IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-225

RICARDO GONZALEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

1. Reply to Argument I.

In Argument I of his appeal to this Court, Mr. Gonzalez asserted that the lower court erred in summarily denying claims relating to trial counsel=s ineffective assistance of counsel at the guilt phase of his capital trial. With regard to Mr. Gonzalez=s allegation concerning counsel=s failure to object to the State=s opening argument and to the admission of evidence during the prosecution=s case, the State, relying on *Robinson v. State*, 707 So. 2d 688 (Fla. 1998), argues that this claim was properly denied in a summary fashion Aas procedurally barred@ (Answer Brief at 28-29). The State=s assertion of a procedural bar is both contrary to the lower court=s ruling and contrary to the law.

First and foremost, the lower court did not, as the State contends, deny this claim Aas procedurally barred@ (Answer Brief at 29). Not surprisingly, the State=s brief provides no record citation to any portion of the lower court=s ruling in which it denied this claim as procedurally barred. Because the lower court clearly denied this claim on its merits, the State=s disingenuous assertion that it was found to be procedurally barred should be rejected by this Court and, because the lower court ruled on the merits, the State=s reliance on *Robinson* is misplaced. In *Robinson*, this Court affirmed a conclusion reached by the trial court that Robinson=s ineffective assistance claims were procedurally barred as an improper attempt to relitigate substantive

matters under the Aguise@ of ineffective assistance of counsel. *Robinson*, 688 So. 2d at 697-98. Here, as noted above, the lower court made no procedural finding in denying Mr. Gonzalez=s claim, nor would any procedural finding be consistent with the law:

> The trial court concluded that this claim was procedurally barred because it either was, or could have been, raised on direct appeal. This was error. Whereas the main question on direct appeal is whether the trial court erred, the main question in a *Strickland* claim is whether trial counsel was ineffective. Both claims may arise from the same underlying facts, but the claims themselves are distinct andBofnecessityBhave different remedies: A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion, and a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal. A defendant thus has little choice: As a rule, he or she can only raise an ineffectiveness claim via a rule 3.850 motion, even if the same underlying facts also supported, or could have supported, a claim of error on direct appeal. Thus, the trial court erred in concluding that Bruno=s claim was procedurally barred.

Bruno v. State, 807 So. 2d 55, 63 (Fla. 2001) (footnotes omitted).

The law is clear that defense counsel is duty-bound to object to improper attempts to prejudice the defendant and secure conviction on an improper basis. *See, e.g.*, *Burns v. Gammon*, 260 F.3d 892, 897 (8th Cir. 2001) (Aany reasonable counsel would have objected;@ A[n]o sound trial strategy could include failing to make a constitutional objection@); *Rachel v. State*, 780 So.2d 192, 193-4 (Fla. 2nd DCA 2001); *Mannolini v. State*, 760 So.2d 1014 (Fla. 4th DCA 2000). Despite this clear duty, the State suggests that Mr. Gonzalez=s

counsel did not object because, prior to the State=s opening statement in this case, the prosecutor delivered Aan almost identical@ opening statement in co-defendant Fernandez=s case and Fernandez=s counsel did not object (Answer Brief at 29). However, the State=s assumption that trial counsel had a strategic decision for not objecting is improper absent an evidentiary hearing. *See Patton v. State*, 784 So. 2d 380, 387 (Fla. 2000) (rejecting argument that strategic decision could be presumed to support summary denial of ineffective assistance of counsel claim).[1]

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[1]The State appears to fault Mr. Gonzalez=s Rule 3.850 motion for failing to Asuggest that factual development was necessary on this claim or why@ (Answer Brief at 30). The State points to no authority for the proposition that a Rule 3.850 motion has to set forth a reason that factual development is necessary or why. Rather, all the rule requires is that the motion allege the Afactual basis for any claim for which an evidentiary hearing is sought.@ Fla. R. Crim. P. 3.851(e)(1)(D), a requirement met by Mr. Gonzalez=s motion. Certainly the trial court found no Adeficiency@ in the manner in which Mr. Gonzalez=s allegations were pled and thus the State=s attempt to inject an issue where none exists should be rejected. In any event, as the State ultimately acknowledges, Mr. Gonzalez=s counsel did argue the need for an evidentiary hearing at

the *Huff* hearing (Answer Brief at 30).

In a similar vein, the State=s suggestion that Mr. Gonzalez=s trial counsel did not object because this Court wound up concluding in Fernandez=s direct appeal that there was no error should be similarly rejected (Answer Brief at 30). Certainly, Mr. Gonzalez=s trial counsel was not aware of this Court=s opinion in *Fernandez v. State*, 730 So. 2d 277 (Fla. 1999), at the time of trial in this case. Moreover, this Court in *Fernandez* did *not*, as the State posits, conclude that the State=s opening statement in Fernandez=s case was Aproper@ (Answer Brief at 30). What the Court found in *Fernandez* was that the trial court in that case did not abuse its discretion in denying a motion for mistrial requested by Fernandez=s counsel. *Fernandez*, 730 So. 2d at 281. In any event, Mr. Gonzalez is entitled to an individualized determination of the effects of the State=s improper opening argument *on his case*, not on how Anearly identical@ comments made in Fernandez=s case affected, or did not affect, Fernandez=s case. Critically, the State overlooks that by failing to object, Mr. Gonzalez=s counsel failed to preserve the issue for appeal, thereby depriving Mr. Gonzalez of the very direct appellate review that the State relies on in Fernandez=s case. *See Davis v. Sec=y. for Dep=t. Of Corrections*, 341 F. 3d 1310, 1315 (11th Cir. 2003) (AThus, Davis faults his trial counsel not for failing to raise a *Batson* challengeBwhich counsel didBbut for failing to

preserve it. As his federal habeas counsel puts it, the issue is not trial counsel=s failure `to bring the *Batson* issue to the attention of the trial court,= but A`failure in his separate and distinct role of preserving error for appeal.=@). As the Eleventh Circuit has held, Awhen a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nonetheless failed to preserve it for appeal, the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved.@ *Davis*, 341 F. 3d at 1316. In so holding, the Eleventh Circuit observed that the Supreme Court had also reached the same conclusion in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), a case in which the Supreme Court observed that *Strickland*=s prejudice prong Ais not always fastened to the forum in which counsel performs deficiently; even when it is *trial* counsel who represents a client ineffectively in the *trial* court, the relevant focus in assessing prejudice may be the client=s appeal.@ *Davis*, 341 F. 3d at 1314-15. Thus, by unreasonably failing to object, trial counsel, in addition to abdicated the duty to object, also rendered deficient performance in failing to preserve a constitutional issue for appeal. As explained above, this is also a factor to be considered when assessing Mr. Gonzalez=s claim and the summary denial of such issued by the lower court.

With regard to Mr. Gonzalez=s allegation concerning the failure to object to LaSonya Hadley=s testimony, the State asserts that the lower court=s finding of no prejudice is correct (Answer Brief at 31).[2] The State relies on this Court=s opinion in *Franqui v. State*, 699 So. 2d 1332, 1334 n.4 (Fla. 1997), to support its argument that Mr. Gonzalez suffered no prejudice (Answer Brief at 31). First, this was not a basis underlying the lower court=s legal conclusion (PCR-513). In any event, the State=s reliance on *Franqui* is misplaced. The State=s assertion that his Court addressed this very issue in *Franqui* and found the error harmless is patently false (Answer Brief at 31). While it appears that Franqui raised an issue relating to LaSonya Hadley=s testimony, this Court declined to address it Abecause it [] failed to receive a sufficient objection.@ *Franqui*, 699 So. 2d at1334 n.4. The issue that this Court did address on the merits in *Franqui* related to Franqui=s challenge to Ms. Chin-Watson=s testimony regarding her friendship with the victim, which the Court found Awas objected to at

[2]The lower court appears to have found, implicitly if not explicitly, that counsel was deficient, concluding that the challenged testimony Ais not relevant or material,@ and that A[a]n objection on these grounds would likely have been sustained@ (PCR-513).

trial.@ *Franqui*, 699 So. 2d at 1334 n.4. It was this issue on which the Court found error, but ultimately concluded that it was harmless beyond a reasonable doubt. *Id*. Thus, the State=s reliance on *Franqui* is illusory.

With regard to Mr. Gonzalez=s allegation that an evidentiary hearing was required as to trial counsel=s failure to call detectives LaPorte and Pearce and to introduce evidence that a .9 millimeter firearm was discovered at another location not far from the robbery and murder in this case, the State contends that the lower court properly denied this claim without an evidentiary hearing on prejudice grounds (Answer Brief at 32).[3] While faithfully reproducing the portion of the lower court=s order on this issue, the State overlooks the undeniable fact that trial counsel in this case explicitly stated on the record that Ait is our intention to call Detective LaPorte, then recall this detective [Pearce]@ in the defense case (T. Trial 1082-84; 1086-87). Trial counsel also strenuously objected, and indeed moved for mistrial, when the trial judge sustained State objections to defense cross-examination of Pearce as to the discovery of this additional weapon (T. Trial1082-84). It is clear, therefore,

[3]The State again attempts to improperly argue that Mr. Gonzalez=s pleading was somehow deficient in pleading prejudice, positing that such a reason supports the summary denial issued by the lower court (Answer Brief at 32). However, the lower court made no finding that Mr. Gonzalez=s pleading was in any way deficient, and the State=s attempt to argue otherwise should again be rejected by this Court.

that despite the State=s argument that this weapon Ahad nothing to do with these crimes,@ it was *trial counsel=s* stated opinion, on the trial record, that the defense would be presenting this evidence because it was relevant to Mr. Gonzalez=s defense. Thus, whether the State or the trial court believe that the evidence had Anothing to do@ with Mr. Gonzalez=s case is irrelevant given defense counsel=s record statements at the time of trial. Under the facts of this case, Mr. Gonzalez submits that an evidentiary hearing is warranted.

2. Reply to Argument II.

Mr. Gonzales relies on his Initial Brief in response to the State=s arguments as to this Argument. One point raised by the State does, however, mention brief discussion in this Reply Brief.

In discussing the allegations concerning trial counsel=s ineffectiveness in failing to object to prosecutorial comments during closing argument, the State addresses Mr. Gonzalez=s argument that the failure to object prejudiced him in terms of the standard of review that would have applied to him on direct appeal (Answer Brief at 48). In so doing, the State contends that Athe determination of prejudice from a claim of ineffective assistance of **trial** counsel must be based on whether there is a reasonable probability of a different result at **trial** (Answer Brief at 48) (emphasis in original).

Mr. Gonzalez contends that the State is incorrect in its legal analysis, an analysis that has been squarely rejected by both the Eleventh Circuit Court of Appeals and the Supreme Court.

In *Davis v. Sec=y. for Dep=t. Of Corrections*, 341 F. 3d 1310 (11th Cir. 2003), the Eleventh Circuit addressed a claim that trial counsel failed to adequately preserve a jury selection issue at trial, thus rendering the claim unpreserved for appeal. *Id*. at 1315 (AThus, Davis faults his trial counsel not for failing to raise a *Batson* challengeBwhich counsel didBbut for failing to preserve it. As his federal habeas counsel puts it, the issue is not trial counsel=s failure `to bring the *Batson* issue to the attention of the trial court,= but A`failure in his separate and distinct role of preserving error for appeal.=@). The Eleventh Circuit has held that Awhen a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nonetheless failed to preserve it for appeal, the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved.@ *Davis*, 341 F. 3d at 1316. In so holding, the Eleventh Circuit observed that the Supreme Court had also reached the same conclusion in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), a case in which the Supreme Court observed that *Strickland*=s prejudice prong Ais not always

fastened to the forum in which counsel performs deficiently; even when it is *trial* counsel who represents a client ineffectively in the *trial* court, the relevant focus in assessing prejudice may be the client=s appeal.@ *Davis*, 341 F. 3d at 1314-15. Mr. Gonzalez contends, based on *Davis* and *Flores-Ortega*, that the State=s legal analysis is incorrect.

3. Reply to Argument III.

Relying on a factual misrepresentation of the claim addressed in *Steinhorst v. Singletary*, 638 So. 2d 33 (Fla. 1994), and a wholesale failure to acknowledge the finding of the lower court, the State contends that the evidence of Fernandez=s life sentence is not newly-discovered evidence (Answer Brief at 67). The State is incorrect. Fatal to the State=s position is its refusal to acknowledge, much less challenge, the lower court=s finding of fact that Ait is true that the subsequent imposition of a life sentence on a co-defendant is newly-discovered evidence@ (PCR-533). *See also* PCR-534 (ADefendant satisfies the first two prongs of this test [for newly-discovered evidence]; the evidence was unknown and could not have been discovered by due diligence, since the evidence did not exist until after the imposition of the Defendant=s death sentence@). A lower court=s finding that evidence is Anewly-discovered@ is a finding of fact to which this Court defers unless it is

unsupported by competent and substantial evidence and the complaining party can establish an abuse of discretion. *See State v. Mills*, 788 So. 2d 249, 250 (Fla. 2001). In Mr. Gonzalez=s case, the State failed to cross-appeal the lower court=s finding, much less makes any attempt in its brief to establish an abuse of discretion by the lower court. Thus, the State=s argument on this point should be rejected as procedurally defaulted and without merit.

In light of the afore-mentioned finding by the trial court, the State=s reliance on *Steinhorst* is similarly unavailing. In *Steinhorst*, the defendant, in a petition for habeas corpus filed in 1994, alleged, *inter alia*, that his death sentence was disproportionate and a violation of his constitutional rights to due process and equal protection because of the life sentence imposed on his co-defendant, Goodwin, and the term of years imposed on the other co-defendant, Hughes. This Court first found the claim procedurally barred because it was a Asuccessive claim@ made in an earlier postconviction motion. *Id*. at 34. Secondly, the Court rejected the argument that the sentences received by Goodwin and Hughes were Anewly discovered@ since both co-defendants were sentenced in 1981 and 1982 and Steinhorst=s death sentence was affirmed *after* it had reduced Goodwin=s sentence to life imprisonment. *Id*. at 34-35.

Here, Fernandez=s sentence was reduced to life by this Court while Mr. Gonzalez=s case was pending on direct appeal. Unlike the situation in *Steinhorst*, who apparently filed a Rule 3.850 motion raising the same issue later raised in a habeas petition, Mr. Gonzalez=s first and only opportunity to raise the issue of Fernandez=s life sentence was in the instant Rule 3.850 motion, as the lower court here expressly found (PCR-533-34). *See Kight v. State*, 784 So. 2d 396, 400-01 (Fla. 2001) (distinguishing *Steinhorst* and holding that defendant could raise newly-discovered evidence of co-defendant disparate sentencing in a Rule 3.850 motion when claim is predicated on Afacts unknown@ to defendant in earlier proceeding). To accept the State=s argument that Fernandez=s life sentence does not qualify as newly-discovered evidence cognizable in Mr. Gonzalez=s Rule 3.850 would be to conclude that there is no procedural vehicle for Mr. Gonzalez to bring this claim before any court of competent jurisdiction.[4] Such a view would deny Mr. Gonzalez his right to access to the courts and would therefore be unconstitutional.

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[4]While Mr. Gonzalez could perhaps have raised this argument in a state habeas corpus petition, he did not because he had already raised it in the trial court and the trial court found the evidence to be Anewly discovered.@ Given the State=s penchant for raising procedural obstacles to this Court=s review of Mr. Gonzalez=s claims, the State would no doubt have urged this Court to deny the habeas petition should be denied because he had raised the newly-discovered evidence claim in his Rule 3.850 motion and in the instant appeal. *See Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987) (ABy raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material@).

4. Reply to Remaining Arguments.

Mr. Gonzalez relies on his Initial Brief and the record before this Court with regard to the remaining arguments advanced by the State.

CONCLUSION

For the reasons stated herein, the judgements and sentences under review should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief is typed in Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by U.S. Mail to Sandra S. Jaggard, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, 6th Floor, Miami, Florida 33131, on this 4th day of April, 2006.

TODD G. SCHER