

IN THE SUPREME COURT OF FLORIDA

PETER VENTURA,

Petitioner,

v.

CASE NO. SC00-583

MICHAEL W. MOORE, Secretary,  
Florida Department of Corrections,  
and  
ROBERT BUTTERWORTH,  
Attorney General,

Respondents.

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RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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**ISSUES & ARGUMENT**

This petition for writ of habeas corpus is not properly before this Honorable Court because it is untimely filed. *Florida Rules of Criminal Procedure* 3.851(b)(2) requires that such a petition be filed along with the initial brief on the Florida Rules of Criminal Procedure 3.850 motion. The instant petition was not filed until the reply brief was filed, and is, therefore, untimely and procedurally barred. Assuming *arguendo* that the petition is not procedurally barred, it does not merit relief of any kind.

**CLAIM I**

**APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE DID NOT RAISE A CLAIM OF FUNDAMENTAL ERROR REGARDING ALLEGEDLY IMPROPER CONSIDERATION OF VENTURA'S SILENCE AND ASSERTION OF INNOCENCE.**

Ventura complains that his appellate counsel rendered him ineffective assistance by failing to raise as an issue on direct appeal that the sentencing judge relied upon his "failure to present his version of the offense to find aggravating circumstances . . . ." (IB at 8). He claims that the judge responded to his "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.

(IB at 8). He further complains about the court's findings of fact in the sentencing order which states: "There were no eyewitnesses and the Defendant, VENTURA a/k/a MARTINEZ did not present his version." (IB at 8-9). Ventura concludes that the "location of the court's comment . . . and the context in which it was presented, show that the defendant's silence was a key element in the . . . finding of the CCP aggravator." (IB at 9).

The State contends that Ventura has failed to meet either prong of the ineffective assistance of counsel standard. To prevail on such a claim in relation to appellate counsel, Ventura must show that his attorney's performance was professionally deficient and that he was prejudiced thereby. When considering a habeas petition alleging ineffective assistance of appellate counsel, this Court's review is limited to

first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine

confidence in the correctness of the result.

*Suarez v. Dugger*, 527 So. 2d 190, 192-93 (Fla. 1988)(quoting *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986)). See *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. Dugger*, 523 So. 2d 161 (Fla. 1988). The deficiency must be such that had it not occurred, the result of the proceeding would have been different. *Id.*

"One of appellate counsel's responsibilities is to 'winnow out' weaker arguments on appeal and to focus upon those most likely to prevail. *Smith v. Murray*, 477 U.S. 527 . . . (1986)." *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990). "Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points. *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). Even where a claim is "preserved for appellate review, it is well established that counsel need not raise every nonfrivolous issue revealed by the record. See *Jones v. Barnes*, 463 U.S. 745 . . . (1983)." *Provenzano*, 541 So. 2d at 1167.

As Ventura concedes, his trial counsel did not object to the judge's oral comment, nor did he ever complain of the written

comment contained in the sentencing order. (IB at 12). Appellate counsel is not ineffective for failing to raise claims which were not properly preserved. *Suarez*, 527 So. 2d at 193. Thus, trial counsel's failure to object to the verbal comment at the sentencing hearing procedurally barred that issue on appeal. *Parker v. Dugger*, 537 So. 2d 969 (Fla. 1989)[failure to preserve issue at trial, or raise on direct appeal, constitutes procedural bar in habeas petition]. See *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982). Appellate counsel cannot be deemed ineffective for failing to raise unpreserved issues. *Parker*, 537 So. 2d at 971; *Suarez v. Dugger*, 527 So. 2d 190, 193 (Fla. 1988).

Moreover, the failure of appellate counsel to brief a meritless issue, or even one with little merit, is not deficient performance. *Suarez*, 527 So. 2d at 193. Appellate counsel cannot be criticized for failing to raise weak issues. *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). Neither will appellate counsel be deemed ineffective for failing to raise a point, which even if correct, would amount to no more than harmless error. *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990).

The verbal comment was not a comment on the effect of Ventura's failure to testify or explain his version of events.

The very same comment made about Ventura “[a]pparently you know what happened” was also made about Mr. McDonald who testified at trial. The record shows that the judge’s comment was directed to Ventura’s implied complaint that he had not received justice.

Immediately preceding the complained-of comment, Ventura had completed his speech congratulating the prosecution and voicing his confidence in the “wheels of justice.” (Appendix B at 2). In his speech, Ventura did **not** declare his innocence, rather he talked about procedural rulings (motions that were denied) which he felt were improper. *Id.* at 2-3. He expressed his belief that the intermediate appellate court (5th DCA) lacked the “expertise” to see the merit of his position on those issues, and expressed his belief that the next higher court would mete out justice. *Id.*

The judge’s remarks merely point out that Ventura received justice because “[t]he jury has spoken” and the evidence presented at trial supported their verdict. *Id.* at 4. That only four persons (one of whom is “apparently” Ventura) “know for sure what happened” was said in the context of: But as for justice, you are guilty because the jury said so and the evidence supports that. Thus, this comment was not a comment on Ventura’s exercise of his right to remain silent or any declaration of innocence. Indeed, Ventura did not assert

innocence; he asserted a failure to receive justice.

Moreover, the verbal comment at sentencing was subsequent to, and independent of, the complained-of statement in the sentencing order. See *id.* at 6. The verbal comment is clearly in direct response to Ventura's address to the court. *Id.* at 2-3. The sentencing order had already been prepared (and was submitted to the clerk in open court) at the sentencing proceeding.

The placement of the complained-of comment in the sentencing order does not "show that the defendant's silence was a key element in the trial court's finding of the CCP aggravator." (IB at 9). In pointing out that no one was present for the actual murder (other than the victim and Ventura), the court indicated that the evidence establishing how the victim was killed was not as precise as that identifying Ventura as the murderer and showing his cold, calculated, premeditated plan to kill. Since the only person who could tell precisely how Mr. Clemente died had not, the court was left to reconstruct the "how" from the physical evidence. The trial court's comment merely distinguished the manner of proof of the "how" of the murder (physical evidence) from the manner of proof of the elements of the CCP aggravator (eyewitness testimony). Although there is no requirement that the trial judge identify the

underlying basis for its factual findings to this extent, no error flowed from doing so.

Moreover, any error was harmless. The facts of this murder, without any consideration of Ventura's failure to present his version of events, compel a finding of the CCP aggravator. Ventura has conceded that harmless error analysis applies to this issue. See IB at 13[in *Holton*, "this Court found the error to be harmless because . . ."]. Certainly, any error was harmless due to the overwhelming evidence establishing CCP.

In any event, there was no objection to either complained-of comment, and therefore, appellate counsel could not be ineffective for failing to raise an issue not preserved for appellate review. *Suarez*, 527 So. 2d at 193. Ventura has utterly failed to carry his burden to establish that the claimed error was fundamental. The State contends that it was not.

Moreover, to the extent that this issue was raised on direct appeal as part of Point V, it is procedurally barred because this claim has been adversely decided on direct appeal. *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999). Ventura concedes that his appellate counsel raised "the trial court's use . . . of lack of remorse" as a claim on appeal. (IB at 15).

The context in which it was raised was the CCP aggravator.<sup>1</sup>  
(Appendix A at 1-3).

Collateral counsel acknowledges that "appellate counsel submitted a[n] . . . argument that was very close to a meritorious claim which could have been raised . . . but wasn't." (IB at 17). Although collateral counsel might have chosen to raise the issue in terms of a comment on the right to remain silent, that current counsel would have done so is not the test for ineffective assistance. See *Card v. Dugger*, 911 F.2d 1494, 1507 (11th Cir. 1990). It cannot be said that a reasonable appellate attorney would not have chosen to raise the issue in terms of a lack of remorse. Second guessing appellate counsel's choice of issues does not meet the standard. See *Shere v. State*, 742 So. 2d 215 n.9 (Fla. 1999).

## CLAIM II

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Ventura argues that consideration of the CCP aggravator and the lack of remorse issue raised in the initial brief on direct appeal "are not the same thing," even though they "may stem from the same set of facts." (IB at 15). He claims that CCP refers "to the time of and before the offense, while remorse or the lack of it necessarily refers to the time after it." (IB at 15). The State notes that CCP may be concerned with facts happening after the murder; for example, the cover-up of the crime necessarily occurs afterwards, just as remorse, or a lack thereof, does.

**APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE DID NOT RAISE A CLAIM OF FUNDAMENTAL ERROR REGARDING THE TRIAL JUDGE'S ALLEGEDLY IMPROPER FINDING OF NO MITIGATING CIRCUMSTANCES.**

Ventura complains that his appellate counsel was ineffective because he did not challenge the trial court's finding of no mitigating circumstances. (IB at 17-26). He claims that the case underlying the *Nibert* rule,<sup>2</sup> *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988), was existant when he was sentenced and that appellate counsel was ineffective because he did not raise the *Nibert* issue. (IB at 19).

This issue is procedurally barred because Ventura has not alleged that his trial counsel asserted the *Nibert* rule in the trial court. If, as appears to be the case, trial counsel failed to argue that the trial judge had to find mitigation in the presence of a reasonable quantum of competent evidence, appellate counsel cannot be faulted for not raising that issue on appeal. Appellate counsel cannot be deemed ineffective for failing to raise unpreserved issues. *Parker v. Dugger*, 537 So.

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"[W]hen 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." 574 So. 2d 1059, 1062 (Fla. 1990).

2d at 971; *Suarez v. Dugger*, 527 So. 2d 190, 193 (Fla. 1988).

Assuming *arguendo* that the issue is not barred for the failure to properly preserve and assert it below, Ventura cannot prevail because he has failed to meet either prong of the *Suarez/Strickland* ineffective assistance standard. Under *Suarez/Strickland*, Ventura must show that his attorney's performance was professionally deficient and he was prejudiced by that deficiency. *Suarez*, 527 So. 2d at 192-93; *Strickland*, 466 U.S. 668 (1984); *Johnson v. Dugger*, 523 So. 2d 161 (Fla. 1988). The failure to raise a preserved claim does not prejudice the defendant where the act complained-of is one within the trial court's discretion. *Tompkins v. Dugger*, 549 So. 2d 1370 (Fla. 1989). To show prejudice, Ventura must establish that had the deficiency not occurred, the result of the proceeding would have been different. *Id.*

Moreover, "it is well established that counsel need not raise every nonfrivolous issue revealed by the record. See *Jones v. Barnes*, 463 U.S. 745 . . . (1983)." *Provenzano*, 541 So. 2d at 1167. Appellate counsel's failure to brief a meritless issue, or even one that has a little merit, is not deficient performance. *Suarez*, 527 So. 2d at 190-193. Counsel cannot be successfully criticized for failing to raise weak issues.

*Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). Neither is counsel ineffective for failing to raise a claim of error which would be a harmless error. *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990).

Appellate counsel is responsible for winnowing out the weaker arguments and focusing on the issues he believes are most likely to prevail. *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990). See *Smith v. Murray*, 477 U.S. 527 (1986). As a matter of sound appellate tactics, it is better to raise only the strongest issues on appeal because the assertion of weaker arguments often dilutes the impact of the stronger issues. *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989).

In any event, the trial judge properly rejected the proffered mitigation. In this proceeding, Ventura claims some five nonstatutory mitigating circumstances should have been found, to-wit: potential for rehabilitation, caring family person, good employment history and positive character traits, model prisoner, and strong spiritual and religious standards. (IB at 22-23). There was no reasonable quantum of competent, uncontroverted evidence establishing the mitigating circumstances Ventura urges.

Ventura claims his daughter's testimony established that he "is a caring family person." (IB at 22). However, on cross

examination at trial, it was established that Ms. Vallejo's testimony regarded her father as she knew him some **ten years earlier**. (Appendix C at 1-2). She had not seen him in many years and had rarely spoken to him by phone. (*Id.* at 2).

The trial judge had the discretion to conclude that Ms. Vallejo's testimony did not establish that Ventura was a caring family person at the relevant time. Moreover, her testimony did not distinguish Ventura's fatherly character from that which is normal. *Cf. Mendyk v. State*, 592 So. 2d 1076, 1080 (Fla. 1992)[Rejecting Mendyk's claim that mitigating evidence should have been presented,<sup>3</sup> this Court said: "Although an abusive childhood, a history of alcohol and drug abuse, and mental impairment can clearly constitute mitigating factors, in this case we do not find serious deprivations distinguishing this case from the norm of children from broken homes. Thus, Mendyk has not proven he was prejudiced . . . ." (citation omitted)]. Thus, there was no reasonable quantum of competent, uncontroverted evidence that Ventura "**is** a caring family person."

Moreover, the record of the 3.850 proceeding shows that

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<sup>3</sup>This included: "[T]hat his mother was beaten by an alcoholic father; that he spent most of his childhood in his bedroom, reading; that he was a loner and pushed himself to do his homework "perfectly"; and that he had a history of alcohol and drug use and was mentally impaired."

there is substantial evidence to the contrary. For example, Ventura deserted his wife and children, moved to a far distant State, changed his name, and never contacted, or attempted to contact, his wife and children or his brothers and sisters during the seven years prior to the penalty phase presentation. Neither did he send any financial support to his wife and children during that time, even though he was gainfully employed in Texas. (Appendix D at 1-14). Thus, it is clear that were this issue back before the trial court, this alleged mitigator would not be found.

Neither is Ventura's claim that he "had a good employment history and positive character traits" supported by a reasonable quantum of competent, uncontroverted evidence. Mr. Zotas testified that he worked with Ventura ten to sixteen years ago. (Appendix C at 7). He had rarely seen Ventura since 1981 or 1982 and did not associate with him. *Id.* Although he had earlier considered Ventura to be a law abiding citizen, he had heard "off and on that he got in a little bit of trouble here and there . . . ." *Id.* This outdated testimony of a single job Ventura held at some much earlier point in his life hardly constitutes a reasonable quantum of competent, uncontroverted evidence of "a good employment history." Neither does the reputation testimony established on cross support a finding that

Ventura had "positive character traits." Thus, it was within the discretion of the trial judge to conclude that the evidence was insufficient to establish such a mitigator.

Ventura also claims that the trial judge should have found that he "was a model prisoner." (IB 23). Apparently, he thinks that this conclusion should have been reached based on the testimony of a minister, Mr. Gainly. Mr. Gainly had been involved with this prison ministry for "the past two years," although he had been visiting the prison and knew Ventura for 14 or 15 months. (Appendix C at 8-9). In that capacity, he worked with Ventura "once or twice a month."<sup>4</sup> *Id.* at 10. The time spent with Ventura was in a group setting. *Id.* at 15.

This testimony does not provide a reasonable quantum of competent, uncontroverted evidence that Ventura was "a model prisoner." Moreover, as the judge was well aware, Ventura jumped bail in this case, used an alias, committed crimes under that name, and was a fugitive from justice for several years immediately preceding his rearrest and present incarceration. Thus, no error has been established in the trial court's rejection of this alleged "model prisoner" mitigation.

Finally, Ventura claims that the trial judge should have

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<sup>4</sup>He later claimed that he met with Ventura once or twice a week. *Id.* at 15.

found in mitigation that "he developed and evidenced strong spiritual and religious standards." (IB 23). It is true that Mr. Gainly testified that he believed that Ventura had accepted Jesus as his Savior during the preceding few months and that he thought Ventura was "worth saving" because he had expressed his desire to help others find their way to the Savior. However, Mr. Gainly admitted that during the brief time that he had been going to the prison and counseling with inmates, at least two of those who had professed religious beliefs had not followed them when released. (Appendix C at 16). More importantly, as Rev. Hershey, Brother Frank M., and Sister Garay testified below, if Ventura committed the murder he was convicted of, he was not evidencing strong spiritual and religious standards. (See Appendix D at 4, 8, 12). Thus, there is no reasonable quantum of competent, uncontroverted evidence establishing the alleged mitigator, and there was no abuse of judicial discretion in finding no mitigation.

Moreover, even if the mitigation was improperly rejected, Ventura is still entitled to no relief. He has not demonstrated that had the mitigation been found, it would have compelled imposition of a life sentence. The State contends that the alleged mitigation was so weak, and the aggravation so strong, that the result would not have been different had all of the

proposed mitigation been found. Thus, any error in failing to find the mitigation was harmless. Appellate counsel is not ineffective for failing to raise error which was "no more than harmless error." *Duest*, 555 So. 2d at 853.

Finally, appellate counsel raised the issue of the trial court's finding of no mitigating circumstances in his initial brief on direct appeal. (Appendix A at 6). He specifically complained of the lower court's "error in failing to recognize and consider relevant mitigating evidence" and asked this Court to reject the trial court's evaluation of the mitigation and find that it existed. *Id.* at 5-6. Allegations of ineffective appellate counsel may not be used to circumvent the rule that habeas corpus proceedings do not provide a second or substitute appeal. *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987). Appellate counsel's performance cannot be deemed deficient for failing to raise every conceivable aspect of a claim. *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992). Appellate counsel is not ineffective for failing to convince the court of the merit of the claim. *See Alford v. Wainwright*, 725 F.2d 1282, 1289 (11th Cir.), *modified*, 731 F.2d 1486, *cert. denied*, 469 U.S. 956 (1984)["[trial counsel] cannot be faulted simply because he did not succeed."].



### CLAIM III

#### APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE DID NOT RAISE A CLAIM OF FUNDAMENTAL ERROR REGARDING THE ALLEGEDLY INADEQUATE PENALTY PHASE JURY INSTRUCTIONS AND SENTENCING STANDARDS.

Ventura complains that his appellate counsel was ineffective because he did not challenge the jury instructions given at sentencing and used by the trial judge in sentencing him. (IB at 26). He claims that the instruction "shifted the burden" to him "to prove that death was inappropriate." *Id.* He also claims that the jury instruction on the aggravators was vague. *Id.* at 28-29.

This issue is procedurally barred because Ventura has not alleged that his trial counsel objected to the jury instructions or the standard used by the court at sentencing. A review of the record on direct appeal shows that no such objection or argument was made. It is, therefore, procedurally barred in this habeas proceeding. *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). It is well settled that the failure to preserve an issue at trial constitutes a procedural bar in a habeas petition. *Parker v. Dugger*, 537 So. 2d 969 (Fla. 1989). See generally *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982)[contemporaneous objection required to preserve issue for appeal]. Appellate counsel cannot be deemed ineffective for

failing to raise the unpreserved burden shifting issue or the unpreserved *Espinosa* issue. *Duest*, 555 So. 2d at 852. See *Parker*, 537 So. 2d at 971; *Suarez v. Dugger*, 527 So. 2d 190, 193 (Fla. 1988).

Assuming arguendo that the issue is not barred for the failure to properly preserve and assert it below, Ventura cannot prevail because he has failed to meet either prong of the *Suarez/Strickland* ineffective assistance standard. Under *Suarez/Strickland*, Ventura must show that his attorney's performance was professionally deficient and he was prejudiced by that deficiency. *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. Dugger*, 523 So. 2d 161 (Fla. 1988). "[I]t is well established that counsel need not raise every nonfrivolous issue revealed by the record. See *Jones v. Barnes*, 463 U.S. 745 . . . (1983)." *Provenzano*, 541 So. 2d at 1167. Appellate counsel's failure to brief a meritless issue, or even one that has a little merit, is not deficient performance. *Suarez*, 527 So. 2d at 190-193. Counsel cannot be successfully criticized for failing to raise weak issues. *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). Neither is counsel ineffective for failing to raise a claim of error which would be a harmless error. *Duest*, 555 So. 2d at 853.

Appellate counsel is responsible for winnowing out the weaker arguments and focusing on the issues he believes are most likely to prevail. *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990). See *Smith v. Murray*, 477 U.S. 527 (1986). As a matter of sound appellate tactics, it is better to raise only the strongest issues on appeal because the assertion of weaker arguments often dilutes the impact of the stronger issues. *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989).

Ventura cannot demonstrate that his appellate counsel was ineffective for not raising the burden shifting claim because that claim is without merit. *Shellito v. State*, 701 So. 2d 837, 842-43 (Fla. 1997). The standard instruction was specifically approved by this Court. *Id.*

Moreover, any error in phrasing the jury instruction on mitigation was harmless. There can be no harmful error where, as here, there were no mitigating circumstances to be weighed. However, had all of the nonstatutory mitigators Ventura claims the trial judge should have found been proven and weighed, there is no reasonable possibility, much less probability, that the resulting sentence would have been different. The jury vote was 11 to 1. *Ventura v. State*, 560 So. 2d 217, 217 (Fla. 1982). Two weighty aggravators - committed for pecuniary gain and cold, calculated and premeditated murder - were found. *Id.* at 218-19.

Those two aggravators far outweigh all of the alleged nonstatutory mitigation. Thus, there can be no ineffective assistance of counsel because Ventura cannot meet the prejudice prong of the *Suarez/Strickland* standard.

Appellate counsel raised the *Espinosa* issue on direct appeal. *Ventura*, 560 So. 2d at 221. This Court found that claim procedurally barred because it was "never presented to the trial court." *Id.* As in *Downs v. State*, 740 So. 2d 506 (Fla. 1999), *Espinosa* was not decided until well after Ventura's direct appeal. Therefore, the failure to object, or propose an alternate instruction, constituted a procedural bar on appeal. *Downs*, 740 So. 2d at 517-18. Moreover, since the standard instruction was given, there could be no ineffective assistance of trial counsel. *Id.* Appellate counsel cannot be deemed ineffective for failing to convince a court of his position. *See Alford v. Wainwright*, 725 F.2d at 1289.

CLAIM IV

**APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE DID NOT RAISE A CLAIM OF FUNDAMENTAL ERROR REGARDING THE ALLEGED ABSENCE OF THE TRIAL JUDGE AND VENTURA AT A PRE-TRIAL PROCEEDING.**

Ventura complains that his appellate counsel was ineffective because he did not raise, as a claim of fundamental error, the absence of himself and the trial judge from the discussion of a potential stipulation between the State and the Defense. Apparently, he contends that this was a "critical stage of the proceedings" at which the presence of both he and the trial judge was required absent his fully informed, express waiver - which he says he did not give.

The record shows that the prosecutor and Defense Counsel "agreed to mark the State's Exhibits for identification prior to the actual trial of the case." (Appendix E at 1). In the presence of the court reporter, they "presented to the Clerk and placed in her care and custody" certain exhibits which were assigned exhibit designations and briefly described. *Id.* at 1-3. In addition, Deputy Robert Golden identified certain items he had brought with him and explained their chain of custody. *Id.* at 3-5. At the conclusion, the prosecutor announced his attention "to call him at time of trial," but wanted to know if the defense was "satisfied." *Id.* at 5. Defense Counsel

replied: "Yes, as to the recitation of the exhibits and their markings for identification, and as to their custody by Mr. Golden, the Defense stipulates . . . ." *Id.*

Although the record specifically states that the judge was not present for the brief question and answer session with Deputy Golden, it is silent regarding whether he was present for the discussion between the attorneys at which the potential exhibits were marked. Neither does it mention, at any time relevant to this issue, whether Ventura was present. Ventura has not sworn to the alleged facts in the petition. There is simply no basis for a finding that Ventura was not present, or that the trial judge was not present except for the brief question/answer session with the deputy. Thus, he has utterly failed to establish the essential underlying basis for this claim, and it fails.

Moreover, Ventura cannot prevail because he has failed to meet either prong of the *Suarez/Strickland* ineffective assistance standard. Under *Suarez/Strickland*, he must show that counsel's performance was professionally deficient and he was prejudiced by that deficiency. *Suarez*, 527 So. 2d at 192-93; *Strickland*, 466 U.S. 668 (1984); *Johnson v. Dugger*, 523 So. 2d 161 (Fla. 1988). Clearly, "counsel need not raise every nonfrivolous issue revealed by the record. See *Jones v. Barnes*,

463 U.S. 745 . . . (1983).” *Provenzano*, 541 So. 2d at 1167. Appellate counsel’s failure to brief a meritless issue, or even one that has a little merit, is not deficient performance. *Suarez*, 527 So. 2d at 190-193. Counsel cannot be successfully criticized for failing to raise weak issues. *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). Neither is counsel ineffective for failing to raise a claim of error which would be a harmless error. *Duest*, 555 So. 2d at 853.

Appellate counsel is responsible for winnowing out the weaker arguments and focusing on the issues he believes are most likely to prevail. *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990). See *Smith v. Murray*, 477 U.S. 527 (1986). As a matter of sound appellate tactics, it is better to raise only the strongest issues on appeal because the assertion of weaker points often dilutes the impact of the stronger ones. *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989).

Ventura has produced no authority for the proposition that discussion of a potential pre-trial stipulation between opposing counsel is a critical phase of the trial proceedings. The State contends that there is none. It is Ventura’s burden to plead and prove that the failure to have him and the judge present for this discussion was deficient performance and that it prejudiced him. He has not done so, and therefore, he is not entitled to

relief.

Finally, it should be noted that when Deputy Golden testified (he was sworn), both Ventura and the trial judge were present.<sup>5</sup> (Appendix E at 7). Moreover, Defense Counsel affirmatively represented to the court that the previous discussion with the prosecutor and Deputy Golden was "part of our pre-trial work" and occurred "in my presence and with my full knowledge up to and including delivery to the Clerk." *Id.* at 8. Ventura made no objection or complaint about his now alleged absence from that pre-trial proceeding. The State asserts that his silence at this point, together with the silent record, indicates that he was present and/or consented to the matter being handled in his absence.

In any event, he has utterly failed to carry his burden to show either defective performance by his appellate counsel, or prejudice resulting therefrom, muchless both. Thus, he is entitled to no relief.

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Although the transcript does not reflect Ventura's presence at that particular point, he does not claim that he was not there.

CLAIM V

**APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE ALLEGEDLY FAILED TO "FULLY ARGUE" THE ATTORNEY CONFLICT ISSUE RAISED ON DIRECT APPEAL.**

Ventura complains that his appellate counsel rendered ineffective assistance because he neglected to tell this Court that it had granted the appellate public defender's motion to withdraw from this case, resulting in his appointment. (IB 36). He claims that this Court "had already found in favor of the appellant on the conflict issue," and implies that had this Court known that, it would have rendered a different determination on the conflict issue raised, and rejected, on direct appeal. *Id.*

Ventura cannot prevail because he has failed to meet either prong of the *Suarez/Strickland* ineffective assistance standard. Under *Suarez/Strickland*, Ventura must show that his attorney's performance was professionally deficient and he was prejudiced by that deficiency. *Suarez*, 527 So. 2d at 192-93; *Strickland*, 466 U.S. 668 (1984); *Johnson v. Dugger*, 523 So. 2d 161 (Fla. 1988).

It is apparent that the primary point of the two motions to withdraw was different. The motion filed in the trial court complained about specific problems between trial counsel and

Ventura. The motion filed by the Public Defender at the appellate stage pointed out that "there exists in this appeal issues concerning the propriety of the denial of the public defender's motion to withdraw and the denials of . . . requests for other appointed counsel." (Appellant's Attachment to Petition at 3). Thus, that this Court granted the appellate public defender's request to withdraw because an issue on appeal would be the propriety of the denial of the trial public defender's motion to withdraw would have had no relevancy to review of the trial judge's denial of the trial public defender's motion. As a result, Ventura would have gained nothing by having his appellate counsel mention the "very reason for being in the case" to this Court.

Moreover, certainly, this Court well knew that it had granted the motion to withdraw requiring the appointment of another appellate counsel. It did not need new appellate counsel to tell it that it had done so!

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Mark S. Gruber, Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33609-1004, on this \_\_\_\_\_ day of April, 2000.

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Of Counsel