IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

PETER VENTURA

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

MICHAEL J. MINERVA
Capital Collateral Representative
Florida Bar No. 092487

STEPHEN M. KISSINGER
Assistant CCR
Florida Bar No. 0979295

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COLLATERAL REPRESENTATIVE
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COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Ventura's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied Mr. Ventura's claims without an evidentiary hearing.

The following symbols will be used to designate references to the record in this instant cause:

"R." -- record on direct appeal to this Court;

"PC-R." -- record on 3.850 appeal to this Court;

All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE

Mr Ventura filed his Rule 3.850 motion on February 28, 1992,[1] or eight months prior to his two year date,[2] in compliance with an arbitrary schedule set in capital cases by the governor of the State of Florida. (PC-R 367-378). As in the case of most, if not all, of the Rule 3.850 motions which CCR was forced to file in accordance with that schedule, Mr. Ventura's motion contained: (1) claims which incorporated prior allegations of trial and appellate counsel's ineffectiveness and addressed issues which appeared of record, save for the ineffective assistance of counsel aspects to those claims; and, (2) claims which were either based in facts unknown to Mr. Ventura at the time of trial, or were of a nature which this court has ruled should be presented in Rule 3.850 motions, e.g., ineffectiveness of counsel or Brady claims. As to the latter group of claims, Mr. Ventura alleged the nature of each claim, but also alleged that he was unable to fully plead such claims until the State had adequately complied with Chapter 119 of the Florida Statutes. He also asked the circuit court for leave to amend that motion upon receipt of Chapter 119 materials. Notwithstanding the fact that the two year date had not yet passed, the State moved to dismiss Mr. Ventura's motion with prejudice. (PC-R 395-396). As

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[1]The Florida Supreme Court affirmed Mr. Ventura's conviction and sentence in Ventura v. State, 560 So. 2d 217 (Fla. 1990). Certiorari was denied October 29, 1991.

[2]Mr. Ventura's two year date was October 29, 1992.

grounds, the State argued that Claims 7-11 could, should have been, or were raised on direct appeal and that Claims 1 through 6, failed to adequately state a claim upon which relief could be granted.[3] Hearing was set for On April 10, 1992. The circuit court ruled ore tenus in the State's favor. (PC-R 1-40). The court, however, also ordered a hearing regarding Mr. Ventura's Chapter 119 claim for May 9, 1992. On April 20, 1992, Mr. Ventura received a copy of the State's Proposed Order Granting State's Motion to Dismiss Defendant's Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend. Mr. Ventura filed Defendant's Objection to State's Proposed Order Granting State's Motion to Dismiss Defendant's Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend dated April 23, 1992.[4] (PC-R 402-404).

Hearing on Mr. Ventura's Chapter 119 claim was eventually held on May 8, 1992. At the May 8, 1992, hearing, Mr. Ventura presented evidence of various state agencies' failure to comply

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[3]Claim I alleged the failure of various state agencies to comply with the provisions of Chapter 119.

[4]Unbeknownst to Mr. Ventura, on April 15, 1992, the circuit court had already entered an order identical to that order prepared by counsel for the State. Mr. Ventura did not receive a copy of the Court's order. It was not until the May 8, 1992, hearing that Mr. Ventura discovered on his own that the circuit court had entered the State's proposed order verbatim and Mr. Ventura had been denied the opportunity to respond to the State's proposed order. See, generally, Rose v. State, 601 So. 2d 1189 (Fla. 1992). On or about May 21, 1992, Mr. Ventura filed a Motion for Rehearing alleging non-compliance with Chapter 119 and ineffective assistance of counsel as grounds for consideration of claims which could or should have been raised on direct appeal.

with Chapter 119. On June 4, 1992, the circuit court entered an order compelling various state agencies, including the Volusia County Sheriff's Department, the Florida Parole Commission, the Florida Department of Law Enforcement, the district medical examiner, the Seventh Judicial Circuit State Attorney's Office, the Fourth Judicial Circuit State Attorney's Office, and the Volusia County Correctional Department, to produce Chapter 119 records within twenty days of the date of the Court's order. (PC-R 450-456). On or about October 21, 1992, Mr. Ventura moved for an order compelling compliance with the court's prior order. (PC-R 506-691). Hearing was set for May 21, 1993. Mr. Ventura prepared detailed lists of documents or materials not disclosed that had been referred to in other documents or materials that were disclosed. The Volusia County Sheriff's Department was alleged to have withheld one hundred and sixty (160) materials. Six (6) of the materials on the list were disclosed prior to the hearing. The Jacksonville State Attorney's Office was also alleged to have improperly withheld materials. Id.

On May 21, 1993 in open court, a complete Jacksonville State Attorney's Office's file was delivered to Sean Daly, Assistant State Attorney for the Seventh Judicial District. Mr. Daly asked the court to allow him to claim exemptions. (PC-R 83-85). It was not until October 19, 1993, that Mr. Ventura finally received this file.[5] On March 8, 1994, Mr. Ventura received a copy of

[5]The Court should note that this was only 10 days prior to Mr. Ventura's two year date.

the Volusia County Sheriff's Department's file regarding Marshall Krom's death. As may be seen from the facts alleged in Mr. Ventura's amended motion for rehearing, the circumstances surrounding Mr. Krom's death were relevant to many of Mr. Ventura's claims.

As of March 8, 1994, the date on which Mr. Ventura finally received the Marshall Krom file, the Court had not ruled on Mr. Ventura's May 21, 1992, motion for rehearing. On April 20, 1994, a status hearing was set for May 25, 1994. On May 20, even though he had yet to receive all Chapter 119 materials, Mr. Ventura amended his then pending motion for rehearing by adding the factual allegations made possible by the intervening partial Chapter 119 compliance.[6] (PC-R 738-922).

At the status hearing, the State argued, inter alia, that Mr. Ventura could not amend his motion for rehearing because there was no provision for amending motions for rehearing. At no time prior to that status hearing had the State filed a response to either the initial motion for rehearing or its amendment. On July 15, 1994, the circuit court entered an order denying the amended motion for rehearing on this ground. Less than thirty days after the denial of rehearing, Mr. Ventura filed a Rule 3.850 proceeding containing the claims and factual allegations contained in his Amended Motion for Rehearing. Thereafter, Mr. Ventura filed a timely notice of appeal.

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[6]As set forth in Mr. Ventura's amended motion for rehearing, Mr. Ventura has yet to receive public records from numerous state agencies.

SUMMARY OF ARGUMENT

1. This Court has held that capital post-conviction defendants are entitled to Chapter 119 records disclosure. The Court has extended the time period for filing Rule 3.850 motions after Chapter 119 disclosure. Mr. Ventura should likewise have been given an extension of time and allowed to amend once the requested records have been disclosed. The circuit court's contrary ruling denied Mr. Ventura equal protection. If this Court does not reverse the circuit court's order of dismissal and remand this matter with instructions to allow Mr. Ventura a reasonable amount of time in which to resolve remaining Chapter 119 issues and, thereafter, a reasonable amount of time in which to amend his initial Rule 3.850 motion, it must reverse the circuit court's denial of Mr. Ventura's Amended Motion for Rehearing and direct the court to consider the same on the merits.

2. Notwithstanding the uncontroverted evidence that many of the public records sought by Mr. Ventura were somewhere in the possession of the Volusia County Sheriff's Department, the circuit court denied Mr. Ventura's motion. There was no basis in the record for the circuit court's decision. Clearly records existed and clearly Mr. Ventura was entitled to those records.

3. The circuit court failed to attach portions from the record demonstrating that Mr. Ventura was entitled to no relief to either its initial order of dismissal or it order denying Mr. Ventura's motion for rehearing or amended motion for rehearing.

Mr. Ventura is entitled to a full hearing conforming to Rule 3.850.

4. Mr. Ventura is entitled to the Chapter 119 materials he seeks. This information proves Mr. Ventura's innocence. A hearing was required to ensure that Mr. Ventura has received all the materials requested and an evidentiary hearing should follow as to the materials produced.

5. A trial court has only two options when presented with a Rule 3.850 motion: either grant appellant an evidentiary hearing, or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted. The law strongly favors full evidentiary hearings in capital post-conviction cases, especially where a claim is grounded in factual as opposed to legal matters. Mr. Ventura has pled substntial, serious allegations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. Mr. Ventura is entitled to an evidentiary hearing on his Rule 3.850 pleadings.

6. Counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. Defense counsel failed to challenge jurors who were predisposed to recommend a death sentence. Counsel failed to discover and use the wealth of mitigation available in Mr. Ventura's background. The facts alleged provide a basis for relief.

7. Mr. Ventura alleged that trial counsel was ineffective for failing to object to a myriad of constitutional errors in his capital trial. The law was clear regarding each of these errors.

8. Unbenownst to Mr. Ventura at the time of his capital proceedings, his defense counsel was also an active law enforcement officer. He was unaware of Mr. Cass' status as an active law enforcement officer until it was disclosed in an unrelated postconviction hearing. This issue requires a full and fair Rule 3.580 evidentiary resolution.

9. Mr. Ventura did not take the stand during either the innocence or penalty phase of his trial. The trial court found as a factor in support of a death sentence that Mr. Ventura "did not present his version" of the facts of the crime. The use of a defendant's post-Miranda silence is fundamentally unfair, in violation of the due process clause of the fourteenth amendment.

10. The failure to give meaningful consideration and effect to the evidence in mitigation requires reversal of a death sentence. Mr. Ventura presented unrefuted nonstatutory mitigating evidence. Despite the presence of mitigating circumstances, the court concluded "there are no mitigating circumstances" to be considered. The circuit court failed to consider and give effect to nonstatutory mitigating circumstances presented and/or argued by Mr. Ventura. Mr. Ventura's death sentence is in violation of Florida law and the United States Constitution.

11. The court shifted to Mr. Ventura the burden of proving whether he should live or die. Shifting the burden to the defendant to establish that mitigating circumstances outweight aggravating circumstances conflicts with Dixon. The instructions violated the Eighth Amendment.

12. Mr. Ventura's jury failed to receive complete and accurate instructions defining aggravating circumstances in a constitutionally narrow fashion. There was sufficient mitigation in the record for the jury to have a reasonable basis for recommending life and thus preclude a jury override. Mr. Ventura's sentence must be vacated and this matter returned to the trial court for a new sentencing procedure before a jury.

13. Numerous and varied violations occurred at both stages of his trial. These claims have been raised on direct appeal or are currently being raised to the extent possible. However, the claims which arise as a result of Mr. Ventura's trial should not only be considered separately. These claims should be considered in the aggregate. When viewed in their totality it is clear that Mr. Ventura did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments.

ISSUE I

MR. VENTURA IS ENTITLED TO CONSIDERATION OF THE MERITS OF HIS AMENDED MOTION FOR REHEARING AND, THEREAFTER, AN EVIDENTIARY HEARING ON HIS 3.850 ISSUES. IN THE ALTERNATIVE, MR. VENTURA IS ENTITLED TO CONSIDERATION OF THE RULE 3.850 MOTION PRESENTLY PENDING BEFORE THE CIRCUIT COURT AS IF THE SAME HAD BEEN FILED PRIOR TO THE TWO YEAR LIMIT OF RULE 3.850.

A. Introduction

With all due respect to opposing counsel and the court below, Mr. Ventura's appeal presents an unfortunate instance where the Governor of the State of Florida's arbitrary schedule, the State's antagonism toward this Court's decisions in Walton v. Dugger, 621 So. 2d 1357 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992); Hoffman v. State, 613 So. 2d 405 (Fla. 1992); State v. Kokal, 562 So. 2d 324 (Fla. 1990); and Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990), and the circuit court's acquiescence to the State's position, have combined to unnecessarily burden this Court's appellate caseload and needlessly delay Mr. Ventura's attempt to obtain full and fair state post-conviction review of his conviction and sentence of death. Had the circuit court done nothing more than follow the explicit directions of Walton, Mendyk, Hoffman, Kokal, and Provenzano, this present waste of both judicial resources and Mr. Ventura's very life would have been avoided and the circuit court would be considering the merits of Mr. Ventura's petition in the manner prescribed by Rule 3.850 and the decisions of this Court. Instead, this Court is required to once again state that post-

conviction litigants are entitled to Chapter 119 materials and to amend their post-conviction motion after receiving such materials.

Sadly, this waste of both time and judicial resources is the result of what now appears to be a deliberate attempt by the State to improperly deprive Mr. Ventura of a proper consideration of his viable and well-founded claims through what can, at best, be considered a "gamesmanship", and, at worst, must be considered as nothing short of trickery and deceit. This lamentable trivialization of this Court's post-conviction process is revealed in the State's Response To Appellant's Motion To Relinquish Jurisdiction And Hold Appeal In Abeyance, hereinafter, "State's Motion", filed in this Court. Therein, the State maintains:

> It would make no sense to hold the instant appeal in abeyance for the circuit court to rule upon the same claims as those arguably at issue sub judice, especially when the successive motion was filed well beyond the time limit set forth under Rule 3.850.

State's Motion, at Page 4, Paragraph 5. Emphasis supplied.

The State's position is thus clear, not only did the circuit court not err in dismissing Mr. Ventura's Rule 3.850 motion without allowing him to first obtain Chapter 119 material and thereafter amend his motion, it did not err when it prevented Mr. Ventura from presenting additional facts after the State had partially complied with Chapter 119. Moreover, it maintains that Mr. Ventura's presently pending Rule 3.850 motion, filed less than thirty days after the circuit court had entered a final

order on Mr. Ventura's initial Rule 3.850 proceeding, is time barred.

To understand how this matter has reached this point, it is necessary to briefly review the procedural history. Mr. Ventura has, at all times relevant hereto, been a client of the Capital Collateral Representative (CCR). Mr Ventura filed his Rule 3.850 motion on February 28, 1992,[7] or eight months prior to his two year date,[8] in compliance with an arbitrary schedule set in capital cases by the governor of the State of Florida. As in the case of most, if not all, of the Rule 3.850 motions which CCR was forced to file in accordance with that schedule, Mr. Ventura's motion contained: (1) claims which incorporated prior allegations of trial and appellate counsel's ineffectiveness and addressed issues which appeared of record, save for the ineffective assistance of counsel aspects to those claims; and, (2) claims which were either based in facts unknown to Mr. Ventura at the time of trial, or were of a nature which this court has ruled should be presented in Rule 3.850 motions, e.g., ineffectiveness of counsel or Brady claims. As to the latter group of claims, Mr. Ventura alleged the nature of each claim, but also alleged that he was unable to fully plead such claims until the State had adequately complied with Chapter 119 of the Florida Statutes. He

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[7]The Florida Supreme Court affirmed Mr. Ventura's conviction and sentence in Ventura v. State, 560 So. 2d 217 (Fla. 1990). Certiorari was denied October 29, 1991.

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also asked the circuit court for leave to amend that motion upon receipt of Chapter 119 materials. Notwithstanding the fact that the two year date had not yet passed, the State moved to dismiss Mr. Ventura's motion with prejudice. As grounds, the State argued that Claims 7-11 could, should have been, or were raised on direct appeal and that Claims 1 through 6, failed to adequately state a claim upon which relief could be granted.[9] Hearing was set for On April 10, 1992. The circuit court ruled ore tenus in the State's favor. The court, however, also ordered a hearing regarding Mr. Ventura's Chapter 119 claim for May 9, 1992. On April 20, 1992, Mr. Ventura received a copy of the State's Proposed Order Granting State's Motion to Dismiss Defendant's Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend. Mr. Ventura filed Defendant's Objection to State's Proposed Order Granting State's Motion to Dismiss Defendant's Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend dated April 23, 1992.[10]

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[9]Claim I alleged the failure of various state agencies to comply with the provisions of Chapter 119.

[10]Unbeknownst to Mr. Ventura, on April 15, 1992, the circuit court had already entered an order identical to that order prepared by counsel for the State. Mr. Ventura did not receive a copy of the Court's order. It was not until the May 8, 1992, hearing that Mr. Ventura discovered on his own that the circuit court had entered the State's proposed order verbatim and Mr. Ventura had been denied the opportunity to respond to the State's proposed order. See, generally, Rose v. State, 601 So. 2d 1189 (Fla. 1992). On or about May 21, 1992, Mr. Ventura filed a Motion for Rehearing alleging non-compliance with Chapter 119 and ineffective assistance of counsel as grounds for consideration of claims which could or should have been raised on direct appeal.

Hearing on Mr. Ventura's Chapter 119 claim was eventually held on May 8, 1992. At the May 8, 1992, hearing, Mr. Ventura presented evidence of various state agencies' failure to comply with Chapter 119. On June 4, 1992, the circuit court entered an order compelling various state agencies, including the Volusia County Sheriff's Department, the Florida Parole Commission, the Florida Department of Law Enforcement, the district medical examiner, the Seventh Judicial Circuit State Attorney's Office, the Fourth Judicial Circuit State Attorney's Office, and the Volusia County Correctional Department, to produce Chapter 119 records within twenty days of the date of the Court's order. On or about October 21, 1992, Mr. Ventura moved for an order compelling compliance with the court's prior order. Hearing was set for May 21, 1993. Mr. Ventura prepared detailed lists of documents or materials not disclosed that had been referred to in other documents or materials that were disclosed. The Volusia County Sheriff's Department was alleged to have withheld one hundred and sixty (160) materials. Six (6) of the materials on the list were disclosed prior to the hearing. The Jacksonville State Attorney's Office was also alleged to have improperly withheld materials.

On May 21, 1993 in open court, a complete Jacksonville State Attorney's Office's file was delivered to Sean Daly, Assistant State Attorney for the Seventh Judicial District. Mr. Daly asked the court to allow him to claim exemptions. It was not until

October 19, 1993, that Mr. Ventura finally received this file.[11] On March 8, 1994, Mr. Ventura received a copy of the Volusia County Sheriff's Department's file regarding Marshall Krom's death. As may be seen from the facts alleged in Mr. Ventura's amended motion for rehearing, the circumstances surrounding Mr. Krom's death were relevant to many of Mr. Ventura's claims.

As of March 8, 1994, the date on which Mr. Ventura finally received the Marshall Krom file, the Court had not ruled on Mr. Ventura's May 21, 1992, motion for rehearing. On April 20, 1994, a status hearing was set for May 25, 1994. On May 20, even though he had yet to receive all Chapter 119 materials, Mr. Ventura amended his then pending motion for rehearing by adding the factual allegations made possible by the intervening partial Chapter 119 compliance.

At the status hearing, the State argued, inter alia, that Mr. Ventura could not amend his motion for rehearing because there was no provision for amending motions for rehearing. At no time prior to that status hearing had the State filed a response to either the initial motion for rehearing or its amendment. On July 15, 1994, the circuit court entered an order denying the amended motion for rehearing on this ground. Less than thirty days after the denial of rehearing, Mr. Ventura filed a Rule 3.850 proceeding containing the claims and factual allegations

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[11]The Court should note that this was only 10 days prior to Mr. Ventura's two year date.

contained in his Amended Motion for Rehearing. The State now claims that motion to be time barred.

B. The Circuit Court Erred in Dismissing Mr. Ventura's Initial Rule 3.850 Motion.

As noted, the circuit court dismissed Mr. Ventura's initial Rule 3.850 motion for failure to state a cause of action and/or procedural bar. It denied his motion for leave to amend. The circuit court did so at the behest of the State and notwithstanding the fact that Mr. Ventura alleged that he had yet to receive Chapter 119 materials from various state agencies and notwithstanding the fact that Mr. Ventura's two year time limit under Rule 3.850 had not yet elapsed. See, generally, Shaw v. State, 20 Fla. L. Weekly D1064 (Fla. App. 4th Dist. 1995). The State's non-compliance hampered Mr. Ventura's efforts to plead even those claims which the court held to be procedurally barred because it deprived him of the opportunity to present facts to demonstrate that, as to those procedurally barred claims which were barred due to trial and appellate counsel's failure to properly preserve and present the same, his counsel was ineffective.

This Court has addressed this very issue on a number of occasions. In Anderson v. State, 627 So. 2d 1170 (Fla. 1993), this Court stated:

> Next we address Anderson's claim that the trial court erroneously denied an evidentiary hearing and dismissed the motion with prejudice on the merits even though Anderson alleged that various state agencies had failed to comply with his public records request. This court has made it clear that a

> prisoner whose conviction and sentence has become final on direct review is generally entitled to criminal investigative public records as provided in Chapter 119. . . . Under the circumstances presented in this case, we find it appropriate at this time to remand this matter to the district court to enable Anderson to proceed without prejudice to pursue his requests for public records in a timely manner. The various state agencies must either comply with Anderson's requests or object pursuant to the procedures set forth by this Court and under Chapter 119. We direct that Anderson be granted thirty days to amend his motion, computed from the date the various state agencies deliver to Anderson the records to which eh is entitled.

627 So. 2d at 1171-1172. Citations omitted.

Mr. Ventura Rule 3.850 motion outlined his difficulty in pleading his claims because of the state's failure to comply with Chapter 119 public records requests. Claim one of the Rule 3.850 motion informed the circuit court that Mr. Ventura was requesting a hearing to gain the court's assistance in acquiring the public records that were being withheld. While that hearing was given, it was only after Mr. Ventura's motion had been dismissed.

Under this Court's recent decision in Porter v. State, 20 Fla. L. Weekly S152 (Fla. March 28, 1995), collateral counsel in capital cases has the duty to seek and obtain each and every public record related in any fashion to the pending case to ascertain whether any basis for relief exists in those records. This Court has held that capital post-conviction defendants are entitled to Chapter 119 records disclosure. State v. Kokal, 562 So. 2d 364 (Fla. 1990); Jennings v. State, 583 So. 2d 316 (Fla. 1991); Hoffman v. State, 613 So. 2d 405 (Fla. 1992); Mendyk v.

State, 592 So. 2d 1076 (Fla. 1992). Further, the Court has extended the time period for filing Rule 3.850 motions after Chapter 119 disclosure. See Jennings; Kokal. In these cases, sixty (60) days was afforded to litigants to amend Rule 3.850 motions in light of newly disclosed Chapter 119 materials. Thus, this Court has indicated sixty (60) days constitute a reasonable period of time to fully review Chapter 119 materials. Mr. Ventura should likewise have been given an extension of time and allowed to amend once the requested records have been disclosed. The circuit court's contrary ruling denied Mr. Ventura equal protection.[12]

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[12]Mr. Ventura continues to be denied public records necessary to determine what post-conviction claims he has to present to the trial court.

On October 5, 1992, Mr. Ventura's postconviction counsel viewed the original Florida Department of Law Enforcement file. During this inspection, the Florida Department of Law Enforcement legal representative, Ms. Judith Landis, stated that certain materials were being withheld. Ms. Landis stated that blank sheets represented withheld materials and, in fact, when counsel asked to have a certain page copied Ms. Landis replied that the material was being withheld. Ms. Landis had previously deleted material in the file and claimed two exemptions pursuant to Florida Statutes, § 119.07(3)(e) and (3)(h). Regarding Mr. Krom's file, Ms. Landis replied that the file had been purged pursuant to law. Sensitive Colorado Department of Correction's materials were sent to the circuit court prior to disclosure. These materials were lost and never disclosed. On November 1, 1993, Mr. Ventura requested copies of the Volusia County Sheriff's Office file regarding Marshall Krom. The importance of this file has been argued in Claims IV (Brady) and VI (newly discovered evidence). On March 8, 1994, Mr. Ventura finally received a copy of this critical file. This file was not released or available at the time of Mr. Ventura's trial. In fact, this file was not even available during Mr. Wright's trial. The file is far from complete. The following materials have not

(continued...)

As this Court has held, due process governs post-conviction litigation. Holland v. State, 503 So. 2d 1250 (Fla. 1987); see also Brown v. State, 596 So. 2d at 1028; Woods v. State, 531 So. 2d 79 (Fla. 1988).

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[12](...continued)
been disclosed (in quotations) but were referenced in the disclosed materials:

> a. A 4-19-81, interview by Inv. Hudson and Inv. Buscher of Donna Shady, Marshall Krom's wife -- "For details See the Lead sheet under Donna Shadey";
>
> b. "See investigator S report for more complete details on the fire";
>
> c. "A death report was also made under same case number";
>
> d. Krom's body was found fifty inches from the front door -- "(see diagram)";
>
> e. Inv. Hudson transported Michael Weber, roommate of victim, to Donna Shadey's house -- "Interview was done by Inv. B. Buscher on 4-21-81. All details can be obtained from tapes";
>
> f. On 04-15-81, Inv. Hudson and Inv. Buscher interviewed Sheila Brown aka Natalie North aka Mike Brown and James Daniel Bronson aka Dee Dee. "Both interviews taped, and details can be supplied by listening to the tapes";
>
> g. On 4-24-81, Inv. Hudson interviewed Robert Robinson aka "Latice" Chevron. "This interview was also taped and details contained therein";
>
> h. Mr. Fisher was interviewed by Inv. Burnsed, along with Deputy J.R. Long and Inv. Alan Kaye, of the Volusia County Narcotics Task Force. -- "This interview was tape

(continued...)

The people of Florida have long been committed to open government and judicial process. "Unlike other states where reform of the judicial system has sometimes lagged, Florida has developed a modern court system with procedures for merit appointment of judges and for attorney discipline. We have no need to hide our bench and bar under a bushel. Ventilating the judicial process, we submit, will enhance the image of the Florida bench and bar and thereby elevate public confidence in the system." In re Petition of Post-Newsweek Stations, 370 So. 2d 764, 780 (Fla. 1979). Throughout this state's history, Floridians required that their government function in full view of the citizenry. E.g., Davis v. McMillian, 38 So. 666 (Fla. 1905). Although recognizing that open government may have certain disadvantages, Floridians have consistently determined

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[12](...continued)
recorded and for a full report refer to cassette tape marked 'Interview with Anthony Fisher,' which is incorporated in this case file"

Jim Purpello was murdered in a drug related crime about the same time as Mr. Clemente but the file has been withheld. Based upon material obtained from the Marshal Krom file, Mr. Ventura now requests all public records within the possession of the Volusia County State Attorney's Office, the Volusia County Sheriff's Department, and the Daytona Beach Police Department related in any way to the investigation and/or prosecution of the Purpello murder. Mr. Ventura is entitled to this critical material.

Until the State fully discloses these records, Mr. Ventura cannot know if other claims may exist in this case under Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1970); United States v. Cronic, 466 U.S. 648 (1984); Richardson v. State, 546 So. 2d 1037 (1989); Roman v. State, 528 So. 2d 1169 (Fla. 1988); and Strickland v. Washington, 466 U.S. 668 (1984).

that the costs are inconsequential compared to the benefits. Open Gov't Law Manual, p. 5 (1984). This determination underlies the Florida Public Records Act which gives effect to the policy that "all state, county, and municipal records shall at all times be open for a personal inspection by any person." Section 119.01, Fla. Stat. (1991).

Florida's courts have repeatedly held that the Public Records Act is to be liberally construed in favor of open government. Bludworth v. Palm Beach Newspapers, Inc., 476 So. 2d 775 (Fla. App. 4 Dist. 1985). Such open government preserves our freedom by permitting full public participation in the governing process. City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971); Board of Public Instruction v. Doran, 224 So. 2d 693 (Fla. 1969); see Wolfson v. State, 344 So. 2d 611 (Fla. 2d DCA 1977). Thus, every public record is subject to the examination and inspection provisions of the Act unless a specific statutory exemption applies. Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 370 So. 2d 633 (Fla. 1980).

Exemptions to disclosure are construed narrowly and limited to their purposes. Information gathered or held while that purpose is not being served are not exempt. Tribune Company v. Cannella, 438 So. 2d 516, 523 (Fla. 2d DCA 1983), rev'd on other grounds, 458 So. 2d 1075 (1984), app. dismd, 105 S. Ct. 2315 (1985) (criminal investigative information exemption did not prevent disclosure of records); see also State v. Nourse, 340 So.

2d 966 (Fla. 3d DCA 1976) (exceptions to the general law are construed narrowly).

In light of the clear policy of this State and the multitude of decisions of this Court holding that capital defendants are entitled to amend their Rule 3.850 motions after Chapter 119 materials have been received, it is clear that the order of the district court was must be vacated and this matter be remanded with instructions to allow Mr. Ventura a forum in which, and a reasonable amount of time to, obtain remaining undisclosed public records and, thereafter, a reasonable amount of time to amend his motion for post-conviction relief.

C. The Circuit Court Erred in Denying Mr. Ventura's Amended Motion for Rehearing on the Grounds that Court Rules do not Specifically Provide for Amended Motions for Rehearing.

Throughout the period of time following the circuit court dismissal of his Rule 3.850 proceeding, Mr. Ventura continued his efforts to obtain public records pursuant to Chapter 119. It was after the dismissal of his 3.850 motion that the circuit court entered an order compelling various state agencies to comply with Chapter 119. It was after that dismissal that the Court held hearing on Mr. Ventura's motion for sanctions. It was after dismissal that he received the Jacksonville State Attorney's Office's file regarding the prosecution of Jerry Wright.[13] It

[13]Mr. Wright was the individual convicted of ordering the murder Mr. Clemente. He was prosecuted by the Jacksonville State Attorney's Office because of a conflict of interest with the Volusia County State Attorney's Office. He was also the same person who, even though he was the mastermind, and the initiating party, of Mr. Clemente's death, received a sentence of life. A fact not considered by Mr. Ventura's sentencing judge and jury.

was after dismissal that he received the Volusia County Sheriff's Department's file regarding Marshall Krom.[14] As noted above, well within sixty days of the date he finally received the critical Marshall Krom file, Mr. Ventura attempted to present these facts to the circuit court by amending his still pending motion for rehearing. He did so notwithstanding the fact that the State had failed to ever fully comply with the provisions of Chapter 119, and notwithstanding the fact that the circuit court had not set a date by which Mr. Ventura was to amend, nor had the State sought to have such a date set. In short, Mr. Ventura presented those facts timely, solely of his own initiative, and in respect for this Court's decisions in Jennings and Kokal, not because the State, or the circuit court had required him to do so.

The State's responded to Mr. Ventura's effort to voluntarily present the facts supporting his post-conviction motion rather than to delay that motion's consideration not by commending him for moving forward without the urging of the State or the circuit court, but by claiming that the court should not consider those facts because there was no specific provision in the court rules for amending motions for rehearing. Had it not been for the revelation contained in the State's opposition to Mr. Ventura's Motion to relinquish jurisdiction, this position might have been

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[14]Mr. Krom was the victim what was believed by law enforcement to be a drug related murder. Among the information contained within the Krom file was a "hit list" containing both Mr. Krom's name and that of Mr. Clemente, the alleged victim in the instant case.

considered at least somewhat defensible. This Court has often allowed Rule 3.850 motions to be filed outside the two-year time limit where attempts to file those motion within the limit had been thwarted by the State's failure to comply with Chapter 119. Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); Muehleman v. Dugger, 623 So. 2d 480 (Fla. 1993); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). See also Mendyk v. State, 592 So. 2d 1076 (Fla. 1992). Further, this Court has extended the time period for filing Rule 3.850 motions after disclosure of Chapter 119 materials. Muehleman; Jennings v. State, 583 So. 2d 316 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Provenzano.

What the State's Motion revealed, however, is that the State has no intention of conceding that Mr. Ventura's pending Rule 3.850 motion is timely, even though it was filed less than thirty days after the Court had finally denied Mr. Ventura's motion for rehearing and amended motion for rehearing, and is concededly, see, State's Motion, at Page 4, Paragraph 5, virtually identical to the Amended Motion for Rehearing which Mr. Ventura filed well within sixty days after receiving the last of what Chapter 119 materials the State appears inclined to provide without further legal action.

Given the position of the State, which flies directly in the face of at least six decisions by this Court, the question becomes, just what was Mr. Ventura to do? While the circuit court had entered an order dismissing his Rule 3.850 motion, it

did not rule on his motion for rehearing for approximately two years, and thus Mr. Ventura's initial motion remained pending. For virtually that entire two year period the State withheld critical Chapter 119 material. When the State finally provided that material, the two year date was long passed and Mr. Ventura's initial motion was still waiting for a ruling on rehearing.

Because Rule 3.850 allows the filing of only one motion under that rule, except under limited circumstances, and most certainly only one motion at a time, Mr. Ventura could not file a new 3.850 motion until the initial motion was resolved. His initial motion, however, was not resolved until after the two year date had passed. If, as the State apparently now contends, Mr. Ventura's new 3.850 motion, containing the facts obtained through, and claims arising from, Chapter 119 materials does not relate back to the date of the filing of his initial motion and the passage of the two year date renders it time barred and there is no such thing as an amended motion for rehearing, just how was Mr. Ventura to exercise his right to due process, under Florida law and the decisions of this Court?

Under the State's theory, because the State withheld Chapter 119 materials until after the two year date and the circuit court did not resolve the pending motion for rehearing, Mr. Ventura should be denied due process. Such an argument is simply incredible. Moreover, the timing of the State's partial Chapter 119 disclosure, i.e. Jacksonville State Attorney file delivered

ten days prior to two year date and Krom file delivered four months after two year date and its stance regarding time bar, suggests a deliberate attempt by the State to create just such a "double bind". If this Court does not reverse the circuit court's order of dismissal and remand this matter with instructions to allow Mr. Ventura a reasonable amount of time in which to resolve remaining Chapter 119 issues and, thereafter, a reasonable amount of time in which to amend his initial Rule 3.850 motion, it must reverse the circuit court's denial of Mr. Ventura's Amended Motion for Rehearing and direct the court to consider the same on the merits.

ISSUE II

THE CIRCUIT COURT ERRED IN DENYING MR. VENTURA'S MOTION TO COMPEL DISCLOSURE OF DOCUMENTS AND REQUEST FOR ORDER TO SHOW CAUSE.

On September 21, 1992, Mr. Ventura filed a motion to Compel Disclosure of Documents and Request for Order to Show Cause. In that motion, he identified 160 specific documents which the various State agencies, but primarily the Volusia County Sheriff's Department, had failed to produce. In fact, the trial judge expressed his concern that the Sheriff's Department had failed to turn over all of its public records. At a May 8, 1992, hearing, the trial court stated that original evidence from Mr. Ventura's trial and police officers' "personal" files had not been disclosed. At the hearing, this Court stated:

[THE COURT]:

there are so many different investigators on the thing, I think some of them had their own personal records, so I don't know if that might be what the thing is.

MR. PHILLIPS: That may as well be part of it.

THE COURT: A note sitting in a cardboard box at home or something like that. I don't know if that might account for some of it.

* * *

I do recall during those trials there were problems finding a lot of stuff because of the passage of time and so many different people involved.

* * *

And I believe they will have some problem locating a lot of stuff.

(PC-R 51-52). The court continued:

One thing I do know, Mr. Daly, just having been the trial judge in both of the trials, Mr. Ventura's and Mr. Wright's, is that I don't know what ultimately happened to them, but some time during the course of either trial in front of the jury or some pretrial stuff, there was often deputies on the stand saying they had their own personal files and a lot of stuff they kept.

Now, I don't know if subsequently they say they've turned that over to the Sheriff's Office or some of these deputies still have a cardboard box in their attic or something like that of old files, maybe their notes and whatever it might be.

(PC-R 84). The court went on to state:

Also, like, at least some attempt to get with the investigating officers. And if they've got field notes and stuff like that, still they have them, like I said, in their trunk, in their attic, whatever it may be, turn those over.

(PC-R 100). The court also stated:

> I do recall, you know, some of these deputies talking about having, you know, their own files at home on this thing over and above what they made formal reports on.

(PC-R 101). The court also explained:

> In this particular case, I know there had been some references -- I can't remember whether or not it was at trial or motions to compel discovery that I remember some of the investigators on the stand saying that they -- you know, because of the complexity of the case, a lot of them were going up to Chicago and talking to Federal Postal Inspectors in Chicago exchanging information. A lot of them were keeping their own files and were making records, and then turning them in, but still had a lot of their own for lack of a better word, calling them field notes or stuff like that.
>
> MR. DALY: Well, your Honor, I do have to --
>
> THE COURT: And those files may not have -- ultimately, once the case was over with, at least through the trial stage -- may not have been, you know, turned over to the evidence custodian.

(PC-R 108). The Court went on to state:

> At least there's a strong assumption that there ought to be something around, like doing interviews and then, you know -- more objective than not, it's been my experience that some officers interview a witness, there's some notes, if they didn't take an audiotape or didn't have handwritten statement out either by the witness or written out by the police officers and signed by the witness, at least that police officer's made some notes as to what the witness said.

(PC-R 110-111).

Hearing was held on Mr. Ventura's motion on May 21, 1993. The Sheriff's Department records custodian, Ms. Sheets testified

that she had provided Mr. Ventura's counsel with everything she had been given by the Sheriff's Department (PC-R 89-97). However, individual Sheriff's Department officers were called and confronted with their own reports indicating the existence of further materials. There answer was consistently that there were other records, but that they didn't have them because they had turned everything over to the Department. (PC-R 40, 48, 50, 53-54, 63, 64-65, 69, 73, 81-82, 121-122, 122-123, 132, 197-199, 208-209, 210-211).

Notwithstanding the uncontroverted evidence that many of the public records sought by Mr. Ventura were somewhere in the possession of the Volusia County Sheriff's Department, the circuit court denied Mr. Ventura's motion. (PC-R 736-737). There was no basis in the record for the circuit court's decision. Clearly records existed and clearly Mr. Ventura was entitled to those records. The circuit court's order should be reversed and the Volusia County Sheriff's Office directed to search out and provide all public records in its possession.

ISSUE III

THE CIRCUIT COURT FAILED TO ATTACH PORTIONS OF THE RECORD DEMONSTRATING THAT MR. VENTURA WAS ENTITLED TO NO RELIEF.

The circuit court failed to attach portions from the record demonstrating that Mr. Ventura was entitled to no relief to either its initial order of dismissal or it order denying Mr. Ventura's motion for rehearing or amended motion for rehearing.

Recently, this Court explained:

> Without reaching the merits of any of these claims, we nevertheless believe that a hearing is required under rule 3.850. In its summary order, the trial court stated no rationale for its rejections of the present motion. It failed to attach to its order the portion or portions of the record conclusively showing that relief is not required and failed to find that the allegations were inadequate or procedurally barred.
>
> The state argued that the entire record is attached to the order in the Court file before us, thus fulfilling this requirement. However, such a construction of the rule would render its language meaningless. The record is attached to every case before this Court. Some greater degree of specificity is required. Specifically, unless the trial court's order states a rationale based on the record, the court is required to attach those specific parts of the record that directly refute each claim raised.
>
> We thus have no choice but to reverse the order under review and remand for a full hearing conforming to rule 3.850.

Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990)(emphasis added). See also Lemon v. State, 498 So. 2d 923 (Fla. 1986).

Mr. Ventura is entitled to a full hearing conforming to Rule 3.850.

ISSUE IV[15]

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.

Mr. Ventura alleged that on October 5, 1992, Mr. Ventura's postconviction counsel viewed the original Florida Department of Law Enforcement file. During this inspection, the Florida Department of Law Enforcement legal representative, Ms. Judith Landis, stated that certain materials were being withheld. Ms. Landis stated that blank sheets represented withheld materials and, in fact, when counsel asked to have a certain page copied Ms. Landis replied that the material was being withheld. Ms. Landis had previously deleted material in the file and claimed two exemptions pursuant to Florida Statutes, § 119.07(3)(e) and (3)(h). Regarding Mr. Krom's file, Ms. Landis replied that the file had been purged pursuant to law. Pursuant to Hoffman, Mr. Ventura requested that the circuit court allow him time to amend upon the completion of a civil suit.

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[15]The issues which follow were presented to the circuit court, but not considered on the merits due to the circuit court's erroneous denial of Mr. Ventura's Amended Motion for Rehearing. They should properly be considered in the first instance by the circuit court. See, Issue I, infra. They are raised herein out of an abundance of caution. No claim contained hereinafter is abandoned.

He also alleged that sensitive Colorado Department of Correction's materials were sent to this Court prior to disclosure. These materials were lost and never disclosed.

He also alleged that on November 1, 1993, Mr. Ventura requested copies of the Volusia County Sheriff's Office file regarding Marshall Krom. The importance of this file has been argued in Claims IV (Brady) and VI (newly discovered evidence). On March 8, 1994, Mr. Ventura finally received a copy of this critical file. This file was not released or available at the time of Mr. Ventura's trial. In fact, this file was not even available during Mr. Wright's trial. Unfortunately, the file is far from complete. Mr. Ventura is entitled to a hearing as required by Chapter 119.

He also alleged that on the following materials have not been disclosed (in quotations) but were referenced in the disclosed materials:

> i. A 4-19-81, interview by Inv. Hudson and Inv. Buscher of Donna Shady, Marshall Krom's wife -- "For details See the Lead sheet under Donna Shadey";
>
> j. "See investigator S report for more complete details on the fire";
>
> k. "A death report was also made under same case number";
>
> l. Krom's body was found fifty inches from the front door -- "(see diagram)";
>
> m. Inv. Hudson transported Michael Weber, roommate of victim, to Donna Shadey's house -- "Interview was done by Inv. B. Buscher on 4-21-81. All details can be obtained from tapes";

> n. On 04-15-81, Inv. Hudson and Inv. Buscher interviewed Sheila Brown aka Natalie North aka Mike Brown and James Daniel Bronson aka Dee Dee. "Both interviews taped, and details can be supplied by listening to the tapes";
>
> o. On 4-24-81, Inv. Hudson interviewed Robert Robinson aka "Latice" Chevron. "This interview was also taped and details contained therein";
>
> p. Mr. Fisher was interviewed by Inv. Burnsed, along with Deputy J.R. Long and Inv. Alan Kaye, of the Volusia County Narcotics Task Force. -- "This interview was tape recorded and for a full report refer to cassette tape marked 'Interview with Anthony Fisher,' which is incorporated in this case file"

He also alleged that Jim Purpello was murdered in a drug related crime about the same time as Mr. Clemente and under similar circumstances to Mr. Krom but the file has been withheld. Based upon material obtained from the Marshal Krom file, Mr. Ventura now requests all public records within the possession of the Volusia County State Attorney's Office, the Volusia County Sheriff's Department, and the Daytona Beach Police Department related in any way to the investigation and/or prosecution of the Purpello murder.

Mr. Ventura is entitled to this critical material. There are several references to the deaths of Clemente and Krom being drug related. See Claims IV, (Brady and VI (newly discovered evidence). This information proves Mr. Ventura's innocence. A hearing was required to ensure that Mr. Ventura has received all the materials requested and an evidentiary hearing should follow as to the materials produced.

ISSUE V

MR. VENTURA WAS ENTITLED TO AN EVIDENTIARY HEARING ON WHETHER HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, WHETHER THE STATE WITHHELD EVIDENCE THAT WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE, AND WHETHER . NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. VENTURA'S CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Ventura alleged that material relevant evidence went unpresented at the guilt phase of his capital trial. He alleged that there was a reasonable probability that this evidence would have made a difference in the outcome of that trial and/or that this evidence undermined confidence in the outcome of his trial. He alleged that the jury never heard this evidence due to his trial counsel's ineffectiveness, citing, inter alia, Strickland v. Washington, 104 S. Ct. 2052, 2065 (1984) (Claim II, Amended Motion for Rehearing); and/or the State's withholding of evidence and presentation of false evidence, citing, inter alia, Brady v. Maryland, 373 U.S. 83 (1963), United States v. Bagley; Arango v. State, 497 So. 2d 1161 (Fla. 1986) (Claim IV, Amended Motion for Rehearing); and/or that such evidence was newly discovered, citing inter alia, Jones v. State, 591 So. 2d 911 (Fla. 1991) (Claim VI, Amended Motion for Rehearing). He clearly set forth the legal principles upon which these claims were based. More importantly, in support of these claims he alleged a multitude of specific facts.

He alleged that in the Florida Department of Law Enforcement's file are photographs, including a photograph of the shoe print found on the victim or near the truck. The shoe print was of a wavy-lined work boot. Mr. McDonald's testimony was that Mr. Ventura was wearing cowboy boots at the time of the crime (R. 662), and that he told Mr. Ventura to dump the cowboy boots because they were too identifiable (R. 641). If Mr. Ventura was wearing cowboy boots as Mr. McDonald testifies, then Mr. Ventura was not at the crime scene.

He alleged that the jury did not hear of the deals received by Jack McDonald. When Jack McDonald was asked on direct examination if he received any promises, Jack McDonald testified, "none whatsoever." (R. 649). In 1983, Jack McDonald was indicted on federal bank scam charges; however, he jumped bail. As early as December 19, 1986, Mr. Stark, who prosecuted Mr. Ventura, was writing the United States Attorney's Office and soliciting their help:

> I feel that the interests of justice could be better served by having Mr. McDonald on lengthy probation with a short jail term if necessary, available to testify at the trial of Peter Ventura and possibly Jerry Wright (in the event he is indicted).
>
> * * *
>
> I would appreciate any consideration your office could give in the effort to locate Jack McDonald, or coax him out of hiding.

Letter From Mr. Stark to Mr. Grossman of the United States Attorney's Office dated December 19, 1986. On March 6, 1987 the

United States Attorney's Office responded to Mr. Stark that Mr. McDonald's:

> cooperation and truthful testimony in [Mr. Ventura's] case can be made known to the Federal Parole Board at his first parole hearing. Your office can present to the Parole Board all relevant information regarding Mr. McDonald's cooperation.
>
> * * *
>
> Should Mr. McDonald surrender to federal authorities and also appear as a witness at Mr. Ventura's trial, this office will consider the nature of Mr. McDonald's cooperation and truthful testimony in evaluating whether to pursue further prosecution of Mr. McDonald on bond jumping charges.

Letter from Mr. Grossman of the United States Attorney's Office to Mr. Stark dated March 6, 1987. On September 3, 1987, Mr. McDonald sent a letter to Detective Hudson with the Volusia County Sheriff's Office:

> At this point in time it will have to be a two for one trade. In other words I will cooperate fully provided I am released by court order form all federal charges including the IRS.
>
> * * *
>
> [If you can do this] I will promptly turn myself in and cooperate fully.
>
> * * *
>
> If by some fluke I am apprehended without any deal being made I will rot in hell before I would give <u>any</u> testimony on anything. This is a promise.
>
> * * *

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

Letter from Mr. McDonald to Dave Hudson dated September 3, 1987. Mr. McDonald was not apprehended by authorities without a deal being struck with the state and federal authorities. In fact, Mr. McDonald later wrote a letter to Mr. Stark complaining that he did not think he had received all that he was promised. On September 25, 1987, Mr. McDonald was apprehended and told Assistant State Attorney Ray Stark, who prosecuted Mr. Ventura, that he was willing to cooperate.[16] On September 25, 1987, Mr. Stark wrote a letter to the United States Attorney's Office

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

Letter from Mr. Stark to Mr. Schweitzer of the United States Attorney's Office dated September 25, 1987. On October 5, 1987, the United States Attorney's Office wrote a letter to Mr. Stark:

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

Letter from Mr. Valukas the United States Attorney for the Northern District of Illinois to Mr. Stark dated October 5, 1987.

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[16]Mr. Ventura has not received Mr. McDonald's federal case files, including the clerk's files or the Federal Bureau of Prisons files. Mr. Ventura will supplement with any additional information obtained.

On January 20, 1988, Mr. Stark wrote another letter to the United States Attorney's Office that he felt a "compelling obligation" to advise them and the court of Mr. McDonald's assistance to the State of Florida. Mr. Stark's letter also stated that Mr. McDonald was equally responsible for whatever happened to Mr. Clemente, and that Mr. McDonald "will again be a crucial witness for the state of Florida in Mr. Wright's trial." Mr. Starke's letter concluded:

> Whatever consideration can be given [Mr. McDonald] at any future hearings in his two federal cases in return for this assistance would, in my opinion, be in the interests of justice.
>
> * * *
>
> Corporal David Hudson of the Volusia County Sheriff's Office and I would appreciate the courtesy of a telephone call regarding the scheduling of any future hearings to be held for Mr. McDonald so that we can make arrangements to be heard by the court considering Mr. McDonald's cooperation in Florida.

Letter from Mr. Stark to Mr. Grossman of the United States Attorney's Office dated January 20, 1988. Mr. Stark also wrote to the Federal Public Defender's Office:

> Mr. McDonald has been an essential and cooperating witness [in Mr. Ventura's and Mr. Wright's cases].
>
> * * *
>
> Needless to say, Jack McDonald has cooperated and has agreed to cooperate with the state authorities since his resentencing in July by Judge Aspen.
>
> * * *

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

Letter from Mr. Stark to Mr. Galvan of the Federal Public Defender's Office dated October 31, 1988. On November 1, 1988, Mr. Stark wrote a letter to Mr. McDonald wishing him good luck and asking to be kept posted on any future hearings as Mr. Stark and Mr. Hudson were willing to help.

He alleged that Mr. Ventura's jury did not know that the State had intentionally violated Mr. McDonald's speedy trial rights and allowed murder charges against him to be dismissed in exchange for his testimony against Mr. Ventura.

He alleged that had the jury heard this evidence, there is a reasonable probability that it would have rejected Mr. McDonald's self-serving testimony. Without that evidence, there is a reasonable probability that the jury would have acquitted Mr. Ventura.

He alleged that the jury did not hear evidence which demonstrated that Mr. Clemente was killed in connection with his sale of illegal drugs, specifically, cocaine.

He alleged that the Volusia County Sheriff's Office was predicting Mr. Clemente's death **before** it happened. It was not because of Mr. Wright's keyman insurance policy. It was because the victim was a known and established drug-dealer, and there was a drug war being waged by Ralph Pillow. According to sheriff reports, Mr. Krom owed Mr. Pillow money and Mr. Pillow was sleeping with Mr. Krom's wife. On April 6, 1981, Marshall Krom

was killed because of drugs. Lieutenant Carroll wrote in a supplemental report:

> TWO MORE KILLINGS ARE EXPECTED LOCALLY SOON CONNECTED W/ KROM'S MURDER.
>
> KROM - FROM N.Y. LIVES ON RIVER
> CLEMENTE - FROM N.Y. LIVES ON RIVER
> BARTOSH - LIVES ON RIVER, FROM PENNA, NEAR N.Y.
> TOM HUNSINGER FROM N.Y.

Tom Hunsinger was a known cocaine dealer in Fort Lauderdale, a "strong suspect," and on the hit list. Mr. Hunsinger disappeared allegedly to New York. On April 15, 1981, Mr. Clemente was found dead -- just as the Volusia County Sheriff's Office had predicted. According to the sheriff's reports, Marshall Krom was missing a ".38 cal snub revolver." In addition, the sheriff's reports noted that Perry Davis, a suspect and known drug dealer, was missing his .38 special that was later returned by Terry Hodges, who was involved in a drug-related killing in Brevard County. Finally, the Volusia County Sheriff's Office reports reflect that Eddie Sepe[17] had stolen a .38 caliber pistol from Randy Goyne, an associate of Ralph Pillow. The reports also indicated that Mr. Sepe had been involved in a drug deal with Mr. Krom. Mr. Ventura was linked only by a hearsay statement that he asked Mr. Barrett for a .357 Magnum. Mr. Clemente knew Mr. Krom. Sheriff reports state that "Clemente had been to Krom's place before probably to buy drugs." They noted that Mr. Krom and Mr. Clemente used to drink together at the Office Lounge -- a center

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[17]Krom's wife told the sheriff's office that she thought Ralph Pillow had paid Mr. Sepe to kill Mr. Krom.

for drugs. They also noted the feud with Ralph Pillow and noted, "the talk is both Clemente and Krom killed by local narcotics people."

He alleged that the Volusia County Sheriff's Office reports note that a black Cadillac had been involved in another drug-related murder, Fritz, and was seen in DeLeon Springs harassing Mr. Krom's wife. The Brevard County Sheriff's Office allegedly knew the occupants of the car. Because it was not a part of Mr. Ventura's trial, it is obvious that Mr. Ventura was not an occupant. However, this information has not been disclosed to Mr. Ventura. The Volusia County Sheriff's Office also noted that Carl Caruthers of the Broward County Sheriff's Office has information on the Fort Lauderdale suspects. The Sheriff's reports show a connection between Mr. Krom, Mike Webber (Krom's roommate), Mr. Blackburn (a known drug dealer working out of Orlando), and Fort Lauderdale. The sheriff report notes that Mr. Blackburn forced Mr. Krom to go to Fort Lauderdale. Mr. Ventura has not been provided any information from the Broward County Sheriff's Office and no additional follow-up reports are in the disclosed file.[18]

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[18]Jim Purpello was murdered in a drug related crime about the same time as Mr. Clemente but the file has been withheld. Based upon material obtained from the Marshal Krom file, Mr. Ventura now requests all public records within the possession of the Volusia County State Attorney's Office, the Volusia County Sheriff's Department, and the Daytona Beach Police Department related in any way to the investigation and/or prosecution of the Purpello murder.

He alleged that the truck the victim was driving was observed at the victim's house at a time that would have made it impossible for the State's theory, including Mr. Ventura's involvement, to be true. The State's theory was that Mr. Clemente was supposed to meet a Mr. Martin regarding a boat at about 1:00 pm at the Barnett Bank. Mr. McDonald testified that at around 1:00 pm he dropped Mr. Ventura off at the bank and followed them. Mr. McDonald testified they drove around and the actual killing only took ten minutes. The State's theory at trial showed the victim's death to have occurred at approximately 3:00 p.m. on April 15, 1981. Harland Fogle, Jr.[19] estimated that he found the victim dead on April 15, 1981, at 3:00 or 3:30 or 4:00 pm. Mr. Fogle also testified that he found the body and then he drove only a half mile and called the police, who arrived within thirty minutes. However, Sergeant Hyde of the sheriff's office testified that he did not receive a dispatch until 5:33 pm and arrived at the scene at 5:44 pm.[20] However, two witnesses saw the truck found at the crime scene at the victim's house at 4:15 pm on the day he was killed. This directly impeaches Mr. McDonald's testimony and the State's theory. Mr. McDonald testified that he followed the truck and they pulled off at an

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[19]Harland Fogle, Jr. was friends with the Jorgensons, owners of the then Crow's Bluff Marina. The sheriff's files strongly suggest that the marina was involved in the dealing of drugs. After finding Mr. Clemente dead, Mr. Fogle left his old job and started to work at the marina.

[20]Mr. Ventura has not received any records to show the time Mr. Harland called the police.

abandoned gravel pit. Mr. McDonald did not mention any other stops or that they drove around for two or three hours and then made stops at the victim's house before the alleged killing. On April 15, 1981 a black Cadillac limousine bearing an Illinois license plate was observed near the victim's house between 10:30 a.m. and 11:00 a.m. Two large individuals were in the limousine, along with a third person. These persons asked a neighbor for directions to the victim's house. As late as March 16, 1988, the Volusia County Sheriff's Office was still receiving leads on Mr. Krom's death. Mr. Blackburn told the sheriffs that Mr. Krom and Mr. Haynes had "loud and repeated arguments" that could have stemmed from "the narcotics business." Mr. Blackburn told the sheriffs that Mr. Haynes had confessed to killing Mr. Krom. On March 22, 1988, Ms. Noe also stated that Mr. Haynes had told her that he had killed Mr. Krom and the same thing could happen to her. Ms. Noe also stated that Mr. Haynes drove a grey/black pickup truck and had been to the Krom house two days prior in Perry Davis' black Lincoln Continental.

He alleged that other key suspects included Jesse Simms and Mavin Tucker who one to two weeks prior to the murder broke into Mr. Krom's house and stole cocaine and a weapon. Fred "Flash" Haynes was also a prime suspect because he supplied Krom with drugs and Krom owed him money. Steve Macken allegedly confessed to the killing of Mr. Krom. The sheriff's office also interviewed Mr. and Mrs. Emmett Solomon, who stated they saw a black pickup truck at the Krom's house. The sheriff's office

also interviewed Ms. Cole, who also saw a black pickup truck at the Krom's residence. Ms. Cole's daughter had almost been run over "by a black pick up with Crows Bluff Marina written on the doors." Mr. Clemente was found dead in Chip Coccia's black pickup with Crows Bluff Marina written on the door.

Mr. Krom's murder has remained unsolved. The evidence of a connection between the Krom and Clemente murders is substantial. There is absolutely no evidence to suggest that Mr. Ventura was in any way connected with the Krom murder. There is a reasonable probability that, had Mr. Ventura's jury know of this evidence, the result of his trial would have been different.

Mr. Ventura alleged that On April 15, 1981, Robert Clemente was murdered in Deland Florida. On June 25, 1981, Jack McDonald and Peter Ventura were arrested for the murder of Robert Clemente. at that time the arresting officers admittedly felt they could not prove their case against either defendant beyond a reasonable doubt without bargaining for either Ventura or McDonald to testify against the other (See Deputy Hudson Ventura trial testimony R. 572). The police were unsuccessful in eliciting such testimony in 1981, in part due to Ventura's release on bond and failure to appear for extradition hearings in Illinois. As a result the State of Florida intentionally did not bring Jack McDonald to trial within 180 days of arrest. As a result the First Degree Murder charges against McDonald were forever dismissed. McDonald was released from custody on or about December 26, 1981.

He alleged that at the time of McDonald's release from custody on the murder charges, he faced significant incarceration on federal charges stemming from a bank fraud operation that he admittedly planned and headed in Illinois. More than one half million dollars was stolen. By McDonald's own admission, the instant fraud was completed in December 1980, approximately four months prior to the instant murder. Postal Inspector Ed Burger coordinated the investigation of McDonald in the aforementioned bank fraud operation. Burger began interviewing McDonald as to the said bank fraud while the Defendant was still incarcerated in Volusia County, Florida on the Clemente murder charges. Specifically, Burger spoke with McDonald on or about July 17, 1981. At that time McDonald again denied any involvement in the Clemente killing. McDonald claimed that people in Chicago had set him up as to the murder charges. McDonald additionally claimed that he encountered Peter Ventura in Daytona Beach for only a casual conversation at a Denny's Restaurant (See Wright R. 285, 286). During the same time period McDonald told his own attorney, Dan Warren Esquire, that he had nothing to do with the Clemente murder (See Wright R. 723). McDonald pled guilty to several federal criminal counts in the bank fraud operation in early 1983. McDonald was sentenced in May 1983 to 15 years in jail. However, the federal judge permitted McDonald to report for his incarceration at a later time. Instead of reporting, McDonald absconded, and was not taken into custody again until September 1987. One week prior to being sentenced on the federal

charges, and shortly before disappearing for over four years, McDonald met with Assistant State Attorney Ray Stark and Deputy Sheriff Hudson in Atlanta, George on or about May 4, 1983. McDonald was sworn by a certified court reporter and notary. He claimed to have been solicited by one Jerry Wright, a long time friend and business contact, in 1980 to organize a contract murder of Robert Clemente (See McDonald testimony Wright R. 243). McDonald claimed that Jerry Wright had taken a "key man" life insurance policy worth $150,000 out on Clemente. He added that Wright had serious financial setbacks and desperately needed the money from the insurance policy. McDonald claimed to have hired Peter Ventura to perform the killing. McDonald added that he would receive 25% of what he then believed to be an insurance policy worth only $92,000, i.e. receive $23,000. McDonald claimed that Ventura planned the details of the killing and solely executed the murder. McDonald claimed that Ventura called him at the Day's Inn between 1:00 p.m. and 2:00 p.m. of April 15, 1981 and affirmed that the killing was completed. McDonald stated that he then went with Jerry Wright to seek a local businessman named Ralph Jacobs in order for Wright to borrow $2,000. The reason for Wright borrowing $2,000 was to provide funds for Peter Ventura to ostensibly leave town by Greyhound Bus. McDonald also claimed that he was flush financially in December of 1980 after completing the aforementioned bank fraud operation involving one half million dollars. McDonald admitted to having $90,000 while in Atlanta in late 1980 and early 1981

(See McDonald Wright R. 308 LL 6-10). McDonald claimed that he asked Jerry Wright to find investors that would profitably use monies he wanted to loan. McDonald loaned $28,000 to two Wright acquaintances named John Abbott and Scott Chamberlin (See Wright R. 983-984). The loans did not work out and McDonald held Wright personally accountable to return $17,000. Wright in fact recovered $12,000 and invested it in one of his many tire and/or muffler franchise stores. In fact, McDonald had access to so much wealth at the time that he sent gold Kruggerands unexpectedly on several occasions to Jerry Wright. McDonald claimed in his May 1983 sworn statement to state attorney and sheriff personnel that he entered into the Wright arrangement in order to make money for his family in case he died of cancer. McDonald claims to have conducted negotiations concerning the murder at a time he was flush financially from the one half million dollar bank fraud and at a time he actively sought out borrowers for $28,000. McDonald claims to have entered into this arrangement solely to make an additional $23,000 for his estate in case of his death. This was an estate large enough to have supported McDonald from 1978 until being taken back into custody in late 1987, according to his own testimony in the Jerry Wright trial (Wright R. 279). After McDonald was taken back into custody in September 1987, he again was questioned under oath. This time as the star State witness in the trial of Peter Ventura in January 1988 McDonald said that Jerry Wright had contacted him about orchestrating the contract killing of Robert Clemente in

order to collect the aforementioned $92,000 insurance policy. McDonald again expected to receive $23,000. However, this time McDonald's testimony under oath differed markedly from sworn testimony taken in May 1983. This time McDonald did not claim Ventura planned the killing individually. This time McDonald claimed that he jointly planned said killing with Peter Ventura. This time McDonald explained that Ventura called Robert Clemente and claimed to be one Alex Martin. He explained that Ventura claimed to be interested in buying a boat through Clemente. McDonald added that Ventura arranged to meet Clemente behind the Barnett Bank building in downtown Deland, Florida at approximately 1:00 p.m. on April 15, 1981. McDonald claimed to be waiting in a separate vehicle watching the meeting occur. He claimed to see Clemente and Ventura drive off in the truck that the victim borrowed from his work place at Crow's Bluff Marina. The truck was black with a Crow's Bluff Marina insignia on the side. McDonald then claimed he drove to a predesignated spot near the murder scene and waited for Ventura to complete the killing. He then said that Ventura came to his vehicle, affirmed the killing was completed, and was told by McDonald to take off and get rid of his cowboy boots (McDonald testimony Wright RR. 269-273). In the Wright trial Tina Clemente, Robert's widow, stated that she had been introduced by the victim to Peter Ventura, by the Defendant's real name, long before the instant murder on at least three different occasions (Tina Clemente testimony Wright R. 842, LL 5-20). Yet Jack McDonald claimed

that Ventura came to Deland in April 1981 and pretended to be Alex Martin, a retired northern businessman looking to buy a boat. In other words, McDonald implicitly stated that Clemente did not previously know Ventura. McDonald claimed that Ventura pretended to be Alex Martin. Clemente's wife affirmed that the victim introduced Peter Ventura, under his true name, to her months before the killing. This critical fact creates a chain reaction of doubt as to McDonald's entire story. If this fact is believed then McDonald is not to be believed when he stated that:

a) Ventura pretended to be Alex Martin;

b) Ventura pretended to be buying a boat;

c) Ventura met Clemente behind the Barnett Bank pretending to be Alex Martin; and

d) McDonald followed Ventura to a predesignated site and drove the killer away. Additionally, McDonald claimed that the killing occurred at approximately 1:30 p.m. in his 1988 testimony, and between 1:00 and 2:00 in his 1983 testimony. Yet two witnesses at the Wright trial, Gerald and Sharon Smith, neighbors of Robert Clemente, stated that they saw the Crow's Bluff Marina vehicle that contained the victim's body, in the driveway of his home at 4:15 on april 15, 1981 (See Wright RR. 931-940). Additionally, Volusia County Sheriff Lt. Caroll testified that the motor of the aforementioned vehicle was still warm to the touch at 6:30 p.m. on April 15, 1981 (See Carroll testimony Wright). Additionally, Sylvia Magrogan, another neighbor of Clemente's, testified in the Wright trial that three

big men in a large, black car resembling a limousine asked directions to Robert Clemente's house between noon and 1:00 p.m. of April 15, 1981. Yet another Clemente neighbor, Mercedes Van Ulzen, testified at the Wright trial that she saw the same large black car containing three "pretty good size" men near the victim's house on April 15, 1981. However, Mrs. Van Ulzen added the important fact that the car had Illinois license plates. Both Reginald Barrett and Joseph Pike admitted during the Wright trial that they saw a "massive" unnamed man, nearly seven feet tall with large hands, with Jack McDonald, and another fairly large individual named Joe Marshall in Chicago riding in a large black luxury car with Illinois license plates in the fall of 1980 (Wright R. 491-493). Tina Clemente stated in a sworn statement given to Wright investigator Gene Johnson, a retired Deland police captain, that she returned to the victim's home in the early morning hours of April 16, 1981 and discovered two glasses and a burning joint on the living room coffee table that weren't there earlier that day. Police officers testified that they first arrived at the crime scene at 5:30 p.m. They testified that the crime scene was near a construction site containing numerous workers. In fact, a worker from said site discovered Clemente's body and called police at approximately 5:15 p.m. Additionally, the crime scene was located only a few minutes drive from Clemente's home.

If the aforementioned testimony of the four neighbors, Lt. Carroll, Tina Clemente, and other police officers is believed

(all witnesses that have no connection or bias in favor of Peter Ventura) then these facts also create a eviscerate McDonald's entire story. More importantly, the neighbors and police officers testimony lends some insight into what really did happen, i.e., that three "pretty good size" men from Illinois, the home of Jack McDonald, came to Clemente's house and encountered the victim. The killers did not leave Clemente's house in the Crow's Bluff Marina vehicle until after 4:15. between 4:15 and 5:15 p.m. on April 15, 1981, they transported Clemente's body to the crime scene and left him.

He alleged that key prosecution witnesses Joseph Pike and Reginald Barrett stated in transcribed testimony given to Lt. Carroll conducted on May 18, 1981, and in trial testimony that: 1) Barrett was "very, very surprised" that Ventura had anything to do with a crime of violence, and 2) that Barrett had never known Ventura to be involved in a crime of violence in the past, and 3) that it was Pike's feeling that Ventura's own statements gave him a "strong feeling" that McDonald himself committed the murder (See Pike Testimony, Ventura R. 508). Additionally, sworn testimony was given by Pike that Peter Ventura's wife worked as a ticket agent for Amtrak railroads and that his wife regularly got the Defendant free bookings on Amtrak. On April 15, 1981, Amtrak had reservations under the name of both Ventura and Gonzalez for 1:42 p.m. on April 15, 1981. The Amtrak station was located within five minutes driving distance of the crime scene in Deland in 1981.

If this testimony is to be believed then it too creates a chain reaction of doubt as to the believability of McDonald's testimony that Ventura arrived and left by Greyhound bus and that Ventura needed right to borrow $2,000 from Ralph Jacobs so that McDonald could provide said funds to the Defendant for bus fare to leave Daytona Beach after the alleged murder.

He alleged that in the deposition of Valetta Short on or about October 2, 1981 in State v. Jack McDonald, Case No. 81-1939, an employee that answered the phone at Crow's Bluff Marina, she stated that Alex Martin called at approximately 1:25 p.m. to 1:45 p.m. asking for Robert Clemente. Ms. Short told Martin that Clemente was waiting for him in the parking lot behind the Barnett Bank. Clemente himself called to tell her he was still waiting at 1:45 p.m. The voice claiming to be Martin slurred his words. Joseph Pike, in a deposition with Lt. Carroll conducted on or about May 18, 1981 stated that he knew Peter Ventura for 16 or 17 years and never knew the Defendant to slur his words. To the contrary, Ventura spoke with very precise diction according to Pike.

He alleged that McDonald had claimed that Ventura assumed the alias of Alex Martin. However, Tina Clemente had testified that Robert Clemente introduced her to Peter Ventura under his true name at least three times prior to the murder. Additionally, Deputy Sheriff Hudson testified that the Defendant registered at the Days Inn in the Daytona area from April 13-15, 1981, under his true name of Peter Ventura (See Hudson testimony

Wright). However, the Marina secretary testified that a man did call claiming to be Alex Martin, a man who slurred his words, unlike Peter Ventura. Taking all of the aforementioned testimony together it is clear that somebody other than Peter Ventura pretended to be Alex Martin and that in concert with the men from Illinois went to Clemente's home, whether they first met him at the Barnett Bank or not, and did not leave said residence until between 4:15 p.m. and 5:15 p.m. on April 15, 1981.

He alleged that four primary witnesses testified against Peter Ventura. In addition to Jack McDonald, the main witness, the state of Florida also introduced the testimony of Joseph Pike, Reginald Barrett, and Timothy Arview.

He alleged that Joseph Pike testified at both the Wright and Ventura trials, and in several sworn depositions conducted by defense counsel, state attorney's, and various law enforcement personnel over a period of time extended from May 18, 1981 to 1990.

He alleged that Pike claimed that Ventura spoke with him on May 6, 1981. Pike had known Ventura for over 15 years. Pike also admittedly participated in the aforementioned bank fraud scam with Jack McDonald, Peter Ventura, and Reginald Barrett. Pike had been arrested on the instant scam in late 1980 long before Jack McDonald. Interestingly, Pike had been arrested while attempting to cash fraudulent checks in an Illinois bank while Peter Ventura was located on the street outside the building. Pike admitted that Ventura saw him arrested and

arranged for Pike's attorney. Pike began to immediately cooperate with the federal authorities, specifically Postal Inspector Ed Burger. Pike admitted that Ventura and McDonald both suspected he was cooperating with the federal authorities during this May 1981 meeting. Pike also admitted that he and Ventura were not close socially for an extended period of time immediately preceding the May 1981 meeting. Yet despite Pike admitting that:

1) Ventura saw him arrested by federal authorities, and
2) Ventura suspected he was working with the federal authorities, and
3) He and Ventura were not especially close socially at that time.

Pike nonetheless claims that Ventura told him that:

1) he was involved in some fashion with Jack McDonald concerning the "extermination" of an unnamed individual in an unnamed state as to the collection of a $100,000 key man life insurance policy on a person that had previously quit or been fired from his job;
2) that he was going to collect $13,000 from the insurance payment;
3) that he had arranged for the extermination; and
4) that he had inquired about obtaining a firearm.

He alleged that Pike added, however, that Ventura never claimed that he had committed the murder himself. Pike also added specific information about other specific cronies of McDonald, Ventura, and his that commonly dealt in guns and violence named Kenny Reyes and TEO. Interestingly, Pike was sentenced to 30 days in jail as to the bank fraud charge, in return for his cooperation in that investigation and the instant cause. McDonald was sentenced to 15 years incarceration in the same case. If Pike told the truth to improve him position with the federal authorities then one must still wonder why Ventura would confide in the witness about a murder. Especially in lieu of Pike's own admissions that Ventura knew he had been arrested and was suspicious of the witness working with federal authorities. Such admissions make no sense unless Ventura claimed to have "handled the extermination" to place Pike in fear. However, even if Pike was telling the truth it demonstrated only that Ventura was aware of an insurance extermination plan. It does not demonstrate that Ventura carried out the murder himself or played a direct role, nor does it demonstrate that the plan referred to involved Robert Clemente's murder. (Jack McDonald testified at that Wright trial that he and Ventura allegedly investigated the possibility of murdering an individual insured by Jerry Wright that lived in Montgomery, Alabama. McDonald had testified that Ventura had come to Atlanta to meet with McDonald for this purpose several months prior to

the Clemente killing, and that Ventura had gone to Montgomery to look into that).

He alleged that Reginald Barrett also testified against Peter Ventura. Mr. Barrett was also involved as a co-defendant in the aforementioned bank fraud scam in Illinois. Mr. Barrett also began cooperating with federal agents in late 1980. He claimed that Ventura told him that he met with Jack McDonald in Atlanta concerning "burning someone for Jack" as to a key man life insurance policy several months prior to the Clemente killing. Barrett also testified that Ventura inquired about obtaining a weapon with a silencer. All of the aforementioned Barrett testimony is equally consistent with the Montgomery operation or in fact more consistent time wise than with the Clemente killing.

He alleged that Barrett also discussed the light skinned Puerto Rican Kenny Rayes and the Mexican named Tio. Also, Barrett added that Tio and Kenny both went to Atlanta with Peter Ventura to meet Jack McDonald. Barrett also noted that McDonald shipped stolen tires to a Florida connection. He added that a man named Tom Kawalzik drove the stolen tires to Florida, and most importantly that Tom was a dangerous person who had killed people.

He alleged that Barrett admitted that:

1) Ventura had never killed anybody,

2) Ventura had never owned or been in possession of a firearm, and

3) "Unless you prove this case. I've never seen him as a violent person before. I really hadn't, very, very surprised at this, possibility of this happening." (See May 1981 statement of Barrett to Lt. Carroll).

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

He alleged that there was no physical evidence tying Peter Ventura to the murder of Robert Clemente. No fingerprints were found at the murder scene belonging to Peter Ventura. According to crime scene photographs none of the footprints found on the victim's body or in the area of the victim's vehicle were tied to Ventura. Also, the soles of the shoe prints found were inconsistent with the cowboy boots Jack McDonald ostentatiously claimed Ventura wore during the killing.

He alleged that the existing physical evidence as inconsistent with McDonald's testimony that the murder occurred at the chimer scene. Crime scene photographs reveal little if no blood found within the vehicle.

He alleged that Tina Clemente stated that Robert Clemente was extremely nervous before meeting Alex Martin. Such extreme nervousness is totally inconsistent with a simple boat sale. It is more consistent with illegal activity, such as the drug dealing that Clemente indulged in, according to his own wife. Tina Clemente testified in both her statement and at the Wright trial to seeing the victim sell small quantities of drugs on numerous occasions, to having access to quick cash consistent with drug dealing, and to being present at the Marina when a full boat load of marijuana was unloaded.

He alleged that throughout the Ventura trial the specter of murder for greed was raised. The prosecution argued that Jerry Wright solicited Jack McDonald who in turn solicited Peter Ventura, to kill for insurance money. Yet nothing was done at the Ventura trial to explain the background of this insurance money or co-defendant Jerry Wright's involvement. This was curious in that to believe McDonald's story about Ventura, the jury also would need to believe his story about Jerry Wright. If light could not be shed on Jerry Wright's involvement or lack thereof, then doubt could be shed on McDonald's testimony and Ventura's guilt.

He alleged that during the Wright trial numerous witnesses, including Wright's civil attorney Richard Withers, his insurance agent Saul Minkoff, and his accountant Steven Yordon were called upon to explain:

1) The nature of the insurance policy;
2) How the policy came about;
3) How it continued to exist after Clemente's ceased working for Jerry Wright and began working for Crow's Bluff Marina; and
4) Jerry Wright's financial status at the time of the murder

He alleged that Insurance agent Saul Minkoff testified that Jerry Wright told him to cancel the insurance policy on Robert Clemente long before the murder, but shortly after the victim left working with Wright. Additionally, Minkoff and Withers shed light on how the insurance policy came to being. Wright franchised tire stores. Clemente became a 49% owner and primary manager of one such store, with an option to buy the other 51%. However, Clemente was required to put no money down to purchase the 49% holdings. As a result, the only way Wright could protect his investment was to buy a life insurance policy on Clemente. According to attorney withers this was common practice, and one of dozens Wright purchased on co-workers in his franchise operation.

He alleged that accountant Yordon testified that Wright's financial situation was hardly the desperate one portrayed by

both McDonald and the prosecution. In fact, a Daytona Beach resident named Toni Gustafson testified that she borrowed $40,000 from Jerry Wright in 1981, and again agreed to pay it back at the rate of $1,800 per month for approximately three years (See Wright R. 951).

He alleged that Post Inspector Burger stated that Jerry Wright testified against Jack McDonald to a Grand Jury in Chicago in 1981 as to the bank fraud investigation. Yet, McDonald claimed that he and Wright entered into a murder conspiracy at approximately the same time.

He alleged that the jury also did not hear that Todd Waser[21] admitted that he had been in, and even driven, the Crow's Bluff Marina truck. However, Mr. Waser's fingerprints were allegedly not found in the truck. In addition, Mr. Waser was at the Barnett Bank on the day in question and at the victim's residence. Ms. Crotts gave a taped statement on May 5, 1981, and in that statement Ms. Crotts stated that they drove to a couple of banks and to the victim's house on April 15, 1981. Another witness stated that Mr. Waser, Ms. Crotts, and Mr. Tatum discussed the fact they needed an alibi.

He alleged that the jury did not know of the note in the state attorney file which stated, "Bob Owen was going to do the hit but don't know if he ever met Wright", or the note that "Bob Owen just finished with fed[eral] probation Jack [McDonald] says

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[21]A key suspect as noted by a handwritten note in the state attorney file.

he and Bob were here in 1980 Fall to check out Clemente [the victim] living [?] house [?]", or that Mr. McDonald stated that Mr. Owen had stated to him he would do anything for money.

As a further subclaim to his claim of ineffective assistance of counsel Mr. Ventura also alleged that defense counsel also, without a tactic or strategy, failed to object during Mr. Ventura's trial at several critical times. Mr. Cass' ineffectiveness was so egregious that it was raised on direct appeal. The Florida Supreme Court did not fully address the claim and ruled that it could be raised in a postconviction motion.

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

He alleged that defense counsel failed to object to the inadmissible hearsay testimony of Denise Jorgenson. (R. 365). Denise and Terry Jorgenson owned Crow's Bluff Marina. Alternate juror Mr. Wheeler who ultimately sat in judgment of Mr. Ventura admitted at voir dire that he knew Mr. Jorgenson. (R. 208). The

State said it did not matter because Mr. Jorgenson was not going to be a witness. Id. Mr. McCoy who sat on Mr. Ventura's innocence phase jury but died before penalty phase also knew the Jorgensons. This is especially important in light of the evidence that Mr. Clemente's death was drug related and the Crow's Bluff Marina owned by the Jorgensons was allegedly running and dealing drugs. Mr. Ventura's trial was prejudiced.

He alleged that defense counsel failed to move to strike or, in the least, object to the inadmissible hearsay testimony of the medical examiner, Dr. Arthur Schwartz.

He alleged that defense counsel failed to object to the inadmissible hearsay testimony of Edward Berger. (R. 465; 471; 477).

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

He alleged that defense counsel failed to object to inadmissible collateral crimes evidence (or inadmissible character evidence) introduced during the testimony of Joseph Pike.

He alleged that defense counsel failed to object to the inadmissible collateral crimes evidence (or inadmissible

character evidence) found in the testimony of Gary Eager, a U.S. Postal Inspector.

He alleged that defense counsel also failed to object to the inadmissible hearsay testimony of Deputy David Hudson. (R. 559-560, 568, 574-575).

He alleged that defense counsel failed to object to inadmissible collateral crime evidence (or inadmissible character evidence) by the State's star witness Jack McDonald. (R. 630).

He alleged that defense counsel reinforced Mr. Ventura's involvement in collateral crimes in his ineffective cross-examination of Mr. McDonald. (R. 651).

He alleged that defense counsel failed to object to the inadmissible hearsay testimony of Juan Gonzales. (R. 686).

As a further subclaim to his claim of ineffective assistance of counsel Mr. Ventura also alleged that his trial counsel also failed to disclose to Mr. Ventura his conflict of interest.[22] Unbeknownst to Mr. Ventura at the time of his capital proceedings, his defense counsel, in addition to serving in the Public Defenders' Office Capital Division, was also an active law enforcement officer. Counsel's status as a deputy sheriff was never disclosed to Mr. Ventura. These dual positions violate sections of the Florida Constitution as well as Mr. Ventura's rights to the effective and conflict-free counsel as guaranteed by the United States Constitution. In addition, Mr. Cass did not

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[22]These facts also supported Mr. Ventura's claim that his trial counsel was burdened by a conflict of interest. (Claim V, Amended Motion for Rehearing)

inform Mr. Ventura that his office was understaffed and overburdened to effectively represent Mr. Ventura. When Mr. Ventura and Mr. Cass attempted to get Mr. Ventura conflict-free counsel, this Court refused and Mr. Cass improperly continued on the case.

As a further subclaim to his claim of ineffective assistance of counsel Mr. Ventura also alleged that the public defender's office was understaffed and overburdened.[23] Mr. Cass did not even know the name of the State's chief witness, Jack McDonald. Mr. Cass filed a Notice of Taking Deposition on Wednesday, October 14, 1987 "[f]or 10:30 a.m.: **JERRY** MCDONALD, c/o Seminole County Jail" (emphasis supplied). In addition in a Motion for Transcription of Testimony or Proceedings dated October 13, 19[87], Mr. Cass requested a copy of the "Transcript of deposition of **Jerry** McDonald at Seminole County Jail on Wednesday, October 14, 1987" (emphasis supplied). Mr. Cass also had a subpoena issued in the name of **Jerry** McDonald.

As a further subclaim to his claim of newly discovered evidence Mr. Ventura also alleged that evidence of a his codefendant, Jerry Wright's, life sentence should now be considered in mitigation. O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989); Gafford v. State, 387 So. 2d 333 (Fla. 1980); Brookings v. State, 495 So. 2d 135 (Fla. 1986). Where the evidence demonstrates a disparity of sentences, it is appropriate

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[23]These facts also supported Mr. Ventura's claim that his trial counsel was burdened by a conflict of interest. (Claim V, Amended Motion for Rehearing).

to correct the disparity. Subsequent to Mr. Ventura's trial, Jerry Wright the alleged mastermind behind this homicide received a life sentence. Mr. Ventura's jury was ignorant of Mr. Wright's sentence. These new facts are properly presented to this Court in Mr. Ventura's Amended Motion for Rehearing.

This Court has specifically noted that when reviewing a death sentence, a Court should consider a codefendant's life sentence even when that sentence was imposed after the imposition of the death sentence being reviewed. Witt v. State, 342 So. 2d 497, 500 (Fla. 1977); see Scott (Abron) v. State, No. 76,450 (Fla. July 23, 1992). In Scott (Paul) v. State, 419 So. 2d 1058 (Fla. 1982), Justice Overton explained:

> Even when the accomplice has been sentenced subsequent to the sentencing of the defendant seeking review, it is proper for this Court to consider the propriety of disparate sentences, see Will v. State, 342 So. 2d 497, 500 (Fla. 1977), to determine whether a death sentence is appropriate given the conduct of all participants committing the crime.

Id. at 1058. Justice Overton concluded that such a claim, based on facts unavailable earlier, would have to be heard under Rule 3.850 if it were not considered on direct appeal. In Scott (Abron) v. State, the Florida Supreme Court held that Rule 3.850 is the proper vehicle for litigation of the issue of disparate sentences when a codefendant subsequently receives a life sentence. Id. at 8.

Mr. Wright was sentenced after the trial court announced Mr. Ventura's death sentence. Too late for it to be considered by his sentencing judge or jury. This Court did not consider the

issue on direct appeal. To the extent that appellate counsel should have raised or argued the issue, Mr. Ventura received ineffective assistance of appellate counsel. See Strickland v. Washington, 466 U.S. 668 (1984). As it is, no sentencer has been provided a "vehicle" for considering the codefendant's life sentence. See Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989) (capital sentencer "must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense").

A trial court has only two options when presented with a Rule 3.850 motion: "either grant appellant an evidentiary hearing, or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted." Witherspoon v. State, 590 So. 2d 1138 (4th DCA 1992). A trial court may not summarily deny without "attach(ing) portions of the files and records conclusively showing the appellant is entitled to no relief," Rodriguez v. State, 592 So. 2d 1261 (2nd DCA, 1992). See also Bell v. State, 595 So. 2d 1018 (2nd DCA 1992); Brown v. State, 596 So. 2d 1026, 1028 (Fla. 1992). The first claim for relief standing alone warrants an evidentiary hearing. Thus, the motion cannot be summarily denied.

The law strongly favors full evidentiary hearings in capital post-conviction cases, especially where a claim is grounded in factual as opposed to legal matters. "Because the trial court denied the motion without an evidentiary hearing and without

attaching any portion of the record to the order of denial, our review is limited to determining whether the motion conclusively shows on its face that [Mr. Ventura] is entitled to no relief." Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982). "This Court must determine whether the two allegations . . . are sufficient to require an evidentiary hearing. Under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion and record conclusively show that the movant is not entitled to relief (citations omitted)." Harich v. State, 484 So. 2d 1239, 1240 (Fla. 1986)(emphasis added). "Because an evidentiary hearing has not been held . . . we must treat [the] allegations as true except to the extent that they are conclusively rebutted by the record." 484 So. 2d at 1241 (emphasis added). See also Mills v. State, 559 So. 2d 578, 579 (Fla. 1990)(citation omitted) ("treating the allegations as true except to the extent rebutted by the record, we find that a hearing on this issue is needed.") "The law is clear that under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief." O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984).

Recently, this Court explained:

> Without reaching the merits of any of these claims, we nevertheless believe that a hearing is required under rule 3.850. In its summary order, the trial court stated no rationale for its rejections of the present motion. It failed to attach to its order the portion or portions of the record conclusively

> showing that relief is not required and failed to find that the allegations were inadequate or procedurally barred.
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> The state argued that the entire record is attached to the order in the Court file before us, thus fulfilling this requirement. However, such a construction of the rule would render its language meaningless. The record is attached to every case before this Court. Some greater degree of specificity is required. Specifically, unless the trial court's order states a rationale based on the record, the court is required to attach those specific parts of the record that directly refute each claim raised.
>
> We thus have no choice but to reverse the order under review and remand for a full hearing conforming to rule 3.850.

Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990)(emphasis added). See also Lemon v. State, 498 So. 2d 923 (Fla. 1986).

Some fact-based post-conviction claims by their nature can only be considered after an evidentiary hearing. Heiney v. State, 558 So. 2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. When a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So. 2d 1250, 1252-53 (Fla. 1987). "The movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief." State v. Crews, 477 So. 2d 984, 984-985 (Fla. 1985). "Accepting the allegations

. . . at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989).

Mr. Ventura has pled substantial, serious allegations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. "Needless to say, these are serious allegations which warrant a close examination. Because we cannot say that the record conclusively shows [Mr. Ventura] is entitled to no relief, we must remand this issue to the trial court for an evidentiary hearing." Demps v. State, 416 So. 2d 808, 809 (Fla. 1982) (citation omitted).

Mr. Ventura was -- and is -- entitled to an evidentiary hearing on his Rule 3.850 pleadings. Hoffman. Mr. Ventura was -- and is -- entitled in these proceedings to that which due process allows -- a full and fair hearing by the court on his claims. Hoffman; Holland v. State. Mr. Ventura's due process right to a full and fair hearing was abrogated by the lower court's summary denials, which did not afford proper evidentiary resolution.

Under Rule 3.850 and this Court's well-settled precedent, a post-conviction movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Hoffman; Lemon; O'Callaghan; Gorham. Mr. Ventura has alleged facts which, if proven, would entitle him to

relief. Furthermore, the files and records in this case do not conclusively show that he is entitled to no relief.

ISSUE VI

MR. VENTURA WAS ENTITLED TO AN EVIDENTIARY HEARING ON WHETHER HE 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.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2) prejudice. In his motion, Mr. Ventura pleads sufficient facts to establish each (Claim III, Amended Motion for Rehearing).

A. Ineffective Voir Dire and Jury Selection

As to this subclaim, Mr. Ventura alleged that his defense counsel failed to challenge, either peremptorily or for cause, jurors who were predisposed to recommend a death sentence.[24] Both Jurors Kirby and Dixon said they would recommend death even if the mitigating factors outweighed the aggravating

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[24]Mr. Ventura's current counsel is unable to determine what happened to a juror, Mr. George T. Adams, Jr., who was selected during voir dire but who did not sit for Mr. Ventura's trial. Mr. Adams was replaced by Ms. Gettman prior to the phase one verdict. Mr. Ventura's record is silent on this matter. It is also worth noting that Mr. McCoy sat through Mr. Ventura's first phase but died prior to the penalty phase and the last remaining alternate, Mr. Wheeler, sat for the penalty phase.

circumstances. (R. 161-163). These jurors were subject to challenge for cause pursuant to Morgan v. Illinois, 112 S. Ct. 2222 (1992), and the failure to remove them is constitutional error. Ross v. Oklahoma, 108 S. Ct. 2273 (1988); Morgan, supra. Mr. Ventura's right to due process and a fair trial was violated.

He alleged that defense counsel stipulated that jurors Burdick (R. 181) and Hopkins (R. 182) were subject to a challenge for cause. Mr. Hopkins clearly stated that he could apply the law regardless of his religious beliefs. (R. 139-42). Mr. Hopkins was improperly excused for cause. (R. 183).

Mr. Ventura alleged that Mr. Cass provided ineffective assistance of counsel for failing to object to Mr. Hopkins improper recusal from the jury. Regarding Ms. Burdick, Mr. Cass was ineffective in making no effort to rehabilitate Ms. Burdick, who stated she could follow the law regarding the first phase. (R. 174).

B. Ineffective Investigation and Presentation of Mitigating Evidence

Regarding this subclaim Mr. Ventura alleged that his sentence of death is the prejudice resulting from counsel's failure to investigate and prepare. He alleged that counsel failed to adequately investigate and prepare for the penalty phase. Counsel failed to discover and use the wealth of mitigation available in Mr. Ventura's background--mitigating evidence without which no individualized consideration could occur. Had counsel adequately investigated and prepared, overwhelming mitigating evidence which would have precluded a

sentence of death in this case would have been uncovered. Any of the available material and relevant evidence discussed herein which counsel could have presented would have made a difference. Counsel's failure in this regard was not the result of a reasonable tactical decision, but of counsel's failure to adequately investigate and prepare.

He alleged that his sentencing jury knew nothing of the man they sentenced to death. Peter Ventura was the sixth oldest in a large family of eight boys and two girls. His parents, Juan and Lucinda, were both born in Mexico and had come to the United States in the 1930's to escape the abject poverty both faced in their native land. His father's work for the Sante Fe Railroad brought him to Chicago where he met Lucinda and they were married. With 12 mouths to feed, Juan Ventura worked long hours at in the Indiana steel mills whenever the work was available, often leaving home long before dawn and not returning until after dark. Even though he worked arduously, there was never enough money to feed his large family. To make matters worse, the by then firmly entrenched depression often left him without a job. Unable to make ends meet, even though he tried, Juan would turn to the merchants in the neighborhood. He would go to the produce area of the South Water Market, climb up on the trucks, and help the regular crews unload fruit and vegetables. When the trucks were empty, they'd give him the old produce which they couldn't sell. Juan would also go to local restaurants for three day old

bread and other leftovers. Despite Juan's industriousness, his large family often went hungry.

He alleged that Mr. Ventura learned that the local Mennonite church would give its members a ticket after church which could be turned in for chicken bones, old breads, and cakes. Though raised Catholic, the offer of food was impossible to ignore and the Ventura family joined the Mennonite Church. The food did not come without a price, however, which was service to the church. It was a price the entire Ventura family gladly paid. All worked as janitors in an apartment building owned by the church. They cleaned the church building itself. In season, they would harvest crops on the Mennonite farms. Despite not having enough room for even themselves, they would open their doors to church members with no where else to go.

He alleged that Juan's efforts kept him away from home a good part of the time, leaving Lucinda to care for Peter and his nine brothers and sisters. Lucinda was always busy. Not only did she have many children of her own, she cooked for the church, for visiting missionaries, and for the families who would stay with them. Lucinda, however, was a distant woman, who was unable to offer her children, particularly the younger children, the affection which they needed. This role fell to Peter. His father's principles of hard work and charity were passed on to Peter and he took up the mantle without complaint. He taught his younger brothers and sisters to swim. He taught them to skate. He took them to movies. He was the person who held their hand

when they went to church. He stayed with his family and helped support them until the day he was married.

He alleged that Peter too, shared in the work for the church. In addition to his janitorial duties, Peter worked as a lifeguard and a counselor at the Mennonite summer camp. His care for others didn't stop with his family. He was President of the Mennonite Youth Organization and Vice-President of the Latin Youth for Christ. He spent six months in Puerto Rico with the church's disaster unit and helped to rebuild clinics, homes, and churches destroyed by a hurricane. He was active in the church choir, where he was noted for his beautiful voice. Instilled with a deep belief in the teachings of the Mennonite religion that all life was sacred, he was markedly non-violent and, accordingly, could not serve in the military; ultimately registering as a conscientious objector.

He alleged that due to trial counsel's ineffectiveness, Mr. Ventura's sentencing jury knew nothing of the deeply religious,[25] non-violent, hard working, kind, and caring man which stood before them. Had they known that the offense for which they had just convicted him stood in stark contrast to the rest of his life, there is a reasonable probability that they would have returned a binding recommendation of life. With not half so much mitigation, Jerry Wright (who allegedly actually

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[25]In the absence of this evidence, Counsel for the State effectively argued that the evidence of Mr. Ventura's religious activity in prison was nothing more than a "death row conversion".

ordered the murder of Mr. Clemente and but for whose order Mr. Clemente would still be alive) received a life sentence. Mr. Ventura was most certainly prejudiced by counsel's ineffective investigation and is entitled to relief.

C. Failure to Object

As to this subclaim, Mr. Ventura alleged that his trial counsel did not even know the applicable law, allowing the prosecutor to exclude relevant hearsay during penalty phase. (R. 864). Mr. Cass failed to present a wealth of mitigation due to a conflict of interest, his misapprehension of the law, or his ignorance of the substantial mitigation listed above.

He alleged that counsel also failed to know the law and register objections to violations of Mr. Ventura's rights such as inadequate jury instructions and the State's closing arguments.

As a further subclaim to his claim of ineffective assistance of counsel Mr. Ventura also alleged that the public defender's office was understaffed and overburdened.[26] Mr. Cass did not even know the name of the State's chief witness, Jack McDonald. Mr. Cass filed a Notice of Taking Deposition on Wednesday, October 14, 1987 "[f]or 10:30 a.m.: **JERRY** MCDONALD, c/o Seminole County Jail" (emphasis supplied). In addition in a Motion for Transcription of Testimony or Proceedings dated October 13, 19[87], Mr. Cass requested a copy of the "Transcript of deposition of **Jerry** McDonald at Seminole County Jail on

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[26]These facts also supported Mr. Ventura's claim that his trial counsel was burdened by a conflict of interest. (Claim V, Amended Motion for Rehearing).

Wednesday, October 14, 1987" (emphasis supplied). Mr. Cass also had a subpoena issued in the name of Jerry McDonald.

As a further subclaim to his claim of newly discovered evidence Mr. Ventura also alleged that evidence of a his codefendant, Jerry Wright's, life sentence should now be considered in mitigation. O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989); Gafford v. State, 387 So. 2d 333 (Fla. 1980); Brookings v. State, 495 So. 2d 135 (Fla. 1986). Where the evidence demonstrates a disparity of sentences, it is appropriate to correct the disparity. Subsequent to Mr. Ventura's trial, Jerry Wright the alleged mastermind behind this homicide received a life sentence. Mr. Ventura's jury was ignorant of Mr. Wright's sentence. These new facts are properly presented to this Court in Mr. Ventura's Amended Motion for Rehearing.

This Court has specifically noted that when reviewing a death sentence, a Court should consider a codefendant's life sentence even when that sentence was imposed after the imposition of the death sentence being reviewed. Witt v. State, 342 So. 2d 497, 500 (Fla. 1977); see Scott (Abron) v. State, No. 76,450 (Fla. July 23, 1992). In Scott (Paul) v. State, 419 So. 2d 1058 (Fla. 1982), Justice Overton explained:

> Even when the accomplice has been sentenced subsequent to the sentencing of the defendant seeking review, it is proper for this Court to consider the propriety of disparate sentences, see Will v. State, 342 So. 2d 497, 500 (Fla. 1977), to determine whether a death sentence is appropriate given the conduct of all participants committing the crime.

Id. at 1058. Justice Overton concluded that such a claim, based on facts unavailable earlier, would have to be heard under Rule 3.850 if it were not considered on direct appeal. In Scott (Abron) v. State, the Florida Supreme Court held that Rule 3.850 is the proper vehicle for litigation of the issue of disparate sentences when a codefendant subsequently receives a life sentence. Id. at 8.

Mr. Wright was sentenced after the trial court announced Mr. Ventura's death sentence. Too late for it to be considered by his sentencing judge or jury. This Court did not consider the issue on direct appeal. To the extent that appellate counsel should have raised or argued the issue, Mr. Ventura received ineffective assistance of appellate counsel. See Strickland v. Washington, 466 U.S. 668 (1984). As it is, no sentencer has been provided a "vehicle" for considering the codefendant's life sentence. See Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989) (capital sentencer "must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense").

The facts alleged must be taken as true. They provide a basis for relief. On the basis of the points and authorities cited in Issue V, Mr. Ventura is entitled to an evidentiary hearing on this claim.

addition to serving in the Public Defenders' Office Capital Division, was also an active law enforcement officer. Mr. Cass' status as a deputy sheriff was never disclosed to Mr. Ventura. Counsel's status as a deputy sheriff adversely affected his representation of Mr. Ventura.

He alleged that he was unaware of Mr. Cass' status as an active law enforcement officer until it was disclosed in an unrelated postconviction hearing. In State v. Teffeteller, Quince, Herring, Henderson, Stano, Wright, Robinson, Castro and Randolph (Evidentiary hearings re: Howard Pearl held in the Seventh Judicial Circuit, Volusia County, before the Honorable B.J. Driver)[28].

He alleged that the Public Defender's Office was woefully understaffed and could not effectively represent Mr. Ventura at trial. He alleged that Mr. Cass did not even know the name of the State's star witness, Jack McDonald. Mr. Cass filed a Notice of Taking Deposition on Wednesday, October 14, 1987 "[f]or 10:30 a.m.: JERRY MCDONALD, c/o Seminole County Jail" (emphasis supplied). In addition in a Motion for Transcription of Testimony or Proceedings dated October 13, 19[87], Mr. Cass requested a copy of the "Transcript of deposition of Jerry McDonald at Seminole County Jail on Wednesday, October 14, 1987" (emphasis supplied). Mr. Cass also had a subpoena issued in the name of Jerry McDonald.

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[28]Howard Pearl was also involved at an early point in Mr. Ventura's case.

He alleged that without the benefit of critical newly discovered evidence, this claim was only partially raised on direct appeal. The information upon which this claim is now based includes newly discovered evidence, therefore this claim is cognizable in Mr. Ventura's motion for postconviction relief. See Fla. R. Crim. P. 3.850.

This claim involves an issue requiring full and fair Rule 3.850 evidentiary resolution. See, e.g., Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990); Mason v. State, 489 So. 2d 734 (Fla. 1986); Herring v. State, 580 So. 2d 135 (Fla. 1991); Harich v. State, 542 So. 2d 988 (Fla. 1989).

ISSUE IX

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.

Mr. Ventura was denied his constitutional right to remain silent. Mr. Ventura did not take the stand during either the innocence or penalty phase of his trial. The trial court found as a factor in support of a death sentence that Mr. Ventura "did not present his version" of the facts of the crime. (R. 1049). Our version of criminal justice is based on an "accusatorial and not an inquisitorial system." Walls v. State, 580 So. 2d 131, 133 (Fla. 1991)(quoting Miller v. Fenton, 474 U.S. 104, 109 (1985) which quoted, Rogers v. Richmond, 365 U.S. 534, 541 (1961)). "Due process requires fairness, integrity and honor in the operation of the criminal justice system, and in its

treatment of the citizen's cardinal constitutional protections." Haliburton v. State, 514 So. 2d 1088, 1090 (Fla. 1987); Walls, 580 So. 2d at 133 (quoting Moran v. Burbine, 475 U.S. 412 (1986)(Stevens, J., dissenting)). Mr. Ventura's Eighth Amendment rights were violated by this Court relying on an impermissible factor to prove aggravating circumstances. Brooks v. Kemp, 762 F.2d 1383, 1411 (11th Cir.)(en banc)(citing Griffen v. California, 380 U.S. 609 (1965)). Because of this impermissible factor, Mr. Ventura's sentence of death "was more likely to tip in favor of a recommended sentence of death." Valle v. State, 502 So. 2d 1225 (Fla. 1987). This Court's improper consideration of Mr. Ventura's silence put an improper thumb on the death's side of the scale. See Stringer v. Black, 112 S. Ct. 1130 (1992). The presentation and use of evidence of post-Miranda silence is forbidden by the United States Constitution. Doyle v. Ohio, 426 U.S. 610 (1976). The use of a defendant's post-Miranda silence is fundamentally unfair, in violation of the due process clause of the fourteenth amendment. Doyle, 426 U.S. 610, 619. Mr. Ventura's trial counsel failed to object to this Court's findings of fact, and this was deficient performance. Harrison v. Jones, 880 F.2d 1277 (11th Cir. 1989); Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

Mr. Ventura's sentencing phase was prejudiced. A constitutionally impermissible factor was used by this Court to relieve the State of its burden and place an unconstitutional

thumb on the death's side of Mr. Ventura's sentencing scale. Stringer, 112 S. Ct. at 1137.

ISSUE X

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

Mr. Ventura's proceedings resulting in his sentence of death violate the constitutional mandate of Eddings v. Oklahoma, 455 U.S. 104 (1982). Current Florida law requires the sentencing judge to specifically address nonstatutory mitigation presented and/or argued by the defense. Campbell v. State, 571 So. 2d 415 (Fla. 1990). The failure to give meaningful consideration and effect to the evidence in mitigation requires reversal of a death sentence. Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

At the opening of Mr. Ventura's penalty phase, the State chose to present "nothing further in aggravation at this time." (R. 859). At the close of Mr. Ventura's case in mitigation, the State presented nothing in rebuttal. (R. 880). During penalty phase, Mr. Ventura presented three witnesses. The first witness, Larry Gainly, was a lay minister, and Mr. Gainly counseled inmates, including Mr. Ventura. (R. 864-66). Mr. Gainly's testimony regarding Mr. Ventura as a model prisoner with strong religious convictions went unrefuted by the State.

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

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

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

Mr. Ventura presented unrefuted nonstatutory mitigating evidence:

> a) Evidence that a defendant is a caring family person is mitigation. Bedford v. State, 589 So. 2d 245 (Fla. 1991); Dolinsky v. State, 576 So. 2d 271 (Fla. 1991); Harmon v. State, 527 So. 2d 182 (Fla. 1988); Perry v. State, 522 So. 2d 817 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987); Rogers v. State, 511 So. 2d 526 (Fla. 1987); Ventura v. State, 456 So. 2d 444 (Fla. 1984); Washington v. State, 432 So. 2d 44 (Fla. 1983); Jacobs v. State, 396 So. 2d 713 (Fla. 1981).
>
> b) Evidence that Mr. Ventura had a good employment history and positive character traits. Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987); Wasko v. State, 505

So. 2d 1314 (Fla. 1987); McCampbell v. State, 424 So. 2d 1072 (Fla. 1982).

c) Evidence that Mr. Ventura was a model prisoner, including listening and helping other inmates. Skipper v. South Carolina, 476 U.S. 1 (1986); McRae v. State, 582 So. 2d 613 (Fla. 1991); Harmon v. State, 527 So. 2d 182 (Fla. 1988).

d) Evidence that Mr. Ventura developed and evidenced strong spiritual and religious standards. McCrae v. State, 582 So. 2d 613 (Fla. 1991).

Despite the presence of mitigating circumstances, the court concluded "there are no mitigating circumstances" to be considered. (R.1050). It is obvious from the record that this Court failed to fully weigh the mitigation as mandated by Florida Statutes and precedent. See Santos v. State, 591 So. 2d 160, 164 (Fla. 1991).

The Florida Supreme Court has recognized that trial courts "continue to experience difficulty in uniformly addressing mitigating circumstances." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). Because of this, the court, citing Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982), suggested that capital defendants may have been deprived of their fundamental Eighth Amendment right to have all relevant mitigation considered by the capital sentencer. See also Zant v. Stephens, 462 U.S. 862, 879 (1983)(Eighth amendment guarantees a capital defendant an "individualized determination" of the appropriate sentence). Moreover, the Florida Supreme Court noted that the failure to set forth specific findings concerning all aggravating and mitigating circumstances could prevent it from adequately carrying out its

responsibility of providing the constitutionally required meaningful appellate review, including proportionality review. Campbell, 571 So. 2d 419-20; State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Indeed, lack of uniformity in the application of aggravating and mitigating circumstances invariably would result in the arbitrary and capricious imposition of the death penalty. Furman v. Georgia, 408 U.S. 238 (1972); see Grossman v. State, 525 So. 2d 833, 850 (Fla. 1988) (Shaw, J., concurring). The trial court's treatment of the mitigation presented on Mr. Ventura's behalf is clearly inconsistent with Campbell and Eddings v. Oklahoma, 455 U.S. 104 (1982). See also Nibert v. State, 574 So. 2d 1059, 1061-63 (Fla. 1990).

The sentencing order states that the court found "no mitigating circumstances." (R. 1050). Federal constitutional law, however, dictates that any mitigating circumstance is applicable if it relates to "any aspect of a defendant's character or record and any of the circumstances of the offense." Eddings, 455 U.S. at 110 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978))(emphasis added). The circuit court failed to consider and give effect to nonstatutory mitigating circumstances presented and/or argued by Mr. Ventura. Mr. Ventura's death sentence is in violation of Florida law and the United States Constitution, and it must be vacated. Rule 3.850 relief is proper.

ISSUE XI

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.

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given <u>if the state showed the aggravating circumstances outweighed the mitigating circumstances</u>.

<u>State v. Dixon</u>, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Ventura's capital proceedings. To the contrary, the court shifted to Mr. Ventura the burden of proving whether he should live or die.

In <u>Hamblen v. Dugger</u>, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, the Florida Supreme Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. <u>Hamblen</u> indicates that these claims should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Ventura herein urges that the Court assess this significant issue in his case and, for the reasons set forth below, that the Court grant him the relief to which he can show his entitlement. Moreover, he asserts that defense counsel rendered prejudicially

deficient assistance in failing to object to the errors. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with Dixon, for such instructions erroneously shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 481 U.S. 393 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Mr. Ventura's sentencing proceeding did not follow this straightforward due process and eighth amendment requirement. Rather, Mr. Ventura's sentencing jury was specifically instructed that Mr. Ventura bore the burden of proof on the issue of whether he should live or die. (R. 858). See also (R. 900-01).

The instructions violated the Eighth Amendment. Mullaney v. Wilbur, 421 U.S. 684 (1975). The burden of proof was shifted to Mr. Ventura on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Ventura's due process rights under Mullaney. See also, Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). Moreover, the application of this erroneous standard at the sentencing phase violated Mr. Ventura's rights to a fundamentally fair and reliable sentencing determination, i.e.,

one which is not infected by arbitrary, misleading and/or capricious factors. See, Jackson; Dixon.

Second, in believing that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the judge must have concluded that once aggravating circumstances were established, he need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances.[29] Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393 (1987). Thus, the judge was improperly constrained.[30] Dixon. Mr. Ventura is entitled to relief in the form of a new sentencing hearing, due to the fact that his sentencing was tainted by the Court's misapplication of Florida law.

Counsel's failure to object to the clearly erroneous instructions was deficient under the principles of Harrison v. Jones, 880 F.2d 1277 (11th Cir. 1989) and Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). Counsel failed to know the law and that the judge was imposing a burden on the defense to prove mitigation outweighed aggravation. This was deficient performance which prejudiced Mr. Ventura at sentencing. Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991); Lee v.

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[29]See Claim VIII.

[30]In fact this Court referred to the improper standard in the sentencing hearing (R. 914) and in its findings of fact (R. 1049).

United States, 828 F.2d 503 (7th Cir. 1991). Rule 3.850 relief is required.

The files and records do not conclusively establish that Mr. Ventura is entitled to no relief. Accordingly, Rule 3.850 relief is warranted.

ISSUE XII

MR. VENTURA'S RECEIVED CONSTITUTIONALLY DEFICIENT JURY INSTRUCTIONS REGARDING THE AGGRAVATING CIRCUMSTANCES, AND THE AGGRAVATORS WERE IMPROPERLY ARGUED AND IMPOSED, IN VIOLATION OF ESPINOSA, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, RICHMOND AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Ventura's jury failed to receive complete and accurate instructions defining aggravating circumstances in a constitutionally narrow fashion. The penalty phase jury was instructed on the aggravating circumstances as follows:

> 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.

(R. 900).

Mr. Ventura raised this issue on direct appeal arguing that the instructions regarding statutory aggravating circumstances "have since [Proffitt v. Florida, 428 U.S. 242 (1976)] proved to be too broad to comport with constitutional requirements of specificity and consistency in application, and that the vagaries of unbridled discretion denounced in Furman v. Georgia, 408 U.S.

238 (1972) have returned in full force." Appellant's Initial Brief at 35. Mr. Ventura's direct appeal counsel also argued, "[i]t is critical that the statutory aggravating circumstances be sufficiently specific so as to afford consistent application by the this Court, which in turn provides guidance to the trial courts. This simply has not happened." Appellant's Initial Brief at 35-36. Mr. Ventura's appellate counsel challenged the vagueness of the jury instructions as well as the constitutionality of the death penalty statute.

The claim was rejected by this Court. Under Richmond v. Lewis, 113 S. Ct. 528 (1992) and Espinosa v. Florida, 112 S. Ct. 2926 (1992), and that decision was incorrect.

Under Espinosa, Mr. Ventura's capital sentencing was tainted with Eighth Amendment error based upon the jury 's improper consideration of the invalid aggravating circumstances of "pecuniary gain" and "cold, calculated, and premeditated." The standard jury instruction did not contain any of the Florida Supreme Court's limiting constructions regarding this aggravators, and therefore was "so vague as to leave the sentencer without sufficient guidance for determining the presence or the absence of the factor." Espinosa, 112 S.Ct. 2926. In Maynard v. Cartwright, the Supreme Court held "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 108 S. Ct. at 1858. There must be a

"principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not." Id. at 1859, quoting, Godfrey v. Georgia, 446 U.S. 420, 433 (1980).

There was sufficient mitigation in the record for the jury to have a reasonable basis for recommending life and thus preclude a jury override. See Tedder v. State, 322 So. 2d 908 (Fla. 1975); Omelus v. State. In Stringer v. Black, the United States Supreme Court held that relying on an invalid aggravating factor, especially in a weighing state like Florida, invalidates a death sentence:

> Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying on the existence of an illusory circumstance. Because the use of a vague aggravating factor is the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in Zant [v. Stephens] that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Stringer, 112 S. Ct. at 1139.

Mr. Ventura's sentence must be vacated and this matter returned to the trial court for a new sentencing procedure before a jury.

ISSUE XIII

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 AMENDMENT RIGHTS.

It is simply not enough for the Government to provide a "process" to dispose of disputed matters. Mathews v. Eldridge, 425 U.S. 319, 334-35 (1976). Mathews, of course, dealt with the fundamental question of the necessity of requiring formal hearings on disputed issues. The Supreme Court's analysis of the considerations regarding the necessity of procedural safeguards is highly enlightening and instructive. Mathews teaches that it is simply not enough for the Government to provide "a process" to dispose of disputed matters. Rather, the process must be fair to all parties and must be flexible enough to accommodate the particular litigation involved. A capital defendant has a "constitutional right to a fair trial regardless of . . . [the crime]." Heath v. Jones, 941 F.2d 1126, 1131 (11th Cir. 1991).

Mr. Ventura contends that he did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). Yes, he received a trial. Yes, he was represented by counsel. Yes, his case was tried to a jury.

And yes, he was partially allowed to present his case - to tell his side of the story. He has also been provided the opportunity to voice his objections to those portions of the trial that he considers to be erroneous, as this motion demonstrates. In spite of this, however, it is Mr. Ventura's contention that the process itself has failed him. It has failed 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. In short, once indicted Mr. Ventura was essentially guaranteed a death sentence. The trial was but a cog in the machinery that the State had set in motion. It is therefore Mr. Ventura's contention that the process itself has failed him. It has failed 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.

The flaws in the system which sentenced Mr. Ventura to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Ventura's direct appeal, Rule 3.850 Motion, and Motion for Rehearing and while there are means for addressing each individual error, the fact is that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence -- safeguards which are required by the Constitution.

The Supreme Court has reiterated the point that death is an unusual penalty, unique in its severity, and thus greater caution

and safeguards must be utilized to ensure the constitutional validity of each death sentence:

> Death is a different kind of punishment from any other which may be imposed in this country . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 357 (1977)(citations omitted).

This same principle was posited in Woodson v. North Carolina, 428 U.S. 280 (1976):

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson, 428 U.S. at 305 (emphasis added).

This rationale has been applied to both the sentencing and guilt-innocence phases of a capital defendant's trial:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotions," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.

Beck v. Alabama, 447 U.S. 625, 638 (1980)(emphasis added).

Mr. Ventura contends that numerous and varied violations occurred at both stages of his trial. These claims have been raised on direct appeal or are currently being raised to the extent possible. However, the claims which arise as a result of Mr. Ventura's trial should not only be considered separately. Rather, it is Mr. Ventura's contention that these claims should be considered in the aggregate, for when the separate infractions are viewed in their totality it is clear that Mr. Ventura did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). The numerous constitutional claims in the Rule 3.850 motion and Motion for Rehearing, together with those raised on direct appeal, show that this trial was fundamentally flawed. Id.

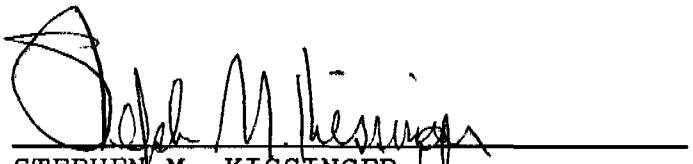
Florida courts have clearly recognized the principle of cumulative error. In Jones v. State, 569 So. 2d 1234 (Fla. 1990) the Florida Supreme Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added).

CONCLUSION

On the basis of the arguments presented herein, Mr. Ventura respectfully submits that he is entitled to a Huff hearing regarding the claims set forth in his Amended Motion for Rehearing, an evidentiary hearing, a new trial, and a resentencing. Mr. Ventura respectfully urges that this Honorable

Court remand to the circuit court for such an evidentiary hearing so that the circuit court may set aside his unconstitutional conviction and death sentence.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on June 15, 1995.



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