

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-583

PETER VENTURA,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary,

Florida Department of Corrections,

Respondent.

and

ROBERT BUTTERWORTH,

Attorney General,

Additional Respondent.

**REPLY TO STATE'S RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS**

**MARK S. GRUBER
STAFF COUNSEL
FLORIDA BAR NO: 0330541
OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
MIDDLE REGION
3801 CORPOREX PARK DRIVE
SUITE 210
TAMPA, FL 33609-1004
(813) 740-3544**

COUNSEL FOR PETITIONER

**REPLY TO STATE'S RESPONSE TO
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Undersigned counsel for the petitioner files this reply to the state's response in this habeas corpus proceeding. Generally, the undersigned rests on the arguments presented in the original petition, but in addition replies as follows:

In Claim I of the petition the undersigned challenged the trial judge's comments on the petitioner's silence prior to and during the trial and his assertion of innocence at sentencing. The respondent argues in its response that this issue was raised on direct appeal in a somewhat different form and is therefore procedurally barred, citing Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999), Card v. Dugger, 911 F.2d 1494 (11th Cir. 1990) and Shere v. State, 742 So.2d 215 (Fla. 1999) (Response pages 6,7). The respondent's argument misrepresents the point made in the petition.

The respondent characterizes this argument simply as a matter of collateral counsel arguing the same issue raised on direct appeal in a different way. The fact is that counsel on direct appeal did not raise anything about Ventura's case at all in this portion of his brief (Point V). Rather, he made a generalized attack on the death penalty by arguing that it had been arbitrarily applied in prior cases. As pointed out in the petition:

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.

(Petition, page 13).

Respondent now states:

Ventura concedes that his appellate counsel raised “the trial court’s use . . . of lack of remorse” as a claim on appeal. (Response, p.7).

The full statement in the petition was:

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*.” (Petition, p. 12)[Emphasis added].

The term defendant was used generically. The point was and remains that counsel on direct appeal did not address the issue raised in the petition at all. Instead, he made a generalized attack on the way the death penalty had been applied over the years in previous cases, and in the course of doing so coincidentally brought up an issue which should have been applied to this case. That he did not do so was deficient performance.

Claim II of the petition was a challenge to the trial court’s finding of no mitigating circumstances despite evidence to the contrary.

First, the respondent argues that the issue is procedurally barred because the Nibert¹ rule was not asserted at trial. The assumption in this argument is that the contemporaneous objection rule applies to the trial court’s findings regarding aggravating and mitigating circumstances in death penalty cases. Such a rule would impermissibly interfere with this Court’s obligation to review capital sentences. See: Maxwell v. State, 443 So.2d 967 (Fla.1983). (“Although appellant has not raised any objections concerning the

¹ Nibert v. State, 574 So.2d 1059, 1062 (Fla.1990) (“[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.”).

judge's findings with regard to the aggravating and mitigating circumstances, we are required to review the sentence of death to ensure that it has been properly imposed.”). This Court has routinely examined aggravating and mitigating circumstances on direct appeal of death penalty cases despite the lack of a contemporaneous objection in the lower court, and the respondent has cited no authority for the proposition that there is anything wrong with this procedure.²

Then, the respondent discusses the mitigation presented at trial and cites negative testimony that was elicited on cross examination of the mitigation witnesses in support of the contention that there was no reasonable quantum of competent, uncontroverted evidence establishing any mitigating circumstances. This is the type of factual dispute that should have factored into the trial court’s decision about the weight to be accorded to the mitigating circumstances, not to whether they existed. None of the witnesses retracted his or her direct testimony on cross examination. Thus the testimony from the petitioner’s daughter and his former employer was uncontroverted, although the fact that they had not seen him for a long period of time may have gone to the weight of the mitigators. Likewise, the testimony of a minister, Mr. Gainly, was uncontroverted, although the extent and setting of his contacts with Ventura may have been reasons to accord the testimony less weight. The point here is that there was a reasonable quantum of mitigating evidence and the court’s failure to recognize it at all was error. The issue was not procedurally barred during the direct appeal and appellate counsel was deficient for failing to address it.

Finally, the respondent argues that this issue was raised by counsel on direct appeal (and presumably that it is therefore now procedurally barred):

²As a practical matter, such a rule would require that counsel either repeatedly object during the trial judge’s imposition of sentence or file a post sentence and pre- appeal motion of some kind.

Finally, appellate counsel raised the issue of the trial court's finding of no mitigating circumstances in his initial brief on direct appeal. [Citation omitted]. 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. (Response, page 14).

Again, this argument mischaracterizes what appellate counsel actually did in the same way as mentioned above. This was a part of appellate counsel's "Point V" in the initial brief where he essentially took this Court to task for not applying the death penalty statute in an a consistent way in cases preceding this one. He was not speaking specifically about what the judge did or did not do in Ventura's case at all.

Claim IV of the petition addressed a point in the trial proceedings where the state's evidence custodian identified physical evidence which was then marked for identification. Neither the defendant or the judge were present.

Inter alia, the respondent argues that this was not a critical phase of the trial proceedings. Respondent argues "Ventura has produced no authority for the proposition that discussion of a potential pre-trial stipulation³ between opposing counsel is a critical phase of the trial proceedings. The State contends that there is none." (Response, page 22).

In fact, when items of evidence are described by the evidence custodian, and when they are marked by the court clerk for identification, their status changes. Before that point, they are in the possession of the state and the state must prove up a chain of custody. They hold no special status. After that point, they are in the possession of the clerk of court. Thereafter, to the extent they have been identified their identity is presumed to be true, chain of custody does not have to be proved, and they

³The undersigned does not agree with this characterization of the proceedings.

become a part of the appellate record. See Brantley v Snapper Power Equip. (1995, Fla App D3) 665 So 2d 241, ([A] distinction should be made between testimony and documents or other tangible items. Documents and other exhibits are usually marked for identification and become part of the record on appeal even if excluded." Charles A. Wright & Kenneth W. Graham, *Federal Practice & Procedure: Evidence* § 5040 (1977). The courtroom clerk will maintain the excluded documents along with any other exhibits offered at trial "but not admitted for one reason or another." Florida Evidentiary Foundations, *supra*, 1995 Cum.Supp., at 6 n. 9); Fla.R.Civ.P. Rule 1.450(b)(When documentary evidence is introduced in an action, the clerk or the judge shall endorse an identifying number or symbol on it and when proffered or admitted in evidence, it shall be filed by the clerk or judge and considered in the custody of the court and not withdrawn except with written leave of court).

Rule 3.180(a) mandates the presence of the defendant "(3) at any pretrial conference, unless waived by the defendant in writing;" and "(6) when evidence is addressed to the court outside of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury;" see Fruetel v. State, 638 So.2d 966, 971 (Fla. 4th DCA); and:

In reversing a murder conviction on several grounds, the court, in Adams v State (1891) 28 Fla 511, 10 So 106 (not followed on other grounds Dixon v State (Fla App D4) 227 So 2d 740, cert den (Fla) 237 So 2d 179) and (ovrld. Hannewacker v Jacksonville Beach (Fla) 419 So 2d 308), that reversible error was committed when the defendant was removed from the courtroom during a discussion between court and counsel, in the jury's absence, concerning the competency of a witness. The court held that a defendant has the right to be--and in fact must be--present during the trial of a capital case, that no steps may be taken by the court in his absence, and that the right to be present extends to discussions of questions of law as well as of fact. The court held that the trial court's offer to have the argument repeated in the defendant's presence after his inadvertent 10-minute absence had been noticed could

not possibly have restored the accused to the position of hearing what had already been said in his absence. Right of Accused to Be Present at Suppression Hearing

or at Other Hearing or Conference Between Court and Attorneys Concerning Evidentiary Questions, 23 A.L.R.4th 955, §13 (1983).

Also:

Where, in the course of a murder trial, the judge and counsel on two occasions retired from the courtroom, leaving there the defendant and the jury, and in the absence of the defendant argued objections to the introduction of evidence, the questions being resolved unfavorably to the defendant, the court, in *State v Snider* (1917) 81 W Va 522, 94 SE 981, held that the absence of the defendant necessitated a new trial. The court held that the two transactions conducted in the absence of the accused were in all substantial respects like that for which a new trial was granted, in *State v Sutter* (1912) 71 W Va 371, 76 SE 811, *supra*, and that it had been the defendant's privilege and right to see and hear what transpired. *Id.*

For the reasons stated herein, the petitioner moves for a new direct appeal or for such other relief as this Court may deem to be appropriate.

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 Times New Roman 12 point, has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this ___ day of April, 2000.

MARK S. GRUBER
ASSISTANT CCRC-MIDDLE
FLORIDA BAR NO: 0330541
OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
3801 CORPOREX PARK DRIVE
SUITE 210
TAMPA, FL 33609-1004
(813) 740-3544

Copies furnished to:

Judy Taylor Rush
Assistant Attorney General
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118

