IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1316

HENRY GARCIA,

Petitioner,

v.

JAMES V. CROSBY, JR., Secretary,
Florida Department of Corrections,

Respondent.

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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Introduction

The Petitioner, Henry Garcia, submits this Reply to the State's Response to the Petition for Writ of Habeas Corpus. Mr. Garcia will not reply to every issue or argument raised by the State and, hereby, expressly does not abandon nor concede any issues and/or claims not specifically addressed in the Reply brief. Mr. Garcia relies on the arguments made in the Petition for Writ of Habeas Corpus for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

CLAIM III: APPELLATE COUNSEL FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO THE TESTIMONY OF ROSE FLIGHT.

The manner in which appellate counsel raised the State's use of "victim impact evidence" at the trial minimized the impact on the fairness of the proceedings to little more than a footnote. Nevertheless, the State's position in the response to the Petition for Writ of Habeas Corpus was that Mr. Garcia's claims on this and other issues raised in the Petition should be ignored simply because appellate counsel half-heartedly mentioned them in the direct appeal.[1] The State cited several of this Court's opinions to support the proposition that "claims that seek to relitigate claims that were raised and rejected on

[1]The State made this argument with respect to Claim IV and Claim V as well. Mr. Garcia incorporates the arguments made in the Reply as arguments to the State's response in Claims IV and V.

different grounds are procedurally barred and without merit."[2] (State's Response, p. 7).

The repeated suggestion that Mr. Garcia asserted different or additional arguments only in an "attempt to avoid the fact that the issues were raised on direct appeal" serves to undermine the function and importance of appellate advocacy in capital litigation. The State's arguments and suggestions of impropriety denigrate both the appellate and post-conviction attorneys' duty to be especially vigilant about raising and litigating *all potential issues*. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), 10.14; 10.15.1; Commentary, p. 131("'Winnowing' issues in a capital case can have fatal consequences. . . When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored or unexploited.").

While the State did appear to find support for its argument in this Court's decisions, there are a number of reasons why such a blanket and general rule should not apply in this case. The State cannot rely on the Reichmann case as a procedural bar to Mr. Garcia's claims despite this Court's language that

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[2]The State cited State v. Reichmann, 777 So. 2d 342, 365-66 (Fla. 2000); Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990); and Swafford v. Dugger, 569 So. 2d 1264, 1267 (Fla. 1990).

"different grounds or legal arguments cannot be used to render appellate counsel ineffective." Reichmann, 777 So. 2d at 366. In the Reichmann opinion, this Court denied relief on an ineffective assistance of appellate counsel claim based on the precedent that "in order for an argument to be cognizable on appeal, it must be the specific contention, or motion below." Reichmann at 366; citing Martin v. State, 705 So. 2d 1337, 1345 (Fla. 1997); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).

In this case, the trial attorney clearly objected to the prejudicial and irrelevant testimony of Rose Flight, even though he did allow some of the State's improper comments to go unchallenged. He also posed a specific objection to the witness's outburst by clearly informing the lower court that the emotional display prejudiced Mr. Garcia's right to a fair trial. The issue was properly preserved with a request for mistrial. (R. 629-630). Mr. Garcia is not now suggesting that appellate counsel should have challenged the issues surrounding Mrs. Flight's testimony on *different* legal grounds; rather, he should have raised the properly preserved challenge to the outburst in the *context* of the fact that the prosecutor walked this woman to the stand and then used her to introduce irrelevant and inflammatory evidence prior to the outburst.

Similarly, the State cannot succeed in barring Mr. Garcia's cognizable issues in his habeas petition based on this Court's prior opinions in Harvey, Medina, and Swafford. The State cited the Swafford opinion at page 1267 which states that "[p]ostconviction proceedings cannot be used as a second appeal." Swafford, 569 So. 2d at 1256, citing State v. Bolender, 503 So. 2d 1247 (Fla.), cert. denied, 484 U.S. 873 (1987). This Court also cited to the Bolender case in the Medina opinion as well: "Proceedings under *rule 3.850* are not to be used as a second appeal." Medina, 573 So. 2d at 295 (emphasis added). In the Harvey case, this Court cited to Johnson v. State, 593 So. 2d 206 (Fla.), cert. denied, 113 S. Ct. 119 (1992) in support of the statement that "issues that could have been, but were not, raised on direct appeal are not cognizable through collateral attack." Harvey, 656 So. 2d at 1256. The common thread in each of these cases is that they pertained to appeals concerning a *collateral attack brought pursuant to Rule 3.850*.

There is no doubt that a petition for writ of habeas corpus is the appropriate vehicle for raising a claim of ineffective assistance of appellate counsel. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985); Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). While this Court has looked unfavorably upon attempts to use the allegation of ineffective assistance of counsel as a means of "circumventing" the prohibition against a

"second or substitute appeal," McCrae v. Wainwright, 439 So. 2d 868 (Fla. 1983), Mr. Garcia submits that he has not done that in this case. Rather, Mr. Garcia has raised the failures of appellate counsel to brief meritorious issues altogether in the *context* of appellate counsel's failure to properly apprise this Court of the magnitude of the issues that he *did* raise on direct appeal. This is necessary so that the cumulative nature of all of the errors that occurred at the trial level can be considered. See Barclay v. Wainwright, 477 So. 2d 956, 959 (Fla. 1984).

In the direct appeal, appellate counsel challenged the prosecutorial misconduct in argument IX and presented seven different categories in which the State flagrantly disregarded Mr. Garcia's right to a fair trial. (Initial Brief, p. 41-58). One of those categories was the inappropriate "appeals to sympathy" in which appellate counsel made the following half-hearted argument:

> Although it was totally irrelevant to any aspect of the case, the prosecutor informed the jury during opening statement that the victims had a niece who was a nun in New York and that Rose Flight, a neighbor, had the task of letting "the Mother Superior" know of the crimes so that the family could travel to Miami to make the appropriate arrangements (T 377). She subsequently elicited these facts from Flight (T 412-413), an elderly woman whom the prosecutor physically assisted when she took the stand (T 414). The defense objected to the irrelevant

> hearsay testimony and to the prosecutor assisting the witness (t 414).
>
> "It is the responsibility of the prosecutor to seek a verdict based on the evidence without indulging in appeal to sympathy, bias, passion or prejudice." (citation omitted). Prosecutors also have a responsibility to "seek justice," a responsibility that is inconsistent with such appeals. (citation omitted). Irrelevant references to a victim's family are improper appeals to sympathy. (citation omitted). Making the point that such a family member was a nun and doing so through a witness for whom the prosecutor also sought sympathy magnified the impropriety. The prosecutor's actions here ignored her responsibilities and were clearly inappropriate. (Initial Brief, p. 56).

Appellate counsel also argued that all of the instances of misconduct should be considered cumulatively. (Initial Brief, p. 56-57).

In his Petition, Mr. Garcia presented the issue concerning Rose Flight to this Court in light of the fact that her prejudicial and irrelevant testimony set the tone of the entire trial. The problem was much more than the fact that is inappropriate to introduce argument or testimony with the sole purpose of appealing to the juror's sympathy. The problem in this case is that the prosecutor deliberately set out in opening statement to garner sympathy from the jury and then used the elderly witness to reinforce that sympathy. It is against that backdrop that this Court can and should consider all of the instances of prosecutorial misconduct in conjunction with the

denial of the motion for mistrial after the emotional outburst by Mrs. Flight.

Thus, the application of a general prohibition against re-arguing some facts or legal issues in the writ of habeas corpus without regard to the specific circumstances of this case would not be an adequate procedural bar in Mr. Garcia's case.

Conclusion and Relief Sought

For all the reasons discussed in this Reply as well as in Mr. Garcia's Petition for Writ of Habeas Corpus, Mr. Garcia respectfully urges this Court to grant habeas corpus relief.

Certificates of Service and Compliance

I HEREBY CERTIFY that a true copy of the foregoing REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States Mail, first class postage prepaid, to Sandra Jaggard, Assistant Attorney General, 444 Brickell, Miami, Florida this 4th day of January, 2006.

I further CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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