

CASE NO. SC00-583

PETER VENTURA,

Petitioner,

v. IN THE SUPREME COURT OF FLORIDA

MICHAEL W. MOORE,
Secretary,
Florida Department of Corrections,
Respondent.

and

ROBERT BUTTERWORTH,
Attorney General,
Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT ABOUT REFERENCES

The Petitioner herein has also filed a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850. The lower court's denial of that motion is on appeal before this Court in *Ventura v. State*, Case No. 93,839. References to the record on appeal in that case are of the form, e.g., (R. 123). References are also made to the record prepared in the direct appeal of the petitioner's conviction and sentence in *Ventura v. State*, 560 So.2d 217, cert. den. 498 U.S. 951, 111 S. Ct. 372, 112 L. Ed. 334 (1990), and are of the form, e.g., (Dir. 123).

Where there is a reason to draw attention to trial counsel in this case, they are referred to as "the prosecutor" or "defense counsel." "Appellate counsel" is the attorney who represented Mr. Ventura on direct appeal. The phrase "evidentiary hearing" refers to the evidentiary hearing conducted on Ventura's motion for postconviction relief. Generally, the phrase "trial court" means the court which presided over the defendant's trial, whereas "lower court" means the court which presided over his postconviction proceedings.

**JURISDICTION TO ENTERTAIN PETITION
AND GRANT HABEAS CORPUS RELIEF**

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P.

9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Ventura's conviction and sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involve the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Ventura to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of a capital trial and sentencing proceedings. Way; Wilson; Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Ventura's conviction and

sentence of death, and of this Court's appellate review. Mr. Ventura's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmer v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental and retroactive changes in constitutional law. See, e.g., Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Ventura's claims.

This Court therefore has jurisdiction to entertain Mr. Ventura's claims to grant habeas corpus relief. This and other Florida courts have consistently recognized that the writ must issue where fundamental error occurs on crucial and dispositive points, or

where a defendant received ineffective assistance of appellate counsel. See, e.g., Wilson v. Wainwright, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, 287 So. 2d 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968).

Mr. Ventura's claims are presented below. They demonstrate that habeas corpus relief is proper in this case. In light of these circumstances, Mr. Ventura respectfully urges that the Court grant habeas corpus relief.

PROCEDURAL HISTORY

Peter Ventura was convicted of first-degree murder and sentenced to death for his alleged role in the contract murder of a marina employee. This Court set out a factual statement in its decision affirming his conviction and sentence on direct appeal in Ventura v. State, 560 So.2d 217, cert. den. 498 U.S. 951, 111 S. Ct. 372, 112 L. Ed. 334 (1990). In summary, the state's evidence at trial reflected that co-defendant Jerry Wright took out an employee's insurance policy (called a "key man" policy) on Robert Clemente, who

was one of his employees, and later approached one Jack McDonald to find someone to kill Clemente in order to collect the insurance proceeds. McDonald, who was the state's key witness, testified at trial that he arranged for Ventura to carry out the murder. McDonald also testified at Wright's trial. Wright, who was tried about two years after Ventura, was convicted and received a life sentence. Jack McDonald escaped prosecution because his speedy trial rights were violated by the state.

In his direct appeal Ventura raised six claims which this Court described as follows: (1) the trial court erred by failing to conduct a full inquiry into the nature of Ventura's allegations of a conflict of interest and his request to discharge court-appointed counsel and into court-appointed counsel's motion to withdraw; (2) the trial court erred in not granting Ventura's request to discharge counsel and counsel's motion to withdraw; (3) Ventura was denied his right to effective assistance of counsel due to multiple errors allegedly committed by trial counsel during the course of his trial; (4) the trial court erred by giving an instruction on flight; (5) Florida's death penalty statute violates the sixth, eighth, and fourteenth amendments because the statutory aggravating and mitigating circumstances, as applied by trial and appellate courts, do not truly limit the class of persons who are eligible for the death penalty; and (6) Florida's death penalty statute violates the rights to due

process and a jury trial guaranteed by the constitutions of Florida and of the United States in that, in rendering its verdict, the jury did not consider the elements that statutorily define the crime for which the death penalty may be imposed.¹ Claims one, two and four were denied on the merits. Claim three, alleging ineffective assistance of trial counsel, was denied without prejudice to raise it in a motion for postconviction relief. This Court found that both the fifth and sixth claims were procedurally barred. The Court noted that the sixth claim, which argued that the jury was required to make express findings in aggravation, had been considered and rejected in, among other cases, Hildwin v. State, 531 So.2d 124 (Fla. 1988).² The fifth claim was also denied on the merits without further comment.

Ventura filed a motion for post conviction relief. The trial court's summary denial of that first motion was reversed in State v. Ventura, (Fla. 1996) 673 So.2d 479. After obtaining pertinent records through Chapter 119, Florida Statutes, Ventura filed an amended rule 3.850 motion on August 16, 1996. (R. 1 through 218).

The rule 3.850 motion then before the trial court raised fifteen claims for relief. Ten of them were summarily denied after a

¹These claims are presented in the order set out in appellate counsel's initial brief.

²The state had filed a notice of supplemental authority citing the United States Supreme Court's affirmance of Hildwin at 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), which this Court also cited in its opinion.

Huff³ hearing by an order dated April 3, 1998. Claim one, relating to public records requests, was deemed moot. Claims seven through fourteen were summarily denied as being procedurally barred because they ". . . could have and should have been raised on direct appeal." The fifteenth claim alleging cumulative error, was found to be without merit and subject to summary dismissal because many of the errors described in this claim had been found to be procedurally barred. (R.303).

The remaining claims (two through six) were denied after an evidentiary hearing by an order dated July 28, 1998 (R. 304). The lower court's orders denying relief are presently on appeal before this Court.

GROUND FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Ventura asserts that his conviction and sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Ventura's case, substantial and fundamental errors occurred in his capital trial. These errors were

³ Huff v. State, 622 So.2d 982 (Fla.1993).

uncorrected by the appellate review process. As shown below, relief is appropriate.

Ventura's counsel on direct appeal raised six grounds for relief. Except as noted below, these six points failed to include the issues which were presented by the ten claims in the rule 3.850 motion which were denied because they had not been raised on direct appeal. The failure of appellate counsel to raise these issues constituted ineffective assistance of counsel warranting relief.

I. Improper consideration of the defendant's silence and assertion of innocence.

Mr. Ventura's sentencing judge relied upon Ventura's failure to present his version of the offense to find aggravating circumstances, in violation of the fifth, sixth, eighth, and fourteenth amendments. This issue was raised, along with ineffective assistance of trial counsel for failing to take the appropriate measures to preserve the issue, in Claims VII and XI of the rule 3.850 motion. As noted above, these claims were summarily denied because they "could have and should have been raised on appeal."

Ventura had invoked his right to remain silent as early as June of 1986, a year and a half before the trial. (Dir. 918). Ventura exercised his right to remain silent at the trial. At sentencing, Mr. Ventura reasserted his innocence and expressed his belief that the justice system would eventually uncover evidence which Mr.

Ventura believed was being concealed by the Volusia County Sheriff's Department. (Dir. 910-911)

In sentencing Mr. Ventura to death, the sentencing judge responded to the defendant's declaration of innocence by stating:

Mr. Ventura, about all I'd like to say, of course, is as to the absolute question of guilt of [sic] innocence, I was not there. The jury was not there. There appears to be three, possibly four people who might know for sure what happened, tragically, of course Mr. Clemente is dead and he can't tell us what happened. Apparently you know what happened, Mr. McDonald knows what happened, and possibly Jerry Wright knows what happened.

(Dir. 911-912) (Emphasis supplied). Likewise, the trial court noted in its findings of fact in support of the death penalty that "There were no eyewitnesses and the Defendant, VENTURA, a/k/a MARTINEZ did not present his version" (Dir. 1049). The location of the court's comment on the defendant's silence, on page four of the findings, and the context in which it was presented, show that the defendant's silence was a key element in the trial court's finding of the CCP aggravator. At this point in the findings of fact, the trial court sets out specific details about the killing. These were almost all derived from the testimony of Jack McDonald. There was no crime scene evidence tying Ventura to the killing, and the only physical evidence tending to do so comprised some motel receipts and western union documents that showed he was in the general area at the time. No one other than the state's key witness, Jack McDonald, ever

claimed to have been a witness to or direct participant in the killing.⁴ Two witnesses were called to testify about damaging admissions made by Ventura. Neither could provide any specifics. One of them, Joseph Pike, was a convicted felon and a crony of McDonald's. Timothy Arview, the other one, was not effectively cross examined at trial although defense counsel had the means to do so in his hand at the time, but what cross examination there was showed that he turned Ventura in to get the reward money that he thought was available. Thus Ventura's silence must have been a significant factor in the trial court's findings about the way in which the killing occurred, and hence the ultimate finding of the CCP and pecuniary gain aggravators. There is simply no reason why these comments would appear on the record at all, and appear where they did, unless the court actually did factor in the defendant's exercise of his right to remain silent and his assertion of innocence in reaching its conclusions. Also, the fact that the trial judge included a comment on Ventura's silence in both his written findings of fact and oral pronouncement of sentence shows that his remarks cannot be dismissed as a mere passing comment.

The trial court's consideration of Mr. Ventura's silence at

⁴ Reasons for doubting McDonald's testimony form a large part of the brief presently before this Court in Ventura's appeal of the lower court's denial of his rule 3.850 motion for postconviction relief.

trial and assertion of innocence as aggravation was flatly improper:

A defendant has the right to maintain his or her innocence and have a trial by jury. §Art. I, 22, Fla. Const. The protection provided by the fifth amendment to the United States Constitution guarantees an accused the right against self-incrimination. The fact that a defendant has pled not guilty cannot be used against him or her during any stage of the proceedings because due process guarantees an individual the right to maintain innocence even when faced with evidence of overwhelming guilt. A trial court violates due process by using a protestation of innocence against a defendant. This applies to the penalty phase as well as to the guilt phase under article I, section 9 of the Florida Constitution. Holton v. State, 573 So. 2d 284, 292 (Fla. 1991).

The presentation and use of evidence of post-Miranda silence is forbidden by the United States Constitution. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Doyle reversed a criminal conviction where the prosecution attempted to impeach a defendant's exculpatory trial testimony by eliciting testimony that the defendant remained silent following Miranda warnings. The court reasoned that the promise of a right to remain silent carries with it the implicit promise that silence will not be penalized. Doyle, 426 U.S. 610, 619, quoting United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133 (1975)(White, J., concurring). Thus, 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.

It is error for a trial court to aggravate a defendant's

sentence on the basis that the defendant steadfastly maintains his innocence notwithstanding the existence of incriminating evidence. Smith v. State, 482 So.2d 469 (Fla. 5th DCA 1986) Bowdoin v. State, 464 So.2d 596 (Fla. 4th DCA 1985); Hubler v. State, 458 So.2d 350 (Fla. 1st DCA 1984). In Jackson v. Wainwright, 421 So.2d 1385 (Fla.1982), this Court noted that it is improper to consider a defendant's lack of remorse as an aggravating circumstance in imposing the death penalty. In Pope v. State, 441 So.2d 1073 (Fla.1983), this Court held that lack of remorse cannot be inferred from the exercise of constitutional rights.

We have held that lack of remorse is not an aggravating factor in and of itself. McCampbell v. State, 421 So.2d 1072 (Fla.1982). Its use as additional evidence of an especially heinous, atrocious or cruel manner of killing only when the facts of the crime support the finding of that aggravating factor without reference to remorse is, at best, redundant and unnecessary. Unfortunately, remorse is an active emotion and its absence, therefore, can be measured or inferred only from negative evidence. This invites the sort of mistake which occurred in the case now before us--inferring lack of remorse from the exercise of constitutional rights. This sort of mistake may, in an extreme case, raise a question as to whether the defendant has been denied some measure of due process, thus mandating a remand for reconsideration of the sentence. For these reasons, we hold that henceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor. *Id.*, 1078.

If anything, the situation is more extreme here. The trial court did not merely inferentially use the defendant's exercise of his

constitutional rights as one factor in finding a lack of remorse. Rather, the trial court specifically cited instances of the defendant's exercise of his constitutional rights in supporting its finding of an aggravating factor. Except for Holton, all of the cases cited here for the proposition that a trial court should not use the defendant's exercise of his constitutional rights against him were decided before appellate counsel wrote his initial brief, so he should have been aware of their holdings.

Trial counsel did not object or take exception to the trial court's comments. While prosecutorial comments on silence are no longer considered to be fundamental error, State v. Marshall, 476 So.2d 150, 153 (Fla.1985)(citing Clark v. State, 363 So.2d 331 (Fla.1978), receded from in part on other grounds, State v. DiGuilio, 491 So.2d 1129 (Fla.1986)), the above cited authorities make it clear that the sentencing court's reliance on the defendant's exercise of his constitutional rights in finding one or more aggravating circumstances justifying the death penalty constitutes a fundamental denial of due process. In Holton, supra, this Court considered the trial court's finding that a claim of impaired ability to conform to the requirements of law did not apply because Holton had testified that he was innocent of the crime. After noting that this finding was error because it implicated Holton's exercise of his constitutional rights, this Court found the error to be harmless

because the trial court had considered evidence of Holton's drug abuse, which was the reason Holton had argued impaired capacity in the first place. Thus the facts on the record in Holton's case were properly considered by the trial court, but the trial court's reasoning about them was wrong because it factored in the defendant's assertion of innocence. This Court then found that the trial court's finding about impairment or the lack of it could stand on considerations about the evidence of drug abuse alone:

While the trial court did not make the finding that Holton's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired because of his drug abuse, we are not persuaded that Holton's drug abuse was not considered. Indeed, the record reflects that this matter was considered when the trial court reviewed the nonstatutory evidence presented concerning Holton's character. *Id.*, 292.

Thus, this Court in Holton found that the trial court's consideration of the defendant's assertion of innocence was a mere superfluity, whereas here, the trial court found at least the existence of the CCP aggravator expressly in part because Ventura "did not present his version" of the facts. (Dir. 1049).

If an impropriety at trial rises to the level of a due process violation of a fundamental constitutional right, it may be considered fundamental error which can be raised on appeal in spite of a failure to object at trial. Hargrave v. State, 427 So.2d 713 (Fla.1983). Likewise, the Fourth District has stated:

Appellate counsel may be deemed to have rendered ineffective assistance in failing to raise a meritorious issue on appeal even if trial counsel did not preserve it for appeal if the error or impropriety rises to the level of a due process violation, constitutional violation, or another matter of fundamental error. Those, of course, cannot be waived by failure to object. Meyer v. Singletary, 610 So.2d

1329 (Fla. 4th DCA 1992).

The issue should have been raised on direct appeal, but was not. Pursuant to the fourteenth amendment, a criminal defendant has the right to receive assistance of counsel on a direct appeal of a state conviction. Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). This right encompasses the entitlement to receive effective representation by counsel on direct appeal. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir.), cert. denied, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984). In assessing whether a defendant actually received effective assistance of appellate counsel, the standard of review is the same standard used to evaluate the performance of trial counsel. Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir.1987).. Johnson v. Dugger, 911 F.2d 440, 478 (11th Cir.1990).

A person convicted of a crime, whose conviction has been affirmed on appeal and who seeks relief from the conviction or sentence on the ground of ineffectiveness of counsel on appeal must show, first, that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and

second, that the failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome under the governing standards of decision. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Smith v. State, 457 So.2d 1380 (Fla.1984).

Johnson v. Wainwright, 463 So.2d 207 (Fla.1985).

Ventura's appellate counsel did not address the trial court's comments on the defendant's exercise of his right to remain silent and his assertion of innocence at all in his brief. At page 39 he challenged ". . .the trial court's use and this Court's review of lack of remorse by a defendant." Improper use of the defendant's exercise of his constitutional rights both to remain silent at trial and maintain his innocence to justify the finding of one or more aggravating circumstances is one issue. The use of that same conduct to justify a finding of "no remorse," whether that finding is used as a nonstatutory aggravator or to rebut mitigation, is another. They may stem from the same set of facts, but they are not the same thing. The terms "cold, calculated and premeditated" necessarily refer to the time of and before the offense, while remorse or the lack of it necessarily refers to the time after it. The trial court may well have felt that the defendant's silence at trial meant he had no remorse, but it clearly and expressly used the defendant's silence in its finding of the CCP aggravator. Thus, this issue was not raised by appellate counsel at all.

In any event, it is not clear from this portion of appellate counsel's brief whether he was even referring to the events at Ventura's trial. The state argued in its answer brief on direct appeal that ". . . Ventura's appellate counsel has basically presented a soliloquy and/or harangue as to what he thinks is wrong with the manner in which Florida's death penalty statute is applied." (Answer Brief, Page 49). Under Point V of his brief, the one at issue here, appellate counsel wrote about many of this Court's prior decisions in other death penalty cases, but he did not once cite to Ventura's trial record. In support of his argument that aggravating circumstances had been applied in prior cases in an arbitrary manner he discussed in detail aggravators which had no relevance to Ventura's case. As the attorney general said:

If appellant's appellate counsel truly wishes to challenge this court's application of those aggravating circumstances involving the defendant's prior convictions, the existence of great risk of harm to others and the homicide being especially heinous, atrocious or cruel, he should present such arguments in a case in which these aggravating circumstances are found. (Answer Brief, Page 51).

Both "Points" V and VI in appellate counsel's brief are generalized arguments. Appellate counsel referred to his client as "Hildwin" at page 49 of the brief, and the wording of the issue presented in the caption of his Point VI is identical to that asserted as "Point IV" of the initial brief filed by the Public Defender on direct appeal in

Hildwin v. State, 531 So.2d 124 (Fla.1988). The undersigned is not in a position to argue that there is anything wrong with this sort of practice in and of itself, other than bad proofing. The point here is that appellate counsel submitted a generalized boilerplate argument which contained a sub argument that was very close to a meritorious claim which could have been raised on Ventura's behalf, but wasn't. The record in this case reflects that the trial court used the defendant's exercise of his right to remain silent and his assertion of innocence in finding at least the CCP aggravator and probably the pecuniary gain aggravator as well. This was fundamental error entitling Ventura to relief. Appellate counsel instead argued the related issue of no remorse only in a generalized challenge to this Court's application of the death penalty statute up until then. As the attorney general pointed out, the thrust of Point V in appellate counsel's brief was that ". . .this court has simply not been doing its job. . . ." (Answer Brief, Page 49) The failure to present a meritorious issue that is apparent on the record constitutes ineffective assistance of appellate counsel, Wilson v. Wainwright, supra, especially where an issue which depended on the same facts was presented, only without the facts.

II Failure to challenge the trial court's finding of no mitigating circumstances

The eighth amendment was violated by the sentencing

court's refusal to consider mitigating circumstances clearly set out in the record. Despite the presence of mitigating circumstances, the court concluded "there are no mitigating circumstances." (Dir.1050). This issue was raised in Claims VIII and XII of Ventura's motion for postconviction relief. These claims were also summarily denied by the lower court because they "could have or should have been raised on direct appeal."

When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." *Mahn v. State*, 714 So.2d 391 (Fla. 1998); *Nibert v. State*, 574 So. 2d 1059, 1062 (Fla. 1990). *Spencer v. State*, 645 So.2d 377, 385 (Fla.1994). Even where the defendant waives the presentation of mitigation the trial court must examine the record and consider any mitigation that is present. *Farr v. State*, 621 So. 2d 1368, 1369 (Fla. 1993).

In *Nibert*, this Court stated:

Where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. See *Campbell v. State*, 571 So.2d 415 (Fla.1990)]. Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. *Id.*, 1061.

This proposition in *Nibert* was based on *Rogers v. State*, 511 So.2d 526, 534 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98

L.Ed.2d 681 (1988), wherein this Court specifically cited the following language from the United States Supreme Court:

Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.... The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 455 U.S. 104, 114-15, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982).

Appellate counsel was or should have been aware of the Rogers decision and the language contained in it. Ventura's initial brief on direct appeal was filed on September 13, 1988, and this Court's opinion was dated April 5, 1990. Rogers was not cited at all by Ventura's appellate counsel, either in his initial or reply briefs. Rogers was cited without any quotations by the attorney general in the answer brief with the following comment: "Appellee would likewise suggest that the trial court's finding of nothing in mitigation is in accordance with this court's decision in Rogers, supra." (Answer Brief , Page 54). This "suggestion" by the attorney general was wrong. In light of the language from Eddings cited above and cited in Rogers, Rogers says the exact opposite. This misinterpretation went unanswered by appellate counsel.

During the penalty phase, Mr. Ventura presented three witnesses. The first witness, Larry Gainly, was a lay minister, and

Mr. Gainly counseled inmates, including Mr. Ventura. On direct examination, Mr. Gainly testified:

A. If there is a mercy judgment here where Peter would go to prison for the rest of his life, Peter said that he would want to continue with listening to other people within the confines of the jail.

Q. Do you know whether or not, sir, in his character there is a sound Christian foundation?

A. Yes. I'm assured of that, that there is a sound Christian foundation because he has received Jesus Christ. That's his Lord and Savior. He has counseled others within the prison walls and when they would come to him, naturally -- and I'd get the story from other prisoners, not from Pete.

MR. STARK: I would object to that as being hearsay, what other prisoners may have told him.

THE COURT: Sustain the hearsay objection.

BY MR. CASS:

Q. You can't say what those people told you, only what you know.

A. Okay. Yes. I know that Peter has continued in his work within the prison walls when he was not meeting with me. He would bring more people to these Bible Studies, and for the past month, we have had Sunday morning services within the prison which is something they never had before, and Peter was encouraging the other prisoners to come out and hear the message of Jesus Christ.

Q. Did he assist you in any other way in your prison ministry?

A. In that respect, that was really big.

Q. I'm sure, but I wondered and I meant any other instances that he had assisted you?

A. Off hand, sir, I can't think. I don't know just what you mean, but he's been a tremendous assistance to us.

Q. Do you believe he harbors any ill will or malice in his soul?

MR. STARK: Your Honor, I would object. That's an opinion and conclusion of the witness.

THE COURT: Overruled. I will allow it.

A. My last conversation with Pete was yesterday, and this is exactly what I wanted to find out if he did harbor any ill feeling toward anyone.

He said, no, he did not and he was ready for whatever the Court and jury may decide.

Q. Toward the people that testified against him?

A. No ill feeling toward anyone.

Q. And not the jury for having found him guilty?

A. Absolutely not.

As a Christian, he couldn't do that, or shouldn't do that.

Q. But you don't believe he would do that?

A. No.

Q. You do believe that he would not?

A. I believe he would not hold a grudge against anyone.

Q. I think I can ask you an opinion question.

Is Peter Ventura worth saving?

A. In my opinion, sir, he is. I believe that the Lord has much more work for him within the prison walls, and I believe that Pete is equipped for this.

I found out through conversations with him and teachings that he is well equipped to carry on and witness for Jesus Christ.

(Dir. 864-66).

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" (Dir. 871). According to Ms. Vallejo's testimony, Mr. Ventura was very supportive (Dir. 871), loves children (Dir. 871), counseled his children to stay away from trouble (Dir. 872), provided emotional care for his children (Dir. 872), and deserved saving (Dir. 873).

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. (Dir. 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." (Dir. 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" (Dir. 878), and that Mr. Ventura was worth saving. (Dir. 878).

Mr. Ventura presented unrefuted nonstatutory mitigating evidence rejected by the trial court, despite contrary precedent. Potential for rehabilitation was a recognized mitigator at the time of Ventura's trial and appeal. Brown v. State, 526 So.2d 903, 908 (Fla.) ("The potential for rehabilitation constitutes a valid mitigating factor. Francis v. Dugger, 514 So.2d 1097, 1098 (Fla.1987); Valle v. State, 502 So.2d 1225, 1226 (Fla.1987)."); see also Songer v. State, 544 So.2d 1010, 1011-12 (Fla.1989) (mitigation found in, among other things, unrebutted evidence that defendant experienced positive change and self-improvement while in prison; and defendant was adaptable to structured prison life); cf. Carter v. State, 560 So.2d 1166, 1169 (Fla.1990) (defendant's amenability to rehabilitation considered a factor in reversing jury override). Nibert, supra. Evidence that a defendant is a caring family person was also recognized mitigation, e.g. Caruthers v. State, 465 So.2d 496 (Fla.1985) (cited in appellate counsel's brief), as is evidence that Mr. Ventura had a good employment history and positive character traits, See Fead v. State, 512 So.2d 176 (Fla.1987); McC Campbell v. State, 421 So.2d 1072 (Fla.1982), cited in Holsworth v. State, 522 So. 2d 348 (Fla. 1988); as well as evidence that Mr. Ventura was a

model prisoner, *Id.*, McRae v. State, 582 So. 2d 613 (Fla. 1991); and that he developed and evidenced strong spiritual and religious standards. *Id.* Eddings and Rogers were available to appellate counsel, as were Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Downs v. Dugger, 514 So.2d 1069 (Fla.1987); Thompson v. Dugger, 515 So.2d 173 (Fla.1987). Riley v. Wainwright, 517 So.2d 656 (Fla.1987); Morgan v. State, 515 So.2d 975 (Fla.1987), and others.

In Campbell v. State, 571 So. 2d 415 (Fla. 1990), this Court set out the requirements on sentencing courts in making findings with respect to mitigating circumstances:

When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. . . . The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in

the weighing process must be supported by
"sufficient competent evidence in the record."
Brown v. Wainwright, 392 So. 2d 1327, 1331
(Fla. 1981).

Campbell, 571 So. 2d at 419-20 (footnotes and citations omitted)(emphasis added). The trial court's inadequate consideration of Mr. Ventura's unrefuted mitigation leaves no way for this Court to tell whether the court found 1) that the proposed mitigating factors were not sufficiently mitigating, or 2) that the proposed mitigating factors were not the greater weight. Meaningful appellate review was denied. The lack of any factual findings or reasons for the court's conclusions regarding any of the proposed nonstatutory mitigating factors falls far short of the requirements set forth in Campbell that a trial court must make specific findings concerning each proposed mitigating circumstance, including the weight to be accorded to each mitigating factor. Campbell, 571 So. 2d at 419-20. The result is that there is no way to know whether the trial court properly considered all the relevant mitigation advanced by Mr. Ventura and no way for this Court to have performed meaningful review of Mr. Ventura's death sentence. Mr. Ventura is entitled to habeas relief. Appellate counsel was ineffective for failing to present this issue on direct appeal.

Once again, appellate counsel raised the issue of the trial court's "no mitigation" finding only as a sub issue within his general attack on the application of the death penalty in Point V of

his brief, if he can be said to have raised it at all. (Initial Brief, Pages 42 to 44). As noted above, this portion of his brief contains no references to Ventura's trial record, or anything else about what actually did happen at Ventura's trial. As with the rest of the argument presented by Point V of appellate counsel's brief, the portion which referred to a no mitigation finding by the trial court did not depend on the facts of the particular case at hand. The point is not that this was ineffective assistance in and of itself. The point is that appellate counsel was on notice that there was a case-specific meritorious issue apparent on the record which could have been asserted on Ventura's behalf, and appellate counsel did not raise it. His failure to do so constituted ineffective assistance of appellate counsel.

III. Failure to raise the issue of inadequate penalty phase instructions and sentencing standards.

A. Burden shifting.

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. This issue also was raised in Ventura's motion for postconviction relief and summarily denied because it "could have or should have been

raised on appeal." Appellate counsel provided ineffective assistance of counsel by failing to raise this claim.

At the outset of the penalty phase, the jury was instructed as follows:

The State and the Defense may now present evidence relative to the nature of the crime and the character of the defendant.

You are instructed that this evidence, when considered with the evidence you have already heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty.

And second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(Dir. 858)(emphasis added).

In his instructions before the jury retired to deliberate, the judge again explained that once aggravating circumstances were found the jury was to recommend death unless the mitigating circumstances outweighed the aggravating circumstances:

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

(Dir. 900)(emphasis added).

Then, the trial court at sentencing stated:

[t]he Court has considered the aggravating and mitigating circumstances presented in the evidence in this case and determined that sufficient aggravating circumstances exist; and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

(Dir. 948)(emphasis added).

The instructions shifted the burden of proof to Mr. Ventura on the central sentencing issue of whether he should live or die. Under Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) this unconstitutional burden-shifting violated Mr. Ventura's due process and Eighth amendment rights. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

In being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L.Ed.2d 384 (1988); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987). Appellate counsel's failure to raise this issue constituted ineffective assistance of counsel warranting relief.

B. Vagueness

Mr. Ventura's sentencing jury was improperly instructed on the aggravating circumstances, and the aggravators were improperly argued and imposed, in violation of Maynard v. Cartwright, Hitchcock v. Dugger, and the Eighth and Fourteenth Amendments. This issue was raised in Claims X and XIV of the Rule 3.850 motion and denied because it could have been raised on appeal, but was not. The failure to do so constituted ineffective assistance of appellate counsel.

"[I]n a 'weighing' State [such as Florida], where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." Richmond v. Lewis, 506 U.S. 40, 113 S. Ct. 528, 121 L.Ed.2d 411 (1992). A facially vague and overbroad aggravating factor may be cured where "an adequate narrowing construction of the factor" is adopted and applied. Id. However, in order for the violation of the Eighth and Fourteenth Amendments to be cured, "the narrowing construction" must be applied during a "sentencing calculus" free from the taint of the facially vague and overbroad factor. Id. at 535. In Florida, the jury is a co-sentencer. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). "By giving 'great weight' to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must

presume the jury found." Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120 L.Ed.2d 854 (1992). This indirect weighing of the facially vague and overbroad aggravators violates the Eighth and Fourteenth Amendment. Id. Therefore, the jury's sentencing calculus must be free from facially vague and overbroad aggravating factors. Id. at 2929. Thus, in order to cure the facially vague and overbroad statutory language, the jury must receive the adequate narrowing construction. Id. at 2928.

In Mr. Ventura's case the jury was not instructed as to the limiting constructions placed upon any of the aggravating circumstances. The failure to instruct on the elements of the aggravating circumstances in this case left the jury free to ignore those elements, and left no principled way to distinguish Mr. Ventura's case from one in which the state-approved and required elements were applied and death was not imposed. Appellate counsel could and should have raised this issue on appeal, but did not. Failure to do so constituted ineffective assistance of appellate counsel.

IV Absence of the trial judge and the defendant during portions of the trial.

Petitioner was deprived of effective assistance of appellate counsel on direct appeal due to counsel's failure to present to this Court the issue that the trial judge was absent during stage of

petitioner's trial without defendant's knowledge or informed waiver

During the second day of jury selection, outside of the presence of prospective jurors, counsel for the state and defense, pursuant to an agreement, marked the State's Exhibits for identification prior to the actual trial of the case (Dir.198). In addition. Deputy Robert Golden was called by the state to give testimony identifying the State's Exhibits and the custody of those exhibits (Dir. 200).

The record clearly shows that during the marking of the State's exhibits and the testimony of Deputy Robert Golden, the trial judge was not present (Dir. 200). The absence of the trial judge was without the defendant's knowing, intelligent and voluntary waiver. In fact, the defendant himself was involuntarily absent during this stage of the proceedings and was never informed of this "agreement" between counsel, nor the existence of this proceeding. The presence of the trial judge, who is there to insure the proper conduct of the trial, is essential to the state and federally guaranteed rights of the trial by an impartial jury and the absence of the judge during this proceeding constituted fundamental error requiring reversal of the defendant's conviction.

In Brown v. State. 538 So. 2d833(Fla 1989) this Court held, "Article 1, section 16 of the Florida Constitution and the Federal Constitution's sixth amendment guarantee criminal defendants

trial by an impartial jury. The presence of a judge» who will insure the proper conduct of a trial, is essential to this guarantee." Id., 835) This court went on to say that the presence of a judge during trial is a "fundamental right" which can be waived only in limited circumstances and then only by fully informed and advised defendant, and not by counsel acting alone. Id. See also, Bryant v. State. 65& So.2d 426 (Fla 1995); Maldonado v. State. 634 So.2d 661 (Fla 5 DCA 1994). In the instant case, Mr. Ventura was not "fully informed and advised" and did not "knowingly, intelligently and voluntarily waive the trial judge's presence" during this proceeding.

In McCullum v. State. 74 So.2d 74 (Fla. 1954), the Court discussed the reasons behind the requirement that the trial judge be present at every critical stage of the proceedings. It was not until after the State's Exhibit's were marked for identification and after the testimony of Deputy Robert Golden that the defendant was brought into the courtroom. At that time the judge returned and recalled the prospective jurors (Dir. 203).

The Sixth Amendment to the United States Constitution provides that, "In all criminal prosecutions. The accused shall enjoy the right.... to be confronted with the witnesses against him." The confrontation clause, which is applicable to the states via the Fourteenth Amendment, Pointer v. Texas. 380 U.S. 400, 85 S.Ct. 1065, 13 L. Ed.2d 923 (1965), encompasses the very basic right of a

defendant to be present at every critical stage of his trial. Lewis v. United States. 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892), or at every stage "where fundamental fairness might be thwarted by his absence". Francis v. State. 413 So. 2d. 1175 (Fla. 1982). The presence requirement is a constitutional protection that can only be waived by the defendant if he personally chooses to voluntarily absent himself, Peede v. State. 474 So.2d 808 (Fla 1985), and such waiver must be "knowing and intelligent." Schneckloth v. Bustamonte. 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed. 2d 854 (1973); Johnson v. Zerbst. 304 U.S. 4058, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), Mr. Ventura made no "knowing and intelligent waiver." The defendant was not even informed of the proceeding.

In addition to the defendant's involuntary absence, another substantial error occurred in the absence of the trial judge.

Florida Statute 90.605 (1) states.

Before testifying, each witness shall declare that he or she will testify truthfully, by taking an oath or affirmation in substantially the following form: "DO YOU SWEAR OR AFFIRM THAT THE EVIDENCE YOU ARE ABOUT TO GIVE WILL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH ?" The witness' answer shall be noted in the record.

At the time Deputy Robert Golden was called by the State to give testimony identifying the State's Exhibits and the custody of these exhibits, the record clearly indicates that this witness was not given the oath or affirmation as required by F. S. 90.605(1) . The only exception to this oath or affirmation requirement is when

the witness is a child. Houch v. State. 421 So.2d 1113 (Fla 1 DCA 1982); Murphy v. State. 667 So. 2d 375 (Fla 1 DCA 1995).

Had the trial judge been present during this proceeding, he would have ensured the presence of the defendant and would have ensured the mandatory oath or affirmation requirement was given to this witness before testifying.

Appellate counsel's failure to raise this issue on direct appeal prejudiced Mr. Ventura. Surely, confidence in the outcome of the prior proceedings is undermined in light of appellate counsel's failure to raise the fundamental error which occurred in Mr. Ventura's trial on direct appeal. Counsel's failure to raise this claim on direct appeal resulted in the failure of this court to address this issue. By failing to raise this issue, direct appeal counsel's performance fell below the range of professional competence for attorney's in criminal cases. Matire v. Wainwright. 811 F.2d 1430, at 1435 (11th Cir. 1987); Harrison v. Jones. 880 F.2d 1279 (11th Cir. 1989).

In regard to the issue of ineffective assistance of appellate counsel, this Court is especially vigilant in the policing of counsel's performance on appeal. When this court learns of unreasonable attorney omissions, it does not hesitate to act.

In Wilson v. Wainwright. 474 So.2d 1162, (Fla 1985) this Court stated,

It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate to discover and highlight possible error and to present to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deprivations from due process. (Wilson v. Wainwright. 474 So.2d at 1165)

Appellate counsel, however, did nothing with respect to this issue. Appellate counsel did not "highlight" the fundamental deprivation of his client's constitutional rights engendered by the trial judge being absent from the proceedings, nor the fundamental error that occurred in the judge's absence and "present it to the court in such a manner designed to persuade the court of the gravity of the alleged deprivations from due process."Wilson. 474 So.2d at 1165. Appellate counsel did nothing, and this court was thus deprived of the "careful, partisan scrutiny of a zealous advocate." Id. at 1165.

There is simply no tactical or strategic reason which can be ascribed to appellate counsel's failure to present this claim.

See e.g., Wilson; Johnson v. Wainwright. 498 S0.2d939, (habeas corpus relief appropriate where counsel fails to urge clear claim of reversible error on appeal}. This claim would have provided Mr. Ventura with relief. See Wilson. (Court's independent review of

record cannot cure harm caused by counsel's failure to zealously advocate a claim on direct appeal). There simply was no reason whatsoever for counsel to ignore the claim; the omission could not but have resulted from counsel's ignorance of the law. In any event, counsel's omission was a clear example of prejudicial ineffective assistance, see Johnson v. Wainwright, 498 So.2d 939 (Fla 1986), and relief is now appropriate.

This constitutional error is of such proportion that this court should address the issue directly, even if it finds that appellate counsel was not ineffective for omitting it.

In conclusion, this is a case of ineffective assistance of appellate counsel for oversight of a claim which was more than obvious on the face of the record. Prejudice is manifest. Quite simply, Mr. Ventura would have been entitled to a new trial had effective counsel raised this claim. He only failed to raise this claim due to an oversight. Mr. Ventura was deprived of his rights under both the United States and Florida Constitutions and should be granted a new trial or, at least, a new direct appeal.

V. Failure to fully argue the attorney conflict issue.

Mr. Ventura's appellate counsel, Thomas R. Mott, was a private attorney appointed by the circuit court after the public defender's office moved in this Court to withdraw due to conflict of interest.

Appellate counsel argued the conflict issue at Points I and of his brief, where he claimed:

Point I:

The trial court erred in failing to conduct a full inquiry into the nature of appellant's allegations of a conflict of interest and requests to discharge court-appointed counsel and in failing to conduct a full inquiry into court appointed counsel's motion to withdraw.

Point II

The trial court erred in not granting appellant's request to discharge his court-appointed counsel and in denying court-appointed counsel's motion to withdraw, where an actual conflict of interest existed and where given the totality of circumstances it was impractical and unrealistic to expect trial counsel to render effective assistance.

This Court found both claims to be without merit. Although appellate counsel raised and argued these claims, at no time did he address his very reason for being in the case in the first place, namely that the public defender's office had filed a motion to withdraw due to a conflict of interest and this Court had granted the motion. Counsel secured supplements to the record which contained this Court's Order granting the motion to withdraw (Dir.1067, Volume Ten) but not the motion to withdraw itself. The motion is attached to this petition. Counsel's failure to bring to this Court's attention the fact that it had already found in favor of the appellant on the conflict issue was clearly ineffective assistance of appellate counsel.

CERTIFICATE OF FONT SIZE AND SERVICE

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

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