IN THE SUPREME COURT OF FLORIDA,

ROBERT CARRATELLI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC06-97
4th DCA Case No. 4D04-973

****

APPELLEE=S ANSWER BRIEF

****

CHARLES J. CRIST, JR.
ATTORNEY GENERAL
Tallahassee, Florida

CELIA TERENZIO
Senior Assistant Attorney General
Bureau Chief
Florida Bar No. 0656879

DAVID M. SCHULTZ
Assistant Attorney General
Florida Bar No. 0874523
1515 North Flagler Drive
Ninth Floor
West Palm Beach, FL 33401
(561) 837-5000

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

RULES OF PROCEDURE

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's Statement of the Case and Facts, to the extent that it represents an accurate non-argumentative recitation of the procedural history and facts of this case, subject to the following additions, corrections, clarifications, and/or modifications:

The Accident

Appellant indicates that the existence of a skid mark was critical to the State=s case, and that the State=s accident reconstruction expert (Corporal Allen) never saw Athat@ skid mark because he was brought in to complete the report after the original expert (Corporal Watts) died, and that there were no photographs of that skid mark (IB 3). However, Corporal Allen testified that he reviewed photographs and the videotape taken by Corporal Hylton and Sergeant Davis of the crime scene (T IX, 1004/12-16). The record reflects that the videotape shows this skid mark, while Corporal Hylton is speaking to Corporal Watts (see video and T 928/19-20). Corporal Allan testified that he also relied on the measurements taken by Corporals Watts and Hylton and Sergeant Davis (T IX, 1006/5-8, 1059/16-18).[1] He

[1]Sergeant Davis testified that Corporal Watts took measurements at the scene including the pertinent skid marks (T VIII, 923/13-21, 979/12-17).

verified those measurements by going to the scene and matching those measurements to what remaining evidence he actually observed and measured, such as the gouge marks in the road made by the victim's vehicle (T IX, 1006/9-1007/3), which were still visible when he was assigned to the case (T IX, 1134/23-1135/1), which he measured (T IX, 1135/20) and which reflected the exact point and angles of impact (T IX, 1135/21-22, 1136/2-4). He indicated that Sergeant Davis took him to the crime scene and pointed out the general area of the subject skid marks (T IX, 1024/3-6). He placed the skid marks in the lane on his diagrams based in part on where Sergeant Davis told him they had been (T IX, 1024/12-15, 1039/23-1040/3). Sergeant Davis did not know exactly where the skid marks started and stopped (T IX, 1026/8-10), so he used Corporal Watts' measurements to determine the length of the skid mark (T IX, 1026/12-17, 1028/13-15). However, the length of the skid mark is used to determine the speed before braking; the mere fact there is a skid mark is indicative of braking (T IX, 1029/13-25).

Sergeant Davis also testified that he observed skid marks which indicated that appellant was braking prior to impact (T VIII, 929/8-930/5). He testified that after Corporal Watts died, he went back to the scene with Corporal Allen to re-map it and showed Corporal Allen where everything was (T VIII, 939-

940). He also testified that Corporal Allen's report was consistent with the physical evidence that he observed at the crime scene on the day of the offense (T VIII, 943/17-20). Sergeant Davis also drew the skid marks that he saw at the crime scene on State's Exhibit # 4 (T VIII, 939/20-940/13), which is consistent with both Corporal Watt's drawing of the skid marks (State's Exhibit # 42) and Corporal Allen's rendering of the skid marks (State's Exhibit # 27).

Lieutenant Rogers with the Florida Highway Patrol also testified that he observed a tire mark in the road just east of where the collision occurred (T VIII, 883/2-3) which started in the right-hand through lane, curved left to the southwest and ended up near the center where the two lanes come together at the point of impact (T VIII, 894/9-20). He testified that he determined from the tire mark that prior to impact appellant attempted to turn left and brake his vehicle,[2] because his

[2]Although on pages 884/18-885/1 of the transcript Lieutenant Rogers indicates that it was the Mercury (the victims' car) that attempted to brake, it is apparent from the context of the testimony that Lieutenant Rogers is describing what happened to the vehicle that struck the victims' vehicle (appellant's vehicle, the Mercedes).

vehicle went in the same direction that the tire mark led from (T VIII, 884/18-885/1, 890/2-891/1, 894/1-3, 895/).

Eyewitness Anthony Alberti testified that he heard brakes squeal just before impact (T VII, 696/3-4, 697/3-6, 708/7-9).[3]

Further, six eyewitnesses testified that prior to entering the intersection appellant was traveling between 75 and 80 miles per hour (T VI, 575/13, 596/8, 611/16, 640/21, 685/10-12, 718/15). Corporal Allan testified that appellant was traveling a minimum of 76 miles per hour when he entered the intersection (T IX, 1066/2-3). Corporal Allen also testified that based on the crush damage to the vehicles appellant was traveling 66 miles per hour at impact (T IX, 1057/4-5, 1049/21-1051/22). This also would indicate that appellant was braking prior to impact.

The Jury Selection Process

Juror Inman: Defense counsel moved to strike Mr. Inman for cause solely based on the fact that he had read what defense counsel characterized as a "one-sided" newspaper article about the case (T V, 444/9-18). Mr. Inman indicated that he read a Post article Sunday the week before (T IV, 359/7-360/8).

[3]Corporal Allen testified that the victims' vehicle was only moving 4-5 miles per hour at the time of the collision (T IX, 1058/3-6).

However, Mr. Inman told defense counsel that the only things that he remembered from the article was that the accident had happened and the results of that accident (T IV, 365/12-17).

In regard to the conversation at the barber shop, Mr. Inman indicated that he did not participate in this conversation but only overheard the discussion (T IV, 363/4-15). Appellant indicates that this group of men concluded that appellant was guilty (IB 11-12); however, Mr. Inman excluded himself from this group (T IV, 360/17-18). Mr. Inman also indicated that although the guys at the barber shop sort of formed the opinion that appellant was probably guilty, he was not convinced either way (T IV, 360/22-23). Mr. Inman told defense counsel that although the conversation in the barber shop might have caused him to think a little more about the case, it did not cause him to form any definite opinion regarding this case (T IV, 366/2-7). Mr. Inman did admit, however, that the barber shop conversation caused him to think that appellant should have had some forewarning from his diabetic condition which should have warned him to stop driving (T IV, 366/10-367/3). However, Mr. Inman also told defense counsel that if experts testified that there would be no forewarning he would listen to the testimony (T IV, 368/7-12). Mr. Inman also told the judge that he believed that he could put aside the article and the conversation with others and listen to the evidence presented (T IV, 361/6-12). He

reiterated to the prosecutor, that he believed that he could listen to the evidence, put aside what he had already heard and apply the facts as presented to the law and follow the law as instructed by the judge (T IV, 361/16-362/2).

Defense counsel subsequently asked the following leading questions:

> Would you say that this is a fair statement that you have an opinion about the defense but it's not -- you have not positively made up your mind? But it would certainly be more difficult for Mr. Carratelli to convince you of his innocence now than if you had not read the article had not been involved in that discussion.

(IV, 368/19-369/3). Mr. Inman responded affirmatively (T IV, 368/23, 369/4). Immediately thereafter, however, the following dialogue took place between the trial court and Mr. Inman:

> The Court: Mr. Inman, you used a phrase a minute ago but I don't want to put words in your mouth, as to this type of defense; I gather that you think it's possible there is a medical explanation that would explain the situation?
>
> Mr. Inman: Well, there's a possibility that that could happen.
>
> The Court: And regardless of what discussions you had already, you'd be willing, as a juror, to sit here and listen to whatever medical testimony you hear?
>
> Mr. Inman: Absolutely.
>
> The Court: Whether it makes sense or it doesn't?
>
> Mr. Inman: Yes.
>
> The Court: Would you be able to set aside any input you had, bias or prejudice, and sit here and assure us

> all that you can be a fair and impartial juror?
>
> Mr. Inman: If I come in here as a juror, I will sit down with an open slate and listen to what is said and make up my mind from there.

(T IV, 369/13-370/11). Subsequently, when defense counsel was questioning Mr. Inman about whether his experiences during the Korean Conflict might cause him to be too detached from the issues in this case, Mr. Inman stated, "I would give it a fair shake. Like I said, if I come in here and I give my word on the oath that I am going to listen to the testimony, pro and con, both sides; I will make my decisions from that (T V, 415/4-21). Defense counsel responded, "Fair enough" (T V, 415/22).

Other Challenges

Appellant indicates that at one point he had one peremptory challenge left and requested additional peremptory challenges, but the trial court denied this request without explanation (IB 14). This is misleading. Appellant used his six peremptory challenges in the first round of voir dire, four of which were used to remove potential jurors Nesbitt, Lott, Johnson and Jablin (T III, 215-219). Subsequently, defense counsel requested and was given two additional peremptory strikes (T III, 219/20-220/7, 222/25-223/1). During the second round, while appellant still had one peremptory challenge remaining, defense counsel again requested additional peremptory challenges (T IV, 332/9). Although the state had no objection to appellant

receiving additional peremptory challenges, the trial court denied the request on the basis that it was premature in that appellant still had one challenge remaining (T IV, 332/13-19). During the third round, defense counsel moved to remove venireperson Inman for cause, and the trial court denied this request (T V, 444/9-20). Subsequently, appellant again made a general request for additional peremptory challenges before he had exhausted the one he still had remaining (T V, 445/16-23). The trial court again denied his request (T V, 445/24). This is the denial, without explanation, that appellant refers to in his brief (IB 14). Appellant finally used his last peremptory challenge on venireperson Berry, not on Mr. Inman, who sat on the jury (T V, 447/17-18).

Appellant indicates that in the affidavits attached to his motion for post-conviction relief that his attorneys swore that they did not want Mr. Inman to serve on the jury (IB 18-19). However, in those affidavits his attorneys also swore that after they used their last peremptory challenge to remove prospective juror Berry, they did not request or move for any additional peremptory challenges (Rule 3.850 motion at 36-37, Exhibits C and D).

SUMMARY OF ARGUMENT

This court should decline to accept jurisdiction, because the rule of law enunciated in *Austing* (the conflict case)is not the same rule of law now presented to this court.

Be that as it may, the rationale in *Davis* is flawed, and when, as here, a conviction is challenged and counsel:s trial performance is alleged to be deficient, the relevant prejudice inquiry under *Strickland* is whether, absent the errors, the outcome of the trial would have been different.

ARGUMENT

THE TEST FOR PREJUDICE UNDER *STRICKLAND* USED BY THE DISTRICT COURT WAS CORRECT.

The Supreme Court=s test for analysis of ineffective assistance of counsel claims is the two-pronged test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under this test, appellant bears the burden of proving that his counsel=s representation fell below an objective standard of reasonableness, and that he suffered actual and substantial prejudice as a result. *Id*. To

demonstrate the prejudice prong, appellant must show that there is a reasonable probability that, but for his counsel=s unprofessional errors, the result of the proceeding would have been different. *Id*. The standards set forth in *Strickland* have been adopted by this court. *King v. State*, 597 So. 2d 780 (Fla. 1992); *Kelley v. State*, 569 So. 2d 754 (Fla. 1990).

In *Strickland*, the Court repeatedly stated that when applying the above test the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland* at 696, 697-698. In *Strickland*, the appellant was challenging his capital sentencing proceeding. The Court likened a capital sentencing proceeding and counsel=s role to a trial. *Strickland* at 686-687. Therefore, the Court indicated that to prove prejudice appellant was required to demonstrate a reasonable probability that, absent the errors, the result of the sentencing would have been different. *See Strickland* at 677, 695, 699-700). The Court also indicated that when a defendant is challenging his conviction, as distinguished from his sentence, the relevant inquiry in assessing the prejudice prong is whether, absent the errors, there is a reasonable probability that the factfinder would have had a reasonable doubt respecting guilt. *Id*. In other words, whether there is a reasonable probability that the result of the trial

would have been different. *Strickland* therefore makes it clear that when alleging an ineffective assistance of trial counsel claim, a defendant must demonstrate a reasonable probability that the result of the trial, not the appeal, would have been different. *Strickland* at 687.

The standard of review for ineffective assistance of appellate counsel is the same *Strickland* standard used for trial counsel. *Jones v. Moore*, 794 So. 2d 579 (Fla. 2001); *Rutherford v. Moore*, 774 So. 2d 637 (Fla. 2000). However, since the defendant is challenging his appellate proceeding, the relevant inquiry in assessing the prejudice prong is whether there is a reasonable probability, absent the errors, that the outcome of the appeal would have been different. *Id*; *Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985).

Appellant in this matter is challenging his conviction (the result of his trial) (page 42 of appellant=s motion for post-conviction relief and page 14 of appellant=s memorandum of law in support thereof) and arguing that trial counsel was ineffective, but appellant asserts that the relevant question in assessing prejudice is whether there is a reasonable probability, absent the errors, that the outcome of the appeal would have been different. Citing to *Austing v. State*, 804 So. 2d 603 (Fla. 5th DCA (2002)(the stated conflict case) and *Davis v. Sec=y for the*

Dept. of Corr., 341 F.3d 1310 (11th Cir. 2003), appellant argues that when a trial attorney, like trial counsel in this matter, puts the trial court on notice of an alleged error in the trial proceeding but nonetheless fails to preserve the alleged error for appellate review (by not renewing his or her objection to the alleged error), then in order to demonstrate the *Strickland* prejudice prong a defendant must show that had the objection been preserved the result of the appeal, not the trial, would have been different.

In *Austing*, defense counsel sought to exercise a peremptory challenge against a prospective juror, but the trial court denied the challenge on the basis that counsel=s stated reason for the challenge was not race neutral.[4] The opinion indicates that defense counsel failed to preserve this issue for appellate review, because he failed to object to the jury as impaneled. However, the opinion does not reflect that defense counsel ever put the trial court on notice of an alleged error in its ruling. Further, *Austing* does not give any rationale for its holding but merely relies on the doctrine of Stare Decisis, citing as

[4]The district court held that the trial court=s ruling was erroneous.

authority to *Dwyer v. State*, 776 So. 2d 1082 (Fla. 4th DCA 2001)[5] and *Vaz v. State*, 626 So. 2d 1022 (Fla. 3rd DCA 1993). *Dwyer* is similar to *Austing*, in that defense counsel sought to exercise a peremptory challenge against a prospective juror, but the trial court denied the challenge; however, in *Dwyer* the district court makes it very clear that defense counsel never objected to the improper denial of his peremptory challenge. Therefore, the trial court was never put on notice of the alleged error. In *Vaz*, the district court held that trial counsel:s failure to preserve a closing argument error for appellate review was prejudicial, in that the result of the appeal would have been different. Again, in *Vaz* the trial court was never put on notice of the alleged error.

In pertinent part, this court has discretionary jurisdiction over decisions of the district courts of appeal 1) that

[5]The Fourth District Court of appeal receded from *Dwyer* in *Carratelli v. State*, 915 So. 2d 1256 (Fla. 4th DCA 2005) (en banc).

expressly and directly conflict with a decision of another district court of appeal or of this court on the same question of law; or 2) are certified to be in direct conflict with decisions of other district courts of appeal. Fla. R. App. P. 9.030(a)(2)(A)(iv) & (vi). The question of law presented to this court by appellant and the subject of the holding in *Davis* is not the same rule of law presented in the decisions of *Austing*, *Dwyer* and *Vaz*. The rule of law of *Davis* and now presented to this court, in addition to a trial lawyer not preserving an issue for appellate review, adds that the trial lawyer did, however, put the trial court on notice of the alleged error. The Eleventh Circuit Court of Appeals makes it very clear that their holding, unlike the holdings in *Austing*, *Dwyer* and *Vaz*, is only applicable when trial counsel puts the trial court on notice of the alleged error but fails to preserve the issue for appellate review by renewing the objection and distinguishes cases like *Austing*, *Dwyer* and *Vaz*, where trial counsel fails to preserve the issue for appellate review and does not put the trial court on notice of the alleged error. This is because in cases like *Davis* the only effect of trial counsel=s negligence is on the defendant=s appeal. *Davis* at 1314-1315. *See also Brower v. Sec=y for the Dept. of Corr.*, No. 04-14963 (11th Cir. June 24, 2005). Since the rule of law now

presented by appellant is not the same rule of law presented in *Austing*, this court should decline to accept jurisdiction.

Be that as it may, the rationale in *Davis v. Sec'y. for the Dep't. of Corr.*, 341 F.3d 1310, 1316 (11th Cir. 2003), is flawed. Part of the rationale for its holding is that when a trial attorney fails to preserve an issue for appellate review he or she is acting in an appellate capacity, and that therefore to demonstrate the prejudice prong under *Strickland* when alleging this deficient conduct a defendant must show that there is a reasonable likelihood of a more favorable outcome on appeal (not the trial) had the claim been preserved. The undersigned would respectfully disagree. Preserving issues for appellate review is what trial attorneys do, and to claim that they are acting in an appellate capacity when they preserve or fail to preserve an issue for review is a fiction designed to support a desired result.[6] Further, the court justified its holding by citing to *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct.1029, 145 L.Ed.2d 985 (2000), indicating that the Court therein established that the prejudice showing required by *Strickland* is not always fastened to the forum in which counsel performs deficiently, and

[6]The federal courts of appeals generally treat *Batson* violations, like the one in *Davis* as structural and thus subject to per se reversal. *Nebraska v. Lowe*, 677 N.W.2d 178

that 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* at 1315. However, as the court also pointed out, in *Flores-Ortega* the Court held that *Strickland=s* prejudice prong required the petitioner to show that but for counsel=s deficient failure to consult with him about an appeal, he would have timely appealed. *Id*. This is because trial counsel did not file a timely notice of appeal. *Flores-Ortega* at 474. Therefore, the Court limited its holding only to circumstances where counsel fails to consult with a defendant about an appeal and therefore no timely notice of appeal is filed. *Flores-Ortega* at 484. This is significant, because the Court clearly distinguished between ineffective assistance of counsel claims for performance in a trial proceeding versus an appeal proceeding. *Flores-Ortega* at 481. Again, the Court further distinguished ineffective assistance claims in the above proceedings from a claim of ineffective assistance of counsel for failing to file a notice of appeal. *Flores-Ortega* at 477. The Court clarified this distinction when it stated, AToday=s case is unusual in that counsel=s alleged deficient performance arguably led not to a judicial proceeding

---

(Neb. 2004).

of disputed reliability, but rather to the forfeiture of a proceeding itself.@ *Flores-Ortega* at 483. The rationale for this distinction was, at least in part, the fact that filing a notice of appeal is purely a ministerial task. *Flores-Ortega* at 474. Therefore, the Court clearly distinguished between counsel=s conduct during a trial proceeding, counsel=s conduct during an appellate proceeding, and counsel=s conduct in regard to filing a notice of appeal. Consequently, the undersigned would respectfully disagree with the eleventh circuit=s conclusion that *Flores-Ortega* established that when a defendant alleges ineffective assistance of trial counsel, for putting a trial court on notice of an alleged error but failing to preserve the alleged error for appellate review, the relevant focus in assessing the prejudice prong of *Strickland* is whether there is a reasonable likelihood of a more favorable result on appeal.

The Fourth District Court of Appeal also disagreed with the eleventh circuit=s reasoning in reaching this holding. *Carratelli v. State*, 915 So. 2d 1256 (Fla. 4th DCA 2005) (en banc). First, the Fourth District disagreed with *Davis*= characterization of a failure to preserve a trial objection as a failure in trial counsel=s Aseparate and distinct role of preserving error for appeal,@ as opposed to a failure of trial

advocacy, noting that the requirement of preservation is central to the trial process. Second, the district court disagreed with the eleventh circuit=s application of *Roe*, because *Roe* involved the failure to file a timely notice of appeal, which has nothing to do with the trial conduct of failing to preserve an objection to a potential juror. Finally, the Fourth District pointed out that jury selection is a dynamic evolving process where a lawyer=s evaluation of jurors turns on those who have been seated and those potential jurors who might be called if a challenge is exercised. Therefore, the weighted evaluation of a potential juror changes at every step of the jury selection process. The district court noted that it is for this reason that this court requires attorneys to renew an earlier objection to a juror before the jury is sworn. Appellant argues that this case is unique and that the *Davis* holding should be applied, because there was no trial impact in that the trial court was put on notice that Mr. Inman was objectionable. However, the undersigned would disagree. It is only through renewal of such an objection that puts the trial court on notice that appellant has an objection to the jury as finally formed, and has not through the jury selection process decided that another potential juror is more objectionable. Therefore, this exception to *Strickland*, as carved out by the *Davis* court should

not be applied in the State of Florida.

It should be noted that although distinct from the rule of law presented in this case, several cases in Florida have addressed ineffective assistance of counsel for failing to preserve an issue for appellate review. *See State v. Bouchard*, 31 Fla. L. Weekly D768 (Fla. 2nd DCA March 10, 2006). In *Bouchard*, which was published subsequent to *Carratelli*, the Second District Court of Appeal has receded from its holding in *Van Loan v. State*, 872 So. 2d 330 (Fla. 2nd DCA 2004), and adopted the holding in *Carratelli*. In *Bouchard*, the district court again noted that in *Strickland* the Court stated that the ultimate focus must be on the fundamental fairness of the proceeding whose result is being challenged; therefore, in evaluating the prejudice prong under *Strickland* the focus must be on the reliability of the outcome in the proceeding in which the deficient performance occurred rather than on whether counsel=s deficient performance in the trial court affected the defendant=s appellate rights.

Finally, appellant argues that the Fourth District improperly relied on *Jenkins v. State*, 824 So. 2d 977 (Fla. 4th DCA 2002), because in this matter, as opposed to *Jenkins*, it would have been useless for trial counsel to request more peremptory challenges since the judge had just denied a similar

request (IB 34). However, as was stated above, this is incorrect, because when counsel requested these peremptory challenges he still had challenges remaining, and the trial court had already advised him that any such request was premature until he had used these challenges.

Appellant also argues that the district court=s reliance on *Joiner v. State*, 618 So. 2d 174 (Fla. 1993) was also improper, because, as opposed to *Joiner*, trial counsel in this matter did renew his objection, Aexcept secure an express ruling from the trial court rejecting his request for additional challenges@ (IB 36). However, on direct appeal appellee argued and the district court found that whatever trial counsel said, Awas neither a motion nor a request for additional peremptory challenges.@ *Carratelli v. State*, 832 So. 2d 850, 856 (Fla. 4th DCA 2002). Therefore, appellant has shown no error by the district court in relying on these cases.

CONCLUSION

Based on the above argument, Appellee requests that this Honorable Court affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL
Tallahassee, Florida

CELIA TERENZIO
Senior Assistant Attorney General
Bureau Chief
Florida Bar No. 0656879

_____
DAVID M. SCHULTZ
Assistant Attorney General
Florida Bar No. 0874523
1515 North Flagler Drive
Ninth Floor
West Palm Beach, FL 33401
(561) 837-5000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail to Marcia J. Silvers, Esq., 2601 South Bayshore Drive, Ste. 601, Miami, Florida 33133, this ____ day of _____, 2006.

_____
DAVID M. SCHULTZ
Of Counsel

CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief has been prepared in Courier New font, 12 point, and double spaced.

_____
DAVID M. SCHULTZ

Of Counsel