that penalties would be considered for noncompliance (R 457-90).

On September 21, 1992, Ventura moved to compel disclosure of 119 documents, moved for sanctions, and

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[8] The state responds, to the extent that these are actually appealable orders. See Richardson v. Watson, 611 So. 2d 1254, 1255 (Fla. 2d DCA 1992).

requested an order to show cause (R 506-691). In May 1993, the trial court held a hearing on the 119 issues, at which Ventura narrowed his claims strictly to the Sheriff's Office (R 133, 138, 145) and at which various employees of the Sheriff's Office testified (R 160-348). On June 24, 1993, the trial court denied Ventura's motion to compel, finding that the Sheriff's Office had not refused unlawfully to permit public records to be inspected (R 736).

The record clearly shows that the trial court complied with the dictates of chapter 119 and this Court's case law[9] in having a full hearing on Ventura's claims, assessing the testimony presented at the hearing, and considering the argument of counsel. The employees of the Sheriff's Office testified that they did not have any notes, files, tapes, etc. in their possession; that if they had such things in their possession during the investigation, they were turned over to the records division when the investigation was completed; that the Ventura file kept in the records division was secure; and that the records division had withheld nothing requested by Ventura. Thus, all public records in the possession of the Sheriff's Office have been

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[9] Namely, Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1992); Mendyk v. State, 592 So. 2d 1076, 1081 (Fla. 1992); State v. Kokal, 562 So. 2d 324, 326-27 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541, 546-47 (Fla. 1990).

given to Ventura, and the trial court committed no error in so concluding.

Issue III

WHETHER THE TRIAL COURT ATTACHED SUFFICIENT PORTIONS OF THE RECORD IN ITS ORDER DENYING VENTURA'S POSTCONVICTION MOTION.

Ventura claims the trial court failed to attach to its order of denial portions of the record demonstrating that he was entitled to no relief. Initial Brief at 28. Because the trial court based its order of dismissal on the legal insufficiency of the motion, it was not required to attach portions of the record.

In its order, the trial court specifically found all 11 claims facially insufficient (R 400-01). Rule 3.850, Florida Rule of Criminal Procedure, provides: "In those instances when such denial is not predicated upon the legal insufficiency of the motion on its face, a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief shall be attached to the order." Under the express terms of this rule, the trial court had no duty to attach portions of the record. See Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993) ("To support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion.") (citing Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990)); State v. Reynolds, 238 So. 2d 598,

600 (Fla. 1970) ("If the motion is defective in form or substance and insufficient to state a prima facie case entitling a prisoner to relief, the Court may make a summary disposition. If the motion appears to be sufficient, but the files and records in the case *conclusively* refute the allegations or otherwise *conclusively* preclude relief, summary denial is proper.") (emphasis in original); Richardson v. State, 617 So. 2d 801 (Fla. 2d DCA 1993) (if postconviction motion fails to set forth factual basis or contains little beyond conclusory allegations, it may be denied summarily without attaching record excerpts).

Issue IV

WHETHER THE TRIAL COURT CORRECTLY DETERMINED THAT CHAPTER 119 MATERIAL HAD NOT BEEN WITHHELD FROM VENTURA.

Ventura claims that FDLE has continued to withhold materials from his inspection, alleges that the Volusia County Sheriff's Office "finally" released its file regarding Marshall Krom (a file that "is far from complete") but still has not provided a number of items, and now requests all public records from the Volusia County State Attorney's Office, the Volusia County Sheriff's Office, and the Daytona Beach Police Department.[10] Initial Brief at 30-32.

Regarding his claim against FDLE, Ventura has failed to inform this Court that, at the chapter 119 hearing, counsel specifically withdrew its motion to compel as to the Parole Commission, FDLE, and the Medical Examiner's Office (R 133, 138, 145). Ventura should not be permitted to simply change his mind at this juncture: He represented to the trial court that he would not pursue anything further as to FDLE, and should be held to that decision. See Swafford v. State, 636 So. 2d 1309, 1311 n.5 (Fla. 1994) (this Court found the chapter 119 issue procedurally barred, and noted that

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[10] The state responds, to the extent that an appealable order exists.

counsel had expressed satisfaction with disclosure in the trial court).

Furthermore, Ventura has failed to show that he sought to have the documents FDLE allegedly withheld examined *in camera* by the trial court. Clearly, this Court envisioned such a request by a capital defendant when documents sought pursuant to chapter 119 are withheld. See Mendyk v. State, 592 So. 2d 1076, 1081 (Fla. 1992); State v. Kokal, 562 So. 2d 324, 326-27 (Fla. 1990).

Regarding his claim against the Sheriff's Office, Ventura must overcome the barrier of an express finding by the trial court, after a full hearing, that that agency complied with chapter 119 and lawfully provided Ventura access to all of its files. Moreover, Ventura never moved for rehearing regarding the trial court's chapter 119 findings. Because Ventura cannot show how that holding was error, he cannot prevail on this point.

Finally, as to Ventura's new chapter 119 requests, this Court should remind Ventura that this is not the proper forum for presenting such requests. Because Ventura was aware of Marshall Krom from the disclosure by the Sheriff's Office, he should have pursued this vein with the other agencies he now lists at that time, not on appeal after his postconviction motion has been denied and chapter 119 hearings have been concluded.

Issue V

WHETHER THE TRIAL COURT CORRECTLY DENIED VENTURA AN EVIDENTIARY HEARING ON HIS CLAIMS THAT TRIAL COUNSEL WAS INEFFECTIVE, THAT THE STATE WITHHELD EVIDENCE, AND THAT NEWLY DISCOVERED EVIDENCE EXISTED.

For approximately 36 pages in his initial brief, Ventura recounts evidence, that he describes as both material and relevant, which was not presented in the guilt phase of his trial due to counsel's ineffectiveness, the state's withholding of same, and its not being discovered until later, but which would have made a difference in the outcome of his trial. Initial Brief at 33-69. Thus, Ventura claims that he was entitled to an evidentiary hearing below.

Regarding Ventura's claim of ineffectiveness, such a claim and a claim that the state has withheld evidence are mutually inconsistent. After all, "[c]ounsel cannot be considered deficient in performance for failing to present evidence which allegedly has been improperly withheld by the state." Roberts v. State, 568 So. 2d 1255, 1259 (Fla. 1990). See also Williamson v. Dugger, 651 So. 2d 84, 88 (Fla. 1994); Swafford v. State, 569 So. 2d 1264, 1267 (Fla. 1990).

Regarding Ventura's other two claims, Ventura failed to specify for the trial court whether the evidence recounted

under this issue was newly discovered or Brady material. Ventura also failed to show how this evidence was material and relevant, the source of this evidence, who would substantiate this evidence in any hearing, its reliability, why he could not have discovered this evidence earlier, the steps he took to discover this material, or, most importantly, whether this evidence probably would have resulted in a different outcome at trial. Without this critical information, the nagging question remains, how was the trial court supposed to evaluate the need for an evidentiary hearing?

In failing to prove the critical aspects noted above, and in presenting this evidence to this Court in the form of "he alleged . . . ." as to each item, Ventura appears to be relying on arguments presented to the trial court in his amended motion for rehearing. To the extent that Ventura is relying on arguments below without making them in his initial brief, this tactic is improper and has been rejected by this Court. The purpose of an appellate brief is to present argument in support of points raised on appeal, not simply to state that something was alleged below. See Roberts v. State, 568 So. 2d 1255, 1260 (Fla. 1990); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990).

In any event, the most that can be said about all of this evidence is that it constitutes alternative factual

hypotheses. These scenarios could have been related to the victim's murder, but there is absolutely nothing in Ventura's factual recounting that shows that they in fact were related. Furthermore, Ventura has not demonstrated all of the requirements of Strickland v. Washington, 466 U.S. 668 (1984), Brady v. Maryland, 373 U.S. 83 (1963), Jones v. State, 591 So. 2d 911 (Fla. 1991), to warrant relief on any of these alternative grounds.

Ventura makes two claims regarding Jack McDonald, to which the state can respond. Ventura alleges that the jury did not hear of the deals received by McDonald, and recites excerpts from letters from Assistant State Attorney Stark to the United States Attorney General's Office, to the Federal Public Defender's Office, and to McDonald himself. Initial Brief at 34-38. Ventura has failed to establish the existence of any *quid pro quo*, and has neglected to advise this Court that several of these were written after Ventura was convicted and sentenced.[11]

Ventura also claims that the state intentionally violated McDonald's speedy trial rights so that the murder charges could be dismissed against him. Initial Brief at 38. There has been no showing of this intentional act, and this Court alluded to no such intentional act in its direct

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[11] Written judgment and sentence were entered on January 21, 1988 (OR 1052).

appeal opinion. See Ventura v. State, 560 So. 2d 217, 218 (Fla. 1990) ("[D]ue to a lack of evidence, McDonald was released on a speedy trial violation after spending six months in the Volusia County Jail.").

The only item of evidence identified specifically by Ventura as newly discovered is Jerry Wright's life sentence.[12] Initial Brief at 63. Under Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), this evidence meets the first requirement under Hallman v. State, 371 So. 2d 482 (Fla. 1979), i.e., that it was "unknown by the trial court, by the party, or by counsel as the time of trial" and could not have been known through due diligence.

However, the second requirement, that this evidence be of "such a nature that it would probably produce an acquittal on retrial," Jones v. State, 591 So. 2d 911, 195 (Fla. 1991), cannot be met. McDonald hired Ventura to kill the victim so that Wright could receive the key man insurance proceeds and repay McDonald funds Wright had borrowed from McDonald. See Ventura v. State, 560 So. 2d 217, 218 (Fla. 1990). McDonald and Ventura met many times and chose the murder site together; McDonald paid Ventura several times; McDonald waited on Ventura while Ventura

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[12] Wright received a sentence of life imprisonment on March 6, 1990, which he appealed to the Fifth District Court of Appeal. See Wright v. State, 585 So. 2d 321 (Fla. 5th DCA 1991).

committed the murder; and McDonald and Ventura met after the murder and stayed in touch by phone. Id. Wright, however, asked McDonald to help him find someone to kill the victim and split the insurance proceeds, met Ventura and McDonald one time in Chicago, and paid Ventura one time (with McDonald). Id. Thus, Ventura and Wright were not equally culpable participants in the instant murder, unlike Scott and Robinson in Scott. Compare Garcia v. State, 492 So. 2d 360 (Fla.), cert. denied, 479 U.S. 1022 (1986).

Ventura finally asserts that trial counsel was ineffective for disclosing his convicted felon status to the venire during jury selection; failing to objected to Denise Jorgenson's testimony on hearsay grounds; failing to object to Dr. Schwartz's testimony on hearsay grounds; failing to object to Edward Berger's testimony on hearsay grounds; eliciting from Berger testimony that Ventura was involved in a bank fraud scheme; failing to object during Joseph Pike's testimony to collateral crimes evidence; failing to object during Gary Eager's testimony to collateral crimes evidence; failing to object to David Hudson's testimony on hearsay grounds; engaging in ineffective cross examination of Jack McDonald; failing to object to Juan Gonzalez's testimony on hearsay grounds; failing to disclose his own conflict of interest as a law enforcement officer; and for working in an understaffed and overburdened office. Initial Brief at 60-63.

Ventura has not met his burden in alleging specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance by counsel that prejudiced him. Accordingly, the trial court's summary dismissal of these claims was proper. See Rose v. State, 617 So. 2d 291, 296 (Fla. 1993); Roberts v. State, 568 So. 2d 1255, 1259 (Fla. 1990); Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). Although Ventura included with some of these claims of error some factual allegations, he made no showing of deficiency, much less prejudice.[13] This Court need not examine deficiency where it is evident that the prejudice component of Strickland has not been satisfied. Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla.), cert. denied, 479 U.S. 972 (1986).

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[13] The claims regarding counsel's alleged conflict of interest and the understaffed and overburdened nature of counsel's office are argued in Issue VIII of this and the initial brief.

Issue VI

WHETHER THE TRIAL COURT CORRECTLY DENIED VENTURA'S REQUEST FOR AN EVIDENTIARY HEARING ON THE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN JURY SELECTION AND INVESTIGATING AND PRESENTING MITIGATING EVIDENCE.

Ventura claims that trial counsel was ineffective in failing to challenge jurors Kirby and Dixon who were predisposed to recommend death, in stipulating that Hopkins and Burdick were subject to cause challenges, in failing to rehabilitate Burdick, and in failing to register objections to the jury instructions and the state's closing argument. Initial Brief at 70, 74. Ventura also alleges ineffectiveness of appellate counsel, claiming that counsel should have raised codefendant Wright's sentence as an issue on appeal.[14] Initial Brief at 76.

In his postconviction motion, Ventura presented no facts or argument in support of this claim. In his motion for rehearing, once again Ventura failed to supply any facts or argument. Instead, Ventura waited until more than two years after he filed his postconviction motion to present facts and argument on this point in his amended motion for

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[14] This claim is presented improperly in an appeal from the denial of a postconviction motion for two reasons. First, claims of ineffectiveness assistance of appellate counsel are presented properly in a petition for writ of habeas corpus. Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994). Second, this claim was not presented below and thus is not properly presented here.

rehearing. Based on this failure to present supporting facts and argument in a procedurally correct posture, the trial court correctly dismissed this claim.

Arguments cannot be presented for the first time on a motion for rehearing. Sarmiento v. State, 371 So. 2d 1047, 1052 (Fla. 3d DCA 1979), aff'd, 397 So. 2d 643 (Fla. 1981). See also Araujo v. State, 452 So. 2d 54 (Fla. 3d DCA 1984). In an appellate context, motions for rehearing "must state with particularity the points of law or fact the appellate court has 'overlooked or misapprehended.' There is no other proper ground that can be used to support a request for reconsideration of an appellate decision. The rehearing procedure was not established to allow the unsuccessful party a second opportunity to argue his or her case." P. J. **Padovano, Florida Appellate Practice** Grounds for Rehearing § 15.2 at 251 (1988).

Similarly, in a postconviction context, a rehearing motion should point out those matters that need to be reheard, i.e., points of law or fact overlooked or misapprehended by the trial court in its order. Accordingly, the new argument section on this issue provided in Ventura's amended motion for rehearing, intended to supplement the bare issue heading listed in Ventura's postconviction motion, was improperly presented in a rehearing posture. As the trial court found, these

arguments could have, and should have, been presented in the postconviction motion itself. See also **Fla. R. Crim. P.** 3.851(b)(3) (permitting the amendment and supplementation of pending postconviction motions); Woods v. State, 531 So. 2d 79, 83 (Fla. 1988) (rule 3.851 "was implemented to further some degree of finality in postconviction proceedings and to bring more order to such proceedings. We do not encourage piecemeal litigation.") (citation omitted).

If this Court were to find otherwise, Ventura cannot prove deficient performance or resulting prejudice under Strickland v. Washington, 466 U.S. 668 (1984), regarding jury selection or mitigation.

Jury Selection

Kirby stated that she had no objection to the death penalty (OR 159); there were no circumstances that would cause her automatically to refuse to recommend death or life (OR 160); she could recommend life "according to the circumstances of the evidence" (OR 161); she would not "just say no matter what, give him death. [She] would want to know the circumstances" (OR 161); she would consider both the "aggravators and mitigators" (OR 161); and she did not think she would have a problem recommending life if the mitigating evidence outweighed the aggravating (OR 161).[15]

[15] This last answer was given in response to defense

Dixon stated that she had no objection to the death penalty "today" (OR 162); she had had reservations about it "years ago" (OR 162); there were no circumstance under which she would refuse to impose death or life (OR 163); and she would not be reluctant to recommend death if the state presented sufficient aggravating circumstances which outweighed the mitigating factors (OR 163).

In response to the court's question about whether he had any objections to the death penalty, Hopkins responded:

> Philosophically, I think so, Judge. I have to move slowly when it comes to something like that because I have a higher authority to account to.
>
> I feel that I am not in a position to make a hasty decision after thoroughly, through prayer, and meditation, I have to arrive at my convictions and I feel that I am in no position to make an immediate decision on anything.
>
> * * * *
>
> Well, my Bible tells me to deal only with the facts that I know of and I have seen, and I know as an individual, not from, you know, just a mere

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counsel's question: "And if you felt that the mitigators outweighed the aggravators, would it be pragmatic to recommend life?" (OR 161). It is likely that the word "pragmatic" was transcribed improperly, as it was in the question at the beginning of page 161 -- "[W]ould it be pragmatic for [you] at all to return a life recommendation?" (OR 161). Based on the context and the tone of Kirby's answers, defense counsel probably asked if it would be "problematic" not "pragmatic."

> compilation of information that has arrived from other sources.
>
> I feel that I cannot make an impartial decision when I do not know the circumstances surrounding any circumstances.

(OR 139). The court then asked whether these reservations would interfere with Hopkins's ability to determine Ventura's guilt of innocence; Hopkins said no (OR 140). Hopkins stated that he would have reservations about returning a guilty verdict knowing that death was a possible penalty (OR 140). Hopkins stated that he thought he could "abandon [his] philosophy and religious beliefs" to follow the law regarding aggravation and mitigation and recommend death, but would still "have some kind of reservation" (OR 141-42). Hopkins also stated that his philosophy prohibited the taking of life (OR 143).

Burdick stated that she had objections to the death penalty, but these would not interfere with her ability to objectively determine Ventura's guilt or innocence (OR 174). Burdick "really [did not] know right now" whether she could return a guilty verdict knowing that death was a possible penalty (OR 174). After clarification by the court, Burdick responded that she could not return a verdict of guilty knowing that death was a possible penalty (OR 175).

The test for determining juror competence is whether a juror can lay aside a bias and decide the case solely on the evidence adduced and instructions given. Davis v. State, 461 So. 2d 67 (Fla. 1984); Lusk v. State, 446 So. 2d 1038, 1041 (Fla.), cert. denied, 469 U.S. 873 (1984). Placed in context, both Kirby and Dixon indicated without equivocation that they would base their decision on the evidence presented and could follow the law as given by the court.

Despite rehabilitative questions to both Hopkins and Burdick, they maintained their reservations about even finding Ventura guilty, knowing that death would be a possible penalty. These answers made clear that Hopkins and Burdick could not lay aside their biases.

In Bryant v. State, 601 So. 2d 529 (Fla. 1992), no rehabilitation occurred after defense counsel elicited from 11 prospective jurors their view that the death penalty should be automatically imposed for premeditated murder. This Court noted: "The appropriate procedure, when the record preliminarily establishes that a juror's views could prevent or substantially impair his or her duties, is for either the prosecutor or the judge to make sure the prospective juror can be an impartial member of the jury." Id. at 532. Because neither the prosecutor nor the judge in Bryant engaged in such rehabilitation, this Court reversed solely for resentencing. Here, the record plainly shows

that the trial court attempted to rehabilitate both Hopkins and Burdick to no avail, as their opinions were steadfast.

Because Kirby and Dixon clearly exhibited their ability to follow the law, and Hopkins and Burdick indicated that they could not, even in the face of rehabilitative questions, Ventura cannot meet the Strickland requirements. Ventura is wholly unable to show that his counsel was deficient, i.e., that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." 466 U.S. at 687. After all, trial counsel was in the best position to observe the demeanor of these venire persons. Compare Straight v. Wainwright, 772 F. 2d 674, 680 (11th Cir. 1985) (this type of claim is speculative).

Investigation and Presentation of Mitigation

Ventura claims that defense counsel failed to investigate and present mitigating evidence to the jury, i.e., his parents' leaving Mexico due to poverty; his father working long hours to feed "12 mouths"; the depression; hunger; conversion to the Mennonite Church for purposes of eating; his mother was "a distant woman" and the role of caring for the younger children feel to Ventura; hard worker; and active in church. Initial Brief at 72-73.

During the defense case in the penalty phase, Gainly testified that Ventura was a religious man and encouraged other inmates to attend services (OR 863-64). Ventura's daughter testified that Ventura was a good father, supportive of his children, always supported them (OR 871-72). Zotas testified that Ventura was a law abiding man, provided well for his family, and was a hard worker at two jobs (OR 877). Thus, in large part, the evidence Ventura claims counsel failed to investigate and present to the jury in fact was presented to the jury.

Although the record shows that counsel's performance regarding mitigation was not deficient, this Court need not make a specific ruling regarding performance where it is clear that the prejudice component of Strickland is not satisfied. Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla.), cert. denied, 479 U.S. 972 (1986). Ventura cannot "demonstrate how the failure to introduce any further information regarding his background other than that which was already before the jury prejudicially affected the outcome of his trial." Kennedy v. State, 547 So. 2d 912, 914 (Fla. 1989). Furthermore, Ventura has made no showing of the source of this additional mitigation, or that witnesses were available at the time of trial to substantiate it.

Failure to Object to Jury Instructions and the State's Closing Argument

Under this subclaim, Ventura asserts that counsel erred in failing to object to the jury instructions and the state's closing argument; trial counsel's office was understaffed and overburdened; and codefendant Jerry Wright's sentence of life should now be considered in mitigation. Initial Brief at 75-76.[16] Regarding the first claim, other than stating that counsel was ineffective for failing to object to jury instructions and the state's closing argument, Ventura alleges nothing -- no supporting facts, no argument, no citations. This claim is too insubstantial for the state to respond. To the extent that Ventura relies on his amended motion for rehearing to give this claim substance, this tactic is improper and has been soundly disapproved by this Court. The purpose of an appellate brief is to present argument in support of points raised on appeal, not simply to state that something was alleged below. See Roberts v. State, 568 So. 2d 1255, 1260 (Fla. 1990); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990).

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[16] The second claim has been addressed under Issue VIII, and the third claim under Issue V.

Issue VII

WHETHER VENTURA'S TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE ALLEGED ERRORS ADDRESSED SUBSTANTIVELY IN ISSUES IX THROUGH XII HEREIN.

Ventura claims that his trial counsel was ineffective for failing to object to the errors addressed substantively in Issues IX, X, XI, and XII herein. Initial Brief at 77. He also claims entitlement to an evidentiary hearing on this point, because the record does not conclusively rebut this allegation.

Issues IX, X, XI, and XII are clearly procedurally barred, as found by the trial court. To circumvent the bar, Ventura now casts these claims in terms of ineffective assistance of counsel. Such a tactic is disingenuous and has been disapproved by this Court. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990).

In any event, in his postconviction motion, Ventura presented no facts or argument in support of this claim. In his motion for rehearing, once again Ventura failed to supply any facts or argument. Instead, Ventura waited until more than two years after he filed his postconviction motion to present facts and argument on this point in his amended motion for rehearing. Based on this failure to present supporting facts and argument in a procedurally correct posture, the trial court correctly dismissed this claim.

Arguments cannot be presented for the first time on a motion for rehearing. Sarmiento v. State, 371 So. 2d 1047, 1052 (Fla. 3d DCA 1979), aff'd, 397 So. 2d 643 (Fla. 1981). See also Araujo v. State, 452 So. 2d 54 (Fla. 3d DCA 1984). In an appellate context, motions for rehearing "must state with particularity the points of law or fact the appellate court has 'overlooked or misapprehended.' There is no other proper ground that can be used to support a request for reconsideration of an appellate decision. The rehearing procedure was not established to allow the unsuccessful party a second opportunity to argue his or her case." **P. J. Padovano, Florida Appellate Practice** Grounds for Rehearing **§** 15.2 at 251 (1988).

Similarly, in a postconviction context, a rehearing motion should point out those matters that need to be reheard, i.e., points of law or fact overlooked or misapprehended by the trial court in its order. Accordingly, the new argument section on this issue provided in Ventura's amended motion for rehearing, intended to supplement the bare issue heading listed in Ventura's postconviction motion, was improperly presented in a rehearing posture. As the trial court found, these arguments could have, and should have, been presented in the postconviction motion itself. See also **Fla. R. Crim. P.** 3.851(b)(3) (permitting the amendment and supplementation of

pending postconviction motions); Woods v. State, 531 So. 2d 79, 83 (Fla. 1988) (rule 3.851 "was implemented to further some degree of finality in postconviction proceedings and to bring more order to such proceedings. We do not encourage piecemeal litigation.") (citation omitted).

If this Court were to find otherwise, Ventura's burden in proving deficient performance and resulting prejudice under Strickland v. Washington, 466 U.S. 668 (1984), is insurmountable. Ventura has provided no supporting affidavits from counsel. Regarding Issue IX, the trial court made no comment susceptible of being interpreted as a remark on Ventura's rights to remain silent. Instead, the court, in its sentencing order, stated only that it had one version of events upon which to make its findings, i.e., the medical examiner's. Any objection on this point would have proven fruitless based on a full contextual reading of the trial court's order.

Regarding Issue X, the trial court clearly gave meaningful consideration and effect to evidence presented in mitigation. In its written findings, the trial court recounted the testimony of the three defense witnesses, but found, within its discretion, that this evidence did not outweigh the two aggravating circumstances. Again, an objection by trial counsel would have availed nothing, as the trial court had considered Ventura's mitigation exactly as required by Florida law.

Regarding Issue XI, the trial court did not shift the burden of proving whether Ventura should be sentenced to life or death and did not improperly apply this standard in imposing the death sentence. The court instructed the jury according to the standard jury instructions approved by this Court, and employed those standards in imposing sentence. Accordingly, an objection would have availed nothing.

Finally, regarding Issue XII, the trial court gave the standard jury instruction that was valid at the time of Ventura's trial.[17] Reasonable jurists in 1988 would not have concluded that the instruction was deficient. See Aldridge v. Wainwright, 433 So. 2d 988 (Fla. 1983); Vaught v. State, 410 So. 2d 147 (Fla. 1982). Although counsel could have objected and offered an expanded instruction, the issue is not what counsel could have done. Instead, under Strickland, the focus is on "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." 466 U.S. at 690. Because counsel's conduct at the time of Ventura's trial was reasonable, his performance cannot be deemed deficient.

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[17] Jackson v. State, 648 So. 2d 85 (Fla. 1994), did not issue until six years after Ventura's trial.

Even if counsel's performance could have been deemed deficient on this point, Ventura can make no showing of prejudice. See Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla.), cert. denied, 479 U.S. 972 (1986) (this Court need not examine deficiency if the prejudice component of Strickland clearly is not met). Under any definition of the terms "cold, calculated, and premeditated," the state established this factor beyond a reasonable doubt with extensive evidence of planning for weeks before the murder. Slawson v. State, 619 So. 2d 255 (Fla. 1993); Thompson v. State, 619 So. 2d 261 (Fla. 1993).

Issue VIII

WHETHER THE TRIAL COURT PROPERLY DENIED AN EVIDENTIARY HEARING ON VENTURA'S CLAIM THAT HIS COUNSEL HAD AN ACTUAL CONFLICT OF INTEREST.

Ventura argues that, unknown to him at the time of his 1988 trial, defense counsel Raymond Cass was a deputy sheriff, a status which adversely affected his representation of Ventura. Initial Brief at 77-78. Ventura claims that he learned of counsel's status as an active law enforcement in a 1992 postconviction hearing conducted in State v. Teffeteller. Ventura also alleges that counsel's office was so overburdened and understaffed that counsel could not have represented him effectively.

Cass's Status as a Law Enforcement Officer

By the time Ventura filed his postconviction motion in May 1992, Harich v. State, 542 So. 2d 908 (Fla. 1989), and Harich v. State, 573 So. 2d 303 (Fla. 1990), had issued. In those cases, this Court dealt with a similar issue regarding defense attorney Pearl from Cass's office. After the trial court conducted an evidentiary hearing concerning Pearl's status as a deputy sheriff, it became obvious that this "status" was a result strictly of Pearl's desire to carry a gun and that he had never acted as a deputy sheriff or compromised his position as a defense attorney with this "status."

Accordingly, Ventura's claim that this information is newly discovered falls flat. Clearly, this information was within CCR's knowledge by 1992 and could have been presented completely in Ventura's postconviction motion. Although Swafford v. State, 636 So. 2d 1309 (Fla. 1994),[18] and Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993), issued before Ventura filed his amended motion for rehearing in May 1994, the fact remains that this type of claim was known to Ventura long before 1994. Instead of fully presenting and arguing this claim in a clearly authorized motion for postconviction relief, Ventura waited until an amended motion for rehearing to argue this point comprehensively for the first time (R 831-40).

Arguments cannot be presented for the first time on a motion for rehearing. Sarmiento v. State, 371 So. 2d 1047, 1052 (Fla. 3d DCA 1979), aff'd, 397 So. 2d 643 (Fla. 1981). See also Araujo v. State, 452 So. 2d 54 (Fla. 3d DCA 1984). In an appellate context, motions for rehearing "must state with particularity the points of law or fact the appellate court has 'overlooked or misapprehended.' There is no other proper ground that can be used to support a request for

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[18] There, this Court dealt with the same issue, this time concerning defense attorney Cass. At the evidentiary hearing, Cass testified that he had received a deputy sheriff's card between 1968 and 1971 from a previous sheriff, that he had stopped carrying the card in 1973, and that he had informed CCR about this card in 1990. Swafford, 636 So. 2d at 1311.

reconsideration of an appellate decision. The rehearing procedure was not established to allow the unsuccessful party a second opportunity to argue his or her case." **P. J. Padovano, Florida Appellate Practice** Grounds for Rehearing **§** 15.2 at 251 (1988).

Similarly, in a postconviction context, a rehearing motion should point out those matters that need to be reheard, i.e., points of law or fact overlooked or misapprehended by the trial court in its order. Accordingly, the new argument section on this issue provided in Ventura's amended motion for rehearing, intended to supplement the bare issue heading listed in Ventura's postconviction motion, was improperly presented in a rehearing posture. As the trial court found, these arguments could have, and should have, been presented in the postconviction motion itself. See also **Fla. R. Crim. P.** 3.851(b)(3) (permitting the amendment and supplementation of pending postconviction motions); Woods v. State, 531 So. 2d 79, 83 (Fla. 1988) (rule 3.851 "was implemented to further some degree of finality in postconviction proceedings and to bring more order to such proceedings. We do not encourage piecemeal litigation.") (citation omitted).

Counsel's Overburdened and Understaffed Office

As evidence supporting this claim, Ventura cites to counsel referring to the state's "star witness" Jack McDonald as "Jerry" McDonald in a notice of taking deposition and in a motion for transcription. This claim is absolute bunk. Use of the name "Jerry" instead of "Jack" was an understandable scrivener's error, based on there being two state witnesses whose first names both began with the letter "J," i.e., Jack McDonald and Jerry Wright. Moreover, even if this could be considered a deficiency by counsel, Ventura is wholly incapable of proving prejudice. See Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla.), cert. denied, 479 U.S. 972 (1986).

Issue IX

WHETHER THE TRIAL COURT PROPERLY FOUND PROCEDURALLY BARRED THE ISSUE CONCERNING THE ALLEGED VIOLATION OF VENTURA'S RIGHT TO REMAIN SILENT.

Ventura claims that the trial court violated his right to remain silent by referring in its sentencing order to Ventura's failure to present his version of the facts of the crime, and relied on this "impermissible factor" to prove aggravating circumstances. Initial Brief at 79, 80. Ventura is procedurally barred from raising this issue, because, as the trial court found, he could have raised this issue on direct appeal to this Court. See Reinard v. State, 267 So. 2d 88, 89 (Fla. 2d DCA 1972).

If this Court were to find otherwise, there is no merit to Ventura's claim. In its written order, the trial court recounted the steps leading up to the murder, and then described the victim's actual murder:

> There were no eye witnesses to the murder and the Defendant, VENTURA, a/k/a MARTINEZ, did not present his version, but the evidence showed that the victim was shot four (4) times with one (1) bullet entering one armpit and exiting out the other armpit and the three (3) other bullets being fired into the victim's back. In addition, the victim suffered a head laceration consistent with being clubbed or pistol whipped and appeared to have a defensive type of injury to one of his fingernails as it was nearly torn off.

(OR 1049). As this passage, placed in context of the sentencing order, see Dufour v. State, 495 So. 2d 154, 160 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987); White v. State, 377 So. 2d 1149, 1150 (Fla. 1979), shows, the trial court made no comment susceptible of being interpreted as a remark on Ventura's right to remain silent. See Jackson v. State, 522 So. 2d 802, 807 (Fla.), cert. denied, 488 U.S. 871 (1988) (setting forth and discussing fairly susceptible test). Because there was no testimony from either side about how the victim was actually killed, the trial court obviously relied on the medical testimony to make findings as to the murder. In recounting this testimony, the trial court merely pointed out that it had no other version of events, not that Ventura was required to provide a version and failed to do so.

Issue X

WHETHER THE TRIAL COURT PROPERLY FOUND PROCEDURALLY BARRED THE ISSUE CONCERNING THE COURT'S CONSIDERATION OF MITIGATING EVIDENCE.

Ventura claims that the trial court failed to give meaningful consideration and effect to the evidence he presented in mitigation. Initial Brief at 81. Ventura is procedurally barred from raising this issue, because, as the trial court found, he failed to raise it on direct appeal to this Court. See Engle v. Dugger, 576 So. 2d 696, 702 (Fla. 1991); Atkins v. Dugger, 541 So. 2d 1165, 1166 (Fla. 1989).

If this Court were to determine otherwise, this issue has no merit. During the penalty phase, the state presented no additional evidence (OR 859). Defense counsel called three witnesses. Larry Gainly, a prison minister, testified that he had known Ventura for about 14 months (OR 862); during that time, he saw Ventura once or twice a week (OR 868). During those 14 months, Gainly saw Ventura change spiritually to receive Jesus Christ as his Lord and Savior (OR 863). Ventura helped Gainly in his ministry by encouraging other prisoners to "come out and hear the message of Jesus Christ" (OR 864).

Deborah Vallejo, Ventura's daughter, testified that he had been a good father and a wise man (OR 871), and that she loved him (OR 872). Vallejo stated that she had lived in

California for the past 10 years, and had kept in touch with her father mainly by phone calls (OR 874). Cleon Zotas testified that he had known Ventura for about 40 years (OR 876). Zotas stated that Ventura was a good family man who worked two jobs when young, was a hard worker, had his own business in which he was "super," and was a sober man and law abiding citizen (OR 877-78). Zotas admitted that, between the early 1970's and 1982, he did not associate with Ventura (OR 879), and that he had heard Ventura had gotten "in a little bit of trouble here and there" (OR 879).

In its written order, the trial court reviewed the mitigating evidence:

> The mitigating circumstance argued by the Defendant, PETER VENTURA, a/k/a JOSE MARTINEZ, regarding any other aspect of the defendant's character or record, and any other circumstances of the offense, does not outweigh the aggravating circumstances listed above, which this Court has found to exist beyond a reasonable doubt.
>
> As to the one (1) mitigating circumstance, the defense offered testimony of three (3) witnesses in support of it.
>
> The defendant's daughter testified that her father was a loving, kind individual.
>
> A friend of the defendant who had known him for 40 years and at one period of time employed the defendant testified that he was a good person and the defendant was worth saving.

> The defense also called a lay minister who ministers to prisoners in Volusia County Jail and he testified that Mr. VENTURA, a/k/a MARTINEZ, has been attending his classes and has seemed to have accepted Jesus Christ and that in the lay minister's opinion, Mr. VENTURA, a/k/a MARTINEZ, was worth saving.
>
> In conclusion, this Court finds that there are two (2) aggravating circumstances as listed above which have been proved beyond and to the exclusion of a reasonable doubt and there are no mitigating circumstances.

(OR 1049-50).

This written order evidences the trial court's careful consideration and review of the mitigating evidence presented by Ventura. Compare Barwick v. State, 20 Fla. L. Weekly S405, S407 (Fla. July 20, 1995). Within its discretion, the trial court determined that this evidence was too slight to outweigh the weighty aggravating factors.

Issue XI

WHETHER THE TRIAL COURT PROPERLY FOUND PROCEDURALLY BARRED THE ISSUE CONCERNING THE INSTRUCTION OF THE JURY AS TO ITS ROLE.

Ventura claims that the trial court shifted to him the burden of proving whether he should be sentenced to life or death, improperly applied this standard in imposing sentence, and that defense counsel was ineffective for failing to object, without acknowledging the trial court's finding of procedural bar. Initial Brief at 85-87. Ventura is procedurally barred from raising the first two parts of this issue in this appeal, because he failed to raise them either in the trial court or in his direct appeal to this Court.

At the beginning of the penalty phase of Ventura's trial, the trial court instructed the jury: "The final decision as to what punishment shall be imposed rests solely with the Judge of this Court; however, the law requires that you, the jury, render to the Court an adviso[]ry sentence as to what punishment should be imposed upon the Defendant." (OR 858). After penalty phase closing arguments, the trial court instructed the jury:

> [I]t is now your duty to advise the Court as to what punishment should be imposed upon the Defendant, Peter Ventura for his crime of the First Degree Murder of Robert G. Clemente. As

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

Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings.

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: (1) The capital felony was committed for pecuniary gain. (2) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole for 25 years.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider, if established by the evidence, are: (1) Any other aspect of the Defendant's character or record, and any other circumstances of the offense.

> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

(OR 900-01).

In its oral sentencing findings, the trial court stated: "[T]he Court has considered the aggravating and mitigating circumstances presented in the evidence in this case and determined that sufficient aggravating circumstance[s] exist; and that there are insufficient mitigating circumstances to out[weigh] the aggravating circumstances." (OR 914). In its written order, the trial court, after making explicit findings concerning the aggravating factors, stated: "The mitigating circumstance argued by the Defendant, PETER VENTURA, a/k/a JOSE MARTINEZ, regarding any other aspect of the defendant's character or record, and any other circumstances of the offense, does not outweigh the aggravating circumstances listed above, which this Court has found to exist beyond a reasonable doubt." (OR 1049).

Ventura did not object to these instructions, despite the fact that Caldwell v. Mississippi, 472 U.S. 320 (1985), existed at that time. Furthermore, Ventura did not raise this issue in his direct appeal to this Court. Accordingly, the trial court properly found the first two parts of this issue procedurally barred. See Harvey v. Dugger, 650 So. 2d

982 (Fla. 1995); Jackson v. Dugger, 633 So. 2d 1051, 1053-54 (Fla. 1993). See also Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989) (in the context of Caldwell claims, "the Florida Supreme Court has faithfully applied its rule that claims not raised on direct appeal cannot be raised on postconviction review.").

If this Court were to determine otherwise, it is clear these issues had no merit.

> Even if the judge's reference to the weighing of mitigating circumstances against aggravating circumstances could be read to imply the existence of some mitigating circumstances, there is nothing in this sentencing order or in this record which reflects that the court applied an express presumption of death or required [the defendant] to carry the burden of proving that death was inappropriate.

Hamblen v. State, 546 So. 2d 1039, 1041 (Fla. 1989). The court read from the standard jury instructions approved by this Court, and employed those standards in Ventura's imposing sentence.

The trial court also correctly determined that no evidentiary hearing was necessary on the third part of this issue, i.e., that counsel was ineffective for failing to object to the jury instruction. A claim of ineffective assistance of counsel will warrant an evidentiary hearing only where the defendant alleges specific facts that are not

conclusively rebutted by the record and that demonstrate a deficiency in counsel's performance that prejudiced the defendant. Roberts v. State, 568 So. 2d 1255 (Fla. 1990). Prejudice is demonstrated if the deficiency was sufficient to render the result unreliable. Gorham v. State, 521 So. 2d 1067 (Fla. 1988).

Ventura can demonstrate no deficiency by counsel on this point. See Mendyk v. State, 592 So. 2d 1076, 1080-81 (Fla. 1992); Robinson v. State, 574 So. 2d 108, 113 (Fla. 1991). The challenged instructions accurately described the role of the jury under Florida law. See **Fla. Std. Jury Instr. (Crim.)** Penalty Proceedings -- Capital Cases 78, 81-82 (1985). Thus, "there is no basis for a Caldwell claim." Dugger v. Adams, 489 U.S. at 407. See also Harich v. Dugger, 844 F. 2d 1464, 1472-79 (11th Cir. 1988).

Issue XII

WHETHER THE TRIAL COURT PROPERLY FOUND PROCEDURALLY BARRED THE ISSUE CONCERNING THE JURY INSTRUCTIONS ON THE CCP AND PECUNIARY GAIN AGGRAVATING FACTORS.

Ventura claims that his jury received constitutionally inadequate instructions on the CCP and pecuniary gain aggravating factors, without acknowledging the trial court's express finding of procedural bar (R 401). Regardless of the actual instruction below, it is clear that Ventura is procedurally barred from raising this claim now, because he failed to object in the trial court and failed to raise this point on direct appeal to this Court.

Ventura's claim that he raised this issue on direct appeal is not accurate. Ventura raised only two challenges to the penalty phase of his trial. One issue alleged that Florida's death penalty statute was impermissibly vague and was applied unfairly, discriminatorily, and arbitrarily, see Initial Brief at 44, and the other claimed error in the failure of the death penalty statute to require the jury to make express findings in aggravation, see Initial Brief at 49. At no point in his initial brief did Ventura expressly challenge the jury instructions concerning the aggravating circumstances. Furthermore, the record in his direct appeal makes clear that Ventura did not challenge the jury instructions regarding either aggravating factor in the

trial court (OR 854). Ventura did not raise this issue on direct appeal, and this Court expressly noted that the only two issues Ventura raised on direct appeal regarding his sentence had not been raised in the trial court.[19] Finally, although Ventura raised this issue in his motion for rehearing of the trial court's order dismissing his postconviction motion, Ventura's motion for rehearing was untimely and improper.

Accordingly, the trial court's determination of procedural bar is correct. See Harvey v. Dugger, 650 So. 2d 982, 987-88 (Fla. 1995) ("Because Harvey did not object to these instructions or request legally sufficient alternative instructions, these claims are procedurally barred."); Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994) ("Claims that the instruction on the cold, calculated and premeditated aggravator is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal."); Lightbourne v. State, 644 So. 2d 54, 59 (Fla. 1994) ("[A]lthough Lightbourne did object to these aggravating circumstances, he did so only on the grounds that the evidence did not support the instructions. Because Lightbourne did not make a specific

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[19] (1) Florida's death penalty is unconstitutional because the jury did not expressly find any factors in aggravation and did not limit the class of people who are death eligible; and (2) Florida's death penalty is applied unconstitutionally. Ventura, 560 So. 2d at 221.

objection as to the validity of the instructions, the claim is not preserved for appeal."). If Ventura did not approve of the wording of the CCP instruction, he could and should have objected specifically on that point and asked for an expanded instruction.

Issue XIII

WHETHER CUMULATIVE HARMFUL ERROR OCCURRED DURING VENTURA'S TRIAL.

Ventura claims that he did not receive a fair trial because "the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive." Initial Brief at 92. Ventura has failed to indicate how these errors individually, much less cumulatively, resulted in his receiving an unfair trial. The record makes clear that Ventura not only received a fair trial, but was represented effectively by counsel, received accurate jury instructions at the time of his trial, and was sentenced properly by the trial court after careful consideration of all aggravating and mitigating circumstances.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm the lower court's denial of Ventura's motion for postconviction relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GYPSY BAILEY
Assistant Attorney General
Florida Bar #0797200

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Stephen M. Kissinger, Assistant Capital Collateral Representative, Office of the Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this 14th day of September, 1995.

GYPSY BAILEY
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

PETER VENTURA,

Appellant,

v. Case No.: 84,222

STATE OF FLORIDA,

Appellee.

_____/

APPENDIX

March 1992 Postconviction Motion

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

CASE NOS. 81-1939-AA
86-2822-CFAES

STATE OF FLORIDA

v.

PETER VENTURA, - 69368

Defendant.

_____/

FILED
MAR 2 '92

MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND

PETER VENTURA, Defendant in the above-captioned action, respectfully moves this Court for an Order, pursuant to Fla. R. Crim. P. 3.850, vacating and setting aside the judgments of conviction and sentence, including his sentence of death, imposed upon him by this Court. In support thereof, Mr. Ventura, through counsel, respectfully submits as follows:

1. Mr. Ventura's Rule 3.850 motion presents substantial claims challenging the validity of his convictions and sentences including his sentence of death. As will be demonstrated below, Mr. Ventura is entitled to the relief he seeks.

2. Mr. Ventura also requests an evidentiary hearing. As will be demonstrated below, such a hearing is more than warranted in this case on the basis of the claims presented in this action. This Court should conduct an evidentiary hearing at a time when

the Court, Mr. Ventura's counsel, and the State's representatives can delve into the facts of this case -- important facts which were not disclosed at trial -- with thought, with care, and with reason.

3. Under the two-year filing limitation period of Rule 3.850, Mr. Ventura's motion is not due to be filed until October 29, 1992. However, Mr. Ventura's Rule 3.850 motion is being filed eight (8) months prematurely in order to comply with schedules which have been established to prevent the signing of death warrants:

> In March, the Bar agreed it would try to find volunteer attorneys to help relieve overburdening at the Office of Capital Collateral Representative. The deal was part of the final report of the Supreme Court Committee on Postconviction Relief which sought to bring some order to the often chaotic death sentence appeal process.
>
> The committee, chaired by Justice Ben F. Overton, has an agreement with the governor's office to hold off signing death warrants if the appeals process is moving in a timely fashion.

Florida Bar News, October 15, 1991. In accordance with the schedule established by the Governor's Office, Mr. Ventura is required to file his Rule 3.850 motion to avoid the signing of a death warrant. Thus, in order to avoid litigating under the exigencies imposed by a death warrant, Mr. Ventura now files this motion even though it is incomplete due to various state and federal agencies' failures to timely comply with public records requests.

4. The Court should therefore grant Mr. Ventura's request for leave to amend the instant motion. Counsel in good faith represents at the outset of this pleading that Mr. Ventura's pleading is incomplete -- the untenable predicament caused by the failure of various agencies to comply timely with Mr. Ventura's requests for public records, the good faith attempt to expedite the two-year period to prepare the motion, and counsel's demanding workload has made it impossible for counsel to properly investigate and effectively present Mr. Ventura's post-conviction claims. The Office of the Capital Collateral Representative (CCR) is required by law to provide effective legal representation to all death row inmates in post-conviction proceedings. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). This involves filing innumerable pleadings and briefs in Florida's circuit courts, the Florida Supreme Court, the United States District Courts, the Court of Appeals for the Eleventh Circuit, and the United States Supreme Court, presenting oral arguments in these courts, and conducting evidentiary hearings.

5. Effective legal representation has been denied Mr. Ventura because, despite repeated requests, the following agencies have failed to provide counsel with public records under the Florida Public Records Act, Fla. Stat. §119 (1991), and the Freedom of Information Act, 5 U.S.C. 552 (1989).[1] (Without

[1]This list is not exhaustive but is intended to be representative.

these records, it is impossible for counsel to prepare a complete Rule 3.850 motion for Mr. Ventura.)

a. Office of the State Attorney for the Seventh Judicial Circuit.[2]

b. Volusia County Clerk of Court records.

c. Volusia County Sheriff's Office records.

d. Volusia County Correctional Department records.

e. United States Bureau of Prisons records.

f. United States Postal Inspector's Office records.

g. Federal Bureau of Investigation records.

h. United States Department of Justice records.

6. Mr. Ventura's case involved numerous law enforcement agencies and two codefendants. Once the files are received, follow up investigation will be required in terms of additional records requests and interviews. It is counterproductive to proceed with the investigation when it would have to be redone after reviewing the files. CCR cannot afford the luxury of duplicative effort, particularly in light of the present budget crisis. Unless and until counsel have had a full opportunity to review all of the records and fully develop all of his claims,

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[2]A public records request was made to the State Attorney's Office on November 27, 1991. The State Attorney's Office did not begin complying with the request until February 3, 1992. Thus, by February 17, 1992, three (3) boxes of State Attorney files were copied by CCR, over 2-1/2 months after counsel requested those files. Additionally, the materials received do not include a statement regarding the approximately three (3) inches of documents which the State Attorney's Office informed a CCR investigator were being withheld.

Mr. Ventura will be denied his rights under Florida law, and the eighth and fourteenth amendments.

7. The Florida Supreme Court has held that capital post-conviction defendants are entitled to Chapter 119 records disclosure. State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). Further, the Court has extended the time period for filing Rule 3.850 motions where public records have not been properly disclosed. Jennings v. State, 583 So. 2d 316 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Provenzano. In these cases, sixty (60) days was afforded to litigants to amend Rule 3.850 motions in light of newly disclosed Chapter 119 materials. Mr. Ventura should, likewise, be given an extension of time and allowed to amend.

8. The request for leave to amend should be granted because that request is integral to Mr. Ventura's rights in the post-conviction process. Post-conviction litigation is governed by principles of due process, as the Florida Supreme Court has held. See Holland v. State, 503 So. 2d 1250 (Fla. 1987). In accordance with legal precedent, the Florida Supreme Court has encouraged circuit courts to allow amendment of Rule 3.850 motions. See Woods v. State, 531 So. 2d 79 (Fla. 1988). Thus, at the outset, Mr. Ventura, through counsel, requests leave to supplement his claims with additional facts as they become available, add claims, and provide a memorandum of law in support of his claims for relief and his request for an evidentiary hearing.

9. Mr. Ventura has filed no other motions for relief in this case under Fla. R. Crim. P. 3.850. As reflected by the substance of Mr. Ventura's claims, the files and records in this action by no means show that Mr. Ventura is entitled to "no relief," and much less so "conclusively" make such a showing. See Lemon v. State, 498 So. 2d 923 (Fla. 1986). The relief sought herein should therefore be granted.

PROCEDURAL HISTORY

10. The Circuit Court of the Seventh Judicial Circuit, Volusia County, entered the judgments of conviction and sentence under consideration.

11. Mr. Ventura was charged by indictment on June 30, 1981, with first degree murder (R. 917).

12. After a jury trial, Mr. Ventura was found guilty on January 15, 1988 (R. 825). On January 19, 1988, the jury recommended a death sentence (R. 904).

13. On January 21, 1988, the trial court imposed a sentence of death (R. 913-14).

14. On direct appeal, the Florida Supreme Court affirmed Mr. Ventura's conviction and sentence. Ventura v. State, 560 So. 2d 217 (Fla. 1990).

15. This is Mr. Ventura's first post-conviction action of any kind. Although the law allows until October 29, 1992, for Mr. Ventura to file for post-conviction relief, Mr. Ventura, of necessity, now initiates this Rule 3.850 motion. The motion will

be amended as public records material is received and reviewed in conformity with Provenzano.

GROUNDS FOR POST-CONVICTION RELIEF

By his motion for Fla. R. Crim. P. 3.850 relief, Mr. Ventura asserts that his convictions and sentence of death were obtained in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution for each of the reasons set forth below.

CLAIM I

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. VENTURA'S CASE IN THE POSSESSION OF CERTAIN STATE AND FEDERAL AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. MR. VENTURA CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

CLAIM II

MR. VENTURA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. A FULL ADVERSARIAL TESTING DID NOT OCCUR. COUNSEL'S PERFORMANCE WAS DEFICIENT AND AS A RESULT MR. VENTURA'S CONVICTION IS UNRELIABLE.

CLAIM III

MR. VENTURA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL'S PERFORMANCE WAS DEFICIENT AND AS A RESULT THE DEATH SENTENCE IS UNRELIABLE.

CLAIM IV

MR. VENTURA WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

CLAIM V

MR. VENTURA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO AN ACTUAL CONFLICT OF INTEREST WHICH ADVERSELY AFFECTED DEFENSE COUNSEL'S REPRESENTATION OF MR. VENTURA, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM VI

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. VENTURA'S CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VII

MR. VENTURA'S SENTENCING JUDGE RELIED UPON MR. VENTURA'S FAILURE TO PRESENT HIS VERSION OF THE OFFENSE TO FIND AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM VIII

THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

CLAIM IX

MR. VENTURA'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. VENTURA TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. VENTURA TO DEATH. FAILURE TO OBJECT OR ARGUE EFFECTIVELY RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.

CLAIM X

MR. VENTURA'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE AGGRAVATING CIRCUMSTANCES, AND THE AGGRAVATORS WERE IMPROPERLY ARGUED AND IMPOSED, IN VIOLATION OF MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XI

MR. VENTURA'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CONCLUSION AND RELIEF SOUGHT

Mr. Ventura prays for the following relief, based on his prima facie allegations demonstrating violation of his constitutional rights:

1. That an evidentiary hearing be scheduled so as to allow him to present support for his claims, and that such a hearing be conducted at a reasonable time;

2. That he be allowed to proceed in forma pauperis;

3. That he be provided necessary funds with which to obtain expert witness and investigative services in order to properly present his claims, and without which no full and fair hearing can be conducted;

4. That he be provided subpoena power for the production of witnesses, and full and fair pre-hearing discovery;

5. That he be allowed an additional sixty (60) days from the date of disclosure of public records to amend this motion;

6. That he be allowed leave to supplement this motion should new claims, facts, or legal precedent become available to counsel; and, on the basis of the reasons presented herein,

7. That his convictions and sentences, including his sentence of death, be vacated.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 28, 1992.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

JERREL E. PHILLIPS
Assistant CCR
Florida Bar No. 0878219

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: Jerrel E. Phillips
Counsel for Defendant

Copies furnished to:

John Tanner
State Attorney
Office of the State Attorney
251 North Ridgewood Avenue
Daytona Beach, Florida 32114

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

CASE NOS. 81-1939-AA
86-2822-CFAES

STATE OF FLORIDA

v.

PETER VENTURA,

Defendant.

_____/

VERIFICATION

STATE OF FLORIDA)
) ss.
COUNTY OF BRADFORD)

BEFORE ME, the undersigned authority, this day personally appeared **PETER VENTURA**, who, being first duly sworn, says that he is the Defendant in the above styled cause, that he has read the foregoing Motion to Vacate Judgments of Conviction and Sentence With Special Request For Leave to Amend and has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct.

Peter Ventura
PETER VENTURA

SWORN to and SUBSCRIBED before me this 28th day of February, 1992.

Paul J. Hamill
NOTARY PUBLIC
My Commission Expires:

Notary Public, State of Florida
My Commission Expires Dec. 15, 1993
Bonded Thru Troy Fain - Insurance Inc.