IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-97

ROBERT CARRATELLI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S INITIAL BRIEF ON THE MERITS

APPEAL FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA
(CASE NO. 4D04-973)

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STATEMENT OF THE CASE AND FACTS

Appellant Carretelli seeks review of a majority decision rendered by a split Fourth District Court of Appeal *en banc* which the Fourth District's majority certified to be in direct conflict with the Fifth District Court of Appeal's decision in *Austing v. State*, 804 So.2d 603 (Fla. 5th DCA 2002) and which the Fourth District's majority expressly stated was in direct conflict with the Eleventh Circuit's decision in *Davis v. Secretary for the Department of Corrections*, 341 F.3d 1310 (11th Cir. 2003).

I. Proceedings In The Trial Court.

The Accident and the Charges. Robert Carratelli was charged with six counts of manslaughter under §782.07, Fla. Stat., and six counts of vehicular homicide under §782.071(1), Fla. Stat. as a result of an automobile accident in which his car collided with a second car at the intersection of Gatehouse and Yamato Roads in Palm Beach County. Mr. Carratelli was at the wheel of his car when the collision occurred. All six people in the second car died. (T. 555-67, 640, 666).[1]

[1] Defendant/Appellant ROBERT CARRATELLI will be referred to as he stands in this Court, as he stood in the court below, and by name. "T" refers to the trial transcript. Mr. Carratelli's motion for post-conviction relief filed pursuant

Mr. Carratelli was tried by a jury. He was represented at trial by defense attorneys Richard Lubin and Thomas Gano. At Mr. Carratelli's trial, it was undisputed that he was not under the influence of drugs or alcohol at the time of the automobile accident.

Mr. Carratelli's defense at trial was that, unbeknownst to him, at the time of the accident he was suffering from a medical condition called syncope related to his severe diabetes that prevented him from being able to judge speed, time and distance and from exercising judgment. At the trial, it was undisputed that Mr. Carratelli is a Type I, insulin-dependent, diabetic whose condition is advanced and not well-controlled thereby causing him to have damaged kidneys and eyes as well as a damaged autonomic nervous system. (T. 1397, 1476-77). Syncope is common in people with diabetes. (T. 1398, 1466, 1695). A person who has syncope is highly susceptible to a rapid drop in blood pressure, resulting in a fainting or near-fainting episode. (T. 1452, 1460). This can happen while someone is driving, and the condition often

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to Fla.R.Crim.P. 3.850 will be referred to as "Rule 3.850 motion." The "State's Response to Motion for Post-Conviction Relief" will be referred to as "State's Response." All other documents that are made a part of the Record of Appeal in this case pursuant to Fla.R.Crim.P. 9.141(b)(2)(A) will be referred to herein by their full title.

causes automobile accidents. (T. 1469, 1601). There is often no warning that an episode is coming on. (T. 1507-08, 1784).

Mr. Carratelli was first diagnosed with syncope when he fainted and was taken to a hospital several days after the accident. (T. 1609-10, 1634-35). Several defense experts testified that, at the time of the accident, Mr. Carratelli was having a syncopal or near-syncopal episode. (T. 1492, 1530, 1724-25, 1727-28, 1737, 1779). This episode made it impossible for him to judge speed, time, distance, or to exercise judgment. (T. 1779). After the accident, several witnesses observed that Mr. Carratelli was confused and did not know what had happened. (T. 622, 653, 809).

The State did not attempt to refute Mr. Carratelli's defense with medical testimony of its own. Instead, the State relied on its witnesses' interpretation of the physical evidence to attempt to show that Mr. Carratelli was braking and taking evasive action, and therefore was aware and functioning at the time of the accident. The very existence of a skid mark, a disputed fact at trial, was critical to the State's attempt to show that Mr. Carratelli was conscious and could not have been experiencing a syncopal episode at the time. However, the State's accident reconstruction expert never saw, let alone measured that skid mark. He was brought in to complete the

report after the original investigating officer died several weeks after the accident and a preliminary sketch containing a drawing of a skid mark was found in the original investigating officer's home. That sketch had no street names and was not clearly labeled as belonging to this accident. (T. 895, 1000; State's Exhibit 42). The State's accident reconstruction expert could not verify the existence of the skid mark, as it was not there when he went to the scene and there were no photographs of it. (T. 901, 1027, 1039).

None of the eyewitnesses who testified at the trial saw brake lights on Mr. Carratelli's car. (T. 650, 703). The sketch showed a skid mark in the right-hand through lane but two witnesses testified that Mr. Carratelli was in the left-hand through lane, not the right. (T. 671, 689). One testified that there was a car in the right-hand through lane, so Mr. Carratelli could not have been in that lane going into the intersection. (T. 648, 671).

The defense presented evidence from an accident reconstruction expert that, based on the physical evidence, in his opinion Mr. Carratelli's car could not have left the skid mark shown in the preliminary sketch and used by the State's accident reconstruction expert to form his opinion. (T. 1364). The defense's accident reconstruction expert testified that, in his opinion, Mr.

Carratelli's car was traveling about 63 miles per hour in a 55 mile per hour zone at the time of the impact. (T. 1366).

The Jury Selection Process. This was a highly publicized case--both at the time of the accident and at the time of trial. Indeed, news reports about the trial of this case were playing on the television in the jury waiting room during jury selection. (T. 78). Very few members of the venire had neither read nor seen some news report about it. (T. 1-454). Therefore, the jury selection process was lengthy and difficult.

During the jury voir dire, the trial judge in this case refused to exclude for cause four prospective jurors who openly stated that they could not be impartial: Jurors Nesbitt, Lott, Johnson, and Inman. However, as specified below, each of these prospective jurors should have been excused for cause.

Juror Nesbitt. During the jury voir dire in this case, Juror Nesbitt responded to questioning by providing the following information:

Juror Nesbitt worked in law enforcement for fifteen years, and then for five years as a fireman. (T. 30). At the time of Mr. Carratelli's trial, Juror Nesbitt continued to have numerous friends in law enforcement with whom he discussed cases in the news. (T. 30, 154-56).

Juror Nesbitt saw television and news reports concerning this accident. (T. 58). He read every newspaper article on this case, including a newspaper article that appeared in *The Palm Beach Post* on Sunday, April 30, 2000, the day before jury selection began in this case. (T. 58, 151-53, 444; Rule 3.850 motion, Exh. B). This *Palm Beach Post* article was highly prejudicial to Mr. Carratelli. The article described Mr. Carratelli's defense as "the zombie-driver defense." In that article, Sindy Forman, the daughter of two of the people who died in the car accident, was quoted as stating that Mr. Carratelli's defense was "phony and convenient." This *Palm Beach Post* article pointed out that Greg Barnhart, an attorney seeking money in a civil lawsuit for two people killed in the car accident, stated that he "thinks [defense counsel] Lubin will try to overwhelm the jury with some of the country's best doctors in the treatment of diabetes."

With respect to Mr. Carratelli's defense, this same article quoted Barnhart as stating: "It's a meandering theory that tries to fit the actual facts" but "just doesn't comport with the facts as we know them." In the article, Victor Diaz, another attorney seeking money in a civil lawsuit for the children of two of the people who died in the car accident, was quoted as stating that Mr. Carratelli's defense "is the ridiculous invention of creative lawyers." In this same article, family members

were quoted as being critical of Mr. Carratelli because they felt that he was not remorseful. (Rule 3.850 motion, Exh. B).

From the beginning, Juror Nesbitt readily and openly admitted his doubts that he could be fair and impartial. When initially asked by the trial judge whether he could be a fair and impartial juror, Nesbitt responded that he was not sure. (T. 13-15). Later on in the jury selection process, Juror Nesbitt said that he talked about this case with his law enforcement friends; they specifically discussed the reported speed of Mr. Carratelli's car and Mr. Carratelli's diabetic condition. He stated that he had formed an opinion on this case based on what he had read and heard. (T. 152).

The following dialogue subsequently occurred between Juror Nesbitt and defense counsel Richard Lubin:

> Mr. Lubin: In terms of your police officer relationships and the discussion and the publicity, is it a fair statement to say that the defense is not starting on an equal playing field?
> Mr. Nesbitt: As far as me?
> Mr. Lubin: Yeah.
> Mr. Nesbitt: I would ***hope*** to say that you would be. But it's a little hard for me to answer that question, because I don't know if I really formed an opinion or not. I try not to. But if I had - -
> Mr. Lubin: If you have, what is it?
> Ms. Browne: I object to him giving his opinion.
> The Court: Overruled.

Mr. Nesbitt: There could be a matter of guilt there, but that's my opinion, but I can't say for sure that I can't be convinced with evidence.

Mr. Lubin: In other words, you are saying I might be able to talk you out of that?

Mr. Nesbitt: With evidence, I've got to see the evidence. I have to see the evidence and if the evidence is there, beyond a reasonable doubt, I believe I can make the right decision but - - reject my opinion, whatever it may be, but I have to go strictly by the evidence.

Mr. Lubin: You are saying the evidence could convince you to reject the opinion that you have?

Mr. Nesbitt: Yeah, yeah. If there is a - - guilty beyond a reasonable doubt, okay, I would have to go one way.

Mr. Lubin: What way?

Mr. Nesbitt: Guilty, but if it is not there, I can't in all honesty, vote guilty for somebody that it wasn't proven against.

Mr. Lubin: It happens. The last question for you: Is it a concern in your mind, though, that it might take more of a defense or more evidence to help convince you to find Mr. Carratelli not guilty than it might otherwise take if you weren't who you are, having discussed this case and having read what you read?

Mr. Nesbitt: I don't think it would take more. Whatever evidence is presented in the case, I am going to have to go with that evidence and I don't think I would be coming back and say, I need more.

Mr. Lubin: Now, would you suggest might it be more difficult for Mr. Carratelli to be acquitted with you as a juror than with a juror that didn't have the preconceived opinion as it were, as you describe it?

Mr. Nesbitt: That way you put that, in all fairness to him ***probably it would***, but that's - - I don't want to sit here and say, you know, no, but - -

(T. 157-160) (emphasis added).

The prosecutor subsequently utilized leading questions to ask Nesbitt if he could set aside the conversations he had with his friends and his preconceived opinion and not prejudge Mr. Carratelli. Nesbitt responded that he "hoped," "believed" and finally "thought" he could do so. (T. 160-161).

Juror Lott. During the jury voir dire in this case, Juror Lott responded to questioning by providing the following information:

Juror Lott was aware of this case from the pretrial publicity. She saw publicity about this case in the newspaper and on the television when it happened. (T. 10, 171). Juror Lott initially expressed doubts as to whether she could keep her feelings out of her decision. (T. 95-98). On further questioning by defense counsel Lubin during voir dire, it became apparent why Ms. Lott had such an emotional response to this case -- she explained that she related this case in her mind to a recent tragedy where the child of a friend died in an ATV accident and stated:

> MS. LOTT: **I know my emotions would come into play** because I would think, you know, if I am to think about that child, this doesn't even involve kids. **I know my emotions will come into it.**
>
> MR. LUBIN: And will it -- will that then serve to the detriment of Bob Carratelli?
>
> MS. LOTT: It could possibly, and I wouldn't want it to be, so I would honestly say that in fairness to him, I don't think you -- I would be good for him, you know, emotional wise. I don't think I'm there yet.

> MR. LUBIN: **Because of the recency of that tragedy, do I hear you saying that you feel that you do not believe that you could be as fair and impartial as the law would want you to be on this particular case?**
> MS. LOTT: **Yes, and as he deserves.**
> MR. LUBIN: So you would rather not sit because of that?
> MS. LOTT: I would, because **I would want someone sitting here in a reverse role to be totally, you know, I would want them to be totally, out of a hundred percent of themselves, and I am not. And just don't think I would be fair to him.**

(T. 171-75) (emphasis added).

Subsequently, the prosecutor and the trial judge asked Juror Lott leading questions to try to rehabilitate her. The prosecutor asked Lott if she would follow the law and listen to the facts, and she responded, "um-hum." The trial judge also asked Lott if she could do the job and be emotional and logical at the same time, and she stated, "I'll try, yeah, yes, I would think I could." (T. 175-177).

Juror Johnson. During the jury voir dire in this case, Juror Johnson responded to questioning by providing the following information:

Juror Johnson read articles about this case in the newspaper. (T. 54, 179). She remembered that the accident involved six people and that someone might have run a red light. (T. 180-84). Reading newspaper articles about this case upset her, and it would upset her to be on the jury in this case. Indeed, the following

colloquy occurred between Juror Johnson and defense counsel Lubin during voir dire:

> MR. LUBIN: Are you concerned that because of the magnitude of this accident that you can't really concentrate and be fair?
> MS. JOHNSON: **I don't think I could be fair.** I just --
> MR. LUBIN: It's okay too, I just need to know.
> MS. JOHNSON: I don't have the words.
> MR. LUBIN: Are you overwhelmed by the tragedy?
> MS. JOHNSON: Yeah, I feel sorry for the six people that lost their lives.
> MR. LUBIN: **Do you feel because of that, that you are just not going to be able to be fair to Mr. Carratelli in this case?**
> **MS. JOHNSON: Yeah.**
> MR. LUBIN: Even though you like to be?
> MS. JOHNSON: Yes.
> **MR. LUBIN: You just know, no matter what the judge tells you, you are not going to be able to be fair?**
> **MS. JOHNSON: No.**
> **MR. LUBIN: Do you agree with that statement?**
> **MS. JOHNSON: Yes.**
> MR. LUBIN: And you would rather not be seated because you can't be fair --
> MS. JOHNSON: Right.
> MR. LUBIN: - - to Mr. Carratelli?
> MS. JOHNSON: Yes.

(T. 180-182) (emphasis added).

Thereafter, the prosecutor and the trial judge tried to rehabilitate Juror Johnson in a colloquy in which Juror Johnson agreed with some of the leading questions of the prosecutor and the trial judge but continued to state that it would

be difficult for her to sit on Mr. Carratelli's jury, though she "probably" could listen to the evidence presented and "possibly" could be fair to both sides. (T. 182-184).

Defense counsel moved to exclude Jurors Nesbitt, Lott and Johnson for cause. (T. 210-214, 217-218). However, the trial court denied these challenges for cause without any explanation. (T. 212, 214, 218). Defense counsel subsequently used peremptory challenges to strike Jurors Nesbitt, Lott and Johnson. (T. 215, 217-218).

Juror Inman. During the jury voir dire in this case, Juror Inman stated that he had received information about this case, including that a car accident had occurred, from the newspaper and television. (T. 359). He further stated during voir dire that, after learning about this case from the media, he listened to a group of men discuss this case at his local barbershop the week before Mr. Carratelli's trial. (T. 359). Juror Inman explained that this group of men was "pretty much unanimous" that "Mr. Carratelli was probably guilty of the charge." (T. 360). Inman then additionally said that he heard this group of men stating that they "couldn't believe" Mr. Carratelli's "excuse" that his diabetes caused the accident. (T. 363-364).

Thereafter, during the jury selection process, Juror Inman stated that the barbershop discussion caused him to have an opinion that Mr. Carratelli would have had a forewarning about a reaction from diabetes and that he, therefore, should have stopped driving before the accident occurred. Furthermore, Inman stated that, after listening to the barbershop discussion, he felt that Mr. Carratelli's defense did not make sense. (T. 366-367).

When questioned during voir dire, Juror Inman additionally stated that, after he overheard the discussion in the barbershop about this case, he read the newspaper article that appeared in the *Palm Beach Post* concerning this case that came out on Sunday, April 30, 2000, the day before the trial of this case began. (T. 359-360, 367). This was the same previously described April 30, 2000 *Palm Beach Post* article that ridiculed Mr. Carratelli's defense and that was read by Juror Nesbitt. *See infra* at 9-10. Juror Inman conceded that this article took the position that Mr. Carratelli was guilty but claimed that the article did not do that much for him. (T. 367-368).

However, after Juror Inman described the barbershop discussion and his reading of the April 30, 2000 *Palm Beach Post* article, the following dialogue occurred between Juror Inman, defense attorney Lubin and the trial judge:

MR. LUBIN: 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?
MR. INMAN: That's correct.

MR. LUBIN: **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?**
MR. INMAN: **I believe that's a fair statement.**

MR. LUBIN: Even though, of course, you know, we know that in a pure world you wouldn't have read it, and that you should be able to put things out of your mind; obviously it's in there, right?
MR. INMAN: That's correct.
MR. LUBIN: Thank you.

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. 368-370) (emphasis added). At the conclusion of the questioning of prospective jurors, defense counsel Lubin moved to strike Juror Inman for cause.

(T. 444). However, the trial court denied this motion without any explanation. (T. 444).

Other Challenges. After the trial court denied Mr. Carratelli's motion to strike Juror Inman for cause, defense counsel moved to strike for cause all of the prospective jurors who were exposed to the publicity about this case. (T. 444). The trial court denied this motion. (T. 445). Defense counsel then moved to strike for cause three other prospective jurors based on pretrial publicity. The trial court denied this motion. (T. 445).

At that point, Mr. Carratelli had one peremptory challenge remaining. Defense counsel requested additional peremptory challenges for Mr. Carratelli because of the extensive publicity about this case. However, the trial court denied this request without explanation. (T. 445). Defense counsel then asked the trial court for a ruling on Mr. Carratelli's motion for a change of venue due to pretrial publicity, which was denied although the trial judge acknowledged that "clearly there is widespread publicity in this case." (T. 446-47).

Defense counsel subsequently used Mr. Carratelli's last peremptory challenge to strike a prospective juror named Berry. (T. 447). The State then immediately accepted the remaining panel. (T. 447).

The trial judge, who had just denied defense counsel's request for additional peremptories, turned to defense counsel: "Those six jurors unless additional challenges from the defense, Mr. Lubin." Defense counsel responded as follows:

> MR. LUBIN: If - - if there are others, I would challenge including Mr. Inman, and others, if you granted me more peremptories.

(T. 447-48). The trial court did not reply to this statement of Mr. Lubin. (T. 448). The trial court's very next question concerned the alternate juror. After the State struck an alternate, defense counsel accepted the next alternate seated "***without waiving the challenge to the jury itself***." (T. 448) (emphasis added). Because Mr. Carratelli did not have any remaining peremptory challenges, Juror Inman sat as a juror on the panel that rendered the verdict in this case.

The Verdict. The jury acquitted Mr. Carratelli of the six counts of manslaughter by culpable negligence, but found him guilty of the six counts of vehicular homicide. (T. 2203). The trial court sentenced Mr. Carratelli to 15 years in prison. (T. 2211, 2340). He is presently imprisoned.

II. The Appeal.

On appeal to the Fourth District, Mr. Carratelli argued that the trial court committed reversible error by refusing to excuse for cause Jurors Nesbitt, Johnson, Lott and Inman because their above-described responses during voir dire created a reasonable doubt about their ability to serve as fair and impartial jurors in this case. The Fourth District noted that "***reversal is automatic***" where a trial court erroneously denies a cause challenge. *See Carratelli v. State*, 832 So.2d 850, 857 (Fla. 4th DCA 2002)(emphasis added) . The Fourth District unanimously agreed that the trial court should have excused Jurors Nesbitt, Johnson and Lott because "the record demonstrate[d] reasonable doubts concerning Nesbitt's, Johnson's and Lott's abilities to be fair and impartial." *Carratelli*, 832 So.2d at 854-855.

In addition, the Honorable Judge Hazouri wrote a concurring opinion to identify a fourth juror, Juror Inman, who, when challenged for cause, should have been excused, and stated, *inter alia*:

> Carratelli is presumed to be innocent until the State proves guilt beyond any reasonable doubt. His sole defense was that a previously undiagnosed diabetic condition caused a syncopal episode resulting in the crash. Juror Inman's expressed view that it would be more difficult for Carratelli to now convince him of his innocence, i.e. that Carratelli had a syncopal episode, because juror Inman had read the article and had listened to the discussion at the barbershop creates a reasonable doubt that juror Inman could be fair and impartial. The

> trial court's attempt to rehabilitate juror Inman fails to persuade me otherwise.

Carratelli, 832 So.2d at 864 (J. Hazouri concurring).

However, the Fourth District held that Mr. Carratelli did not preserve for appellate review his claim that the trial court improperly denied his cause challenges to Jurors Nesbitt, Johnson, Lott and Inman. The Fourth District stated that, in order to preserve for appellate review a claim that the trial court improperly denied a cause challenge to a juror, a defendant must first exhaust all of his peremptory challenges, ***then*** request an additional peremptory challenge and thereafter identify an objectionable juror that had to be accepted. The Fourth District held that defense counsel's statement after Mr. Carratelli's exhaustion of peremptory challenges that "if there are others, I would challenge including Mr. Inman, and others, if you granted me more peremptories" was not an adequate request for additional peremptories and, "[e]ven if counsel's statement was an adequate communication of the desire for an additional strike, the defense did not preserve the issue for appellate review because it failed to pursue the motion and obtain a ruling on it." *Carratelli*, 832 So.2d at 856.

III. <u>The Motion for Post-Conviction Relief.</u>

Mr. Carratelli timely filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. In that motion, Mr.

Carratelli asserted that his trial attorneys rendered ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution because, although they repeatedly made the trial court aware of their objection to Jurors Nesbitt, Johnson, Lott and Inman, they did not make an adequate request for additional peremptories after Mr. Carratelli exhausted all of his peremptory challenges, and did not receive a definitive ruling from the trial court denying Mr. Carratelli additional peremptories after Mr. Carratelli exhausted all of his peremptory challenges. Mr. Carratelli further asserted in this motion that, as a result of these errors, Mr. Carratelli's trial attorneys did not preserve for appellate review the trial court's denial of Mr. Carratelli's cause challenges of jurors Nesbitt, Lott, Johnson and Inman. Mr. Carratelli noted in this motion that the trial court's denial of these cause challenges would have been *per se* reversible error and, therefore, would have resulted in the reversal of Mr. Carratelli's convictions on appeal if Mr. Carratelli's trial attorneys had preserved the error for appellate review.

In addition, Mr. Carratelli asserted in his Rule 3.850 motion that, because his trial attorneys failed to request additional peremptory challenges after Mr. Carratelli had exhausted all of his peremptory challenges or obtain a ruling on such a request, Juror Inman, a juror who was biased against Mr. Carratelli, actually

served on the jury. (Rule 3.850 motion at 32-33, 35-38). In his Rule 3.850 motion, Mr. Carratelli described affidavits of his trial attorneys that were attached to the motion wherein they swore that it was always their intention to preserve for appellate review the issue of the trial court's denial of Mr. Carratelli's cause challenges of Jurors Nesbitt, Lott, Johnson and Inman and that they did not want these four prospective jurors to serve as jurors at Mr. Carratelli's trial. (Rule 3.850 motion at 36-37, Exhibits C and D).

In the State's Response to Mr. Carratelli's Rule 3.850 motion, the State did not dispute that Mr. Carratelli's trial attorneys failed to preserve for appellate review Mr. Carratelli's cause challenges to those jurors. However, the State claimed that (1) the appropriate prejudice inquiry for evaluating Mr. Carratelli's ineffective assistance of counsel claim is whether a biased juror actually served on the jury, (2) Juror Inman was qualified to serve on the jury, and (3) Mr. Carratelli's Rule 3.850 motion should be summarily denied.

The trial court denied Mr. Carratelli's Rule 3.850 motion without conducting a hearing on that motion. In doing so, the trial court incorporated the State's Response and its attachments into its Order. (Order Denying Motion for Post-Conviction Relief).

Mr. Carratelli appealed the trial court's decision. However, in a divided *en banc* decision, the Fourth District affirmed it. *See State v. Carratelli*, 915 So.2d 1256 (Fla. 4th DCA 2005)(*en banc*).[2] **In the majority opinion, the Fourth District recognized that, under *Strickland v. Washington*, 466 U.S. 668 (1984), to justify post-conviction relief based upon ineffective assistance of counsel, a defendant must show that his attorney's deficient performance prejudiced him. *Carratelli,* 915 So.2d at 1260. The Fourth District's majority held that, when a defense attorney fails to preserve for appellate review the challenge to an objectionable juror, the standard for prejudice is whether this failure resulted in a biased juror serving on the jury. They further held that Juror Inman, the only juror objectionable to Mr. Carratelli who actually served, did not have the actual bias necessary for post-conviction relief. *Carratelli*, 915 So.2d at 1260-61.**

In holding that the standard for prejudice in this case was whether defense counsel's failure to preserve the challenges to objectionable jurors resulted in a biased juror serving on the jury, the Fourth District's majority expressly certified conflict with *Austing v. State*, 804 So.2d 603 (Fla. 5th DCA 2002) and expressly disagreed with *Davis v. Secretary for Department of*

[2] Judge Hazouri did not participate in the decision because he *sua*

Corrections, 341 F.3d 1310 (11th Cir. 2003). _See Carratelli_, 915 So.2d 1261-64. Both _Austing_ and _Davis_ hold that the standard for prejudice when a defense attorney fails to preserve a challenge to an objectionable juror is whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved. If the Fourth District's majority had applied this standard for prejudice, Mr. Carratelli would have obtained post-conviction relief because the Fourth District's opinion on his direct appeal made clear that, if Mr. Carratelli's challenges to the jurors at issues had been properly preserved in all respects, the Fourth District would have reversed his convictions on appeal. _State v. Carratelli_, 832 So.2d 850, 857 (Fla. 4th DCA 2002). Notably, the dissenting opinion in this case recognized that the standard of prejudice set forth in _Davis_ and _Austing_ should have been applied to this case and, therefore, the trial court's order denying Mr. Carratelli's Rule 3.850 motion should have been reversed. _Carratelli_, 915 So.2d at 1264-65.

SUMMARY OF THE ARGUMENT

In direct conflict with *Austing v. State*, 804 So.2d 603 (Fla. 5th DCA 2002) and *Davis v. Secretary for the Department of Corrections*, 341 F.3d 1310 (11th Cir.

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sponte recused himself from this case.

2003), the Fourth District in a divided *en banc* decision in the instant case held that, when a defendant raises a claim that his trial counsel while efficacious in raising a jury selection issue at trial nonetheless failed to preserve it for appeal, the appropriate prejudice inquiry asks whether a biased juror served on the jury rather than whether there was a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved. *Carratelli*, 915 So.2d at 1258-64. The Fourth District's majority certified conflict with *Austing*, *supra*. *Id.* at 1263-64. Furthermore, they expressly acknowledged that the Eleventh Circuit's decision in *Davis*, *supra*, is directly on point with the instant case but rejected the holding of *Davis*. *See Carratelli*, 915 So.2d at 1261-63.

However, as Judge Warner wrote in the minority opinion, the principles of *Davis* should apply in this case. *Id*. The *Davis* Court concluded that the standard for prejudice where the defense attorney has been efficacious in raising an issue pertaining to jury selection but fails to preserve the issue for appeal is whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved. 342 F.3d at 1316. The *Davis* Court chose this standard because it believed that trial counsel was acting in a separate and distinct role of preserving error on appeal when renewing an objection to a juror before swearing in the jury. *Id*.

Judge Warner noted in the minority opinion that the Fourth District's majority rejected the *Davis* analysis, because the necessity to renew the objection before the swearing in of the jury is to assure that events had not transpired subsequent to the objection to make the defendant satisfied with the jury chosen. Thus, the majority concluded that the purpose of renewing the objection is related to the trial, and counsel is not performing in an appellate role only.

However, Judge Warner explained that, because Mr. Carratelli renewed his objection before the jury was sworn and did everything required to properly object to the jurors except secure an express ruling from the trial court rejecting his request for additional challenges, counsel's deficient performance in this case consisted of his failure to properly preserve the juror challenges for appeal, not his trial performance of bringing this to the attention of the trial judge to reconsider his prior rulings. She also pointed out that the Fourth District's opinion on Mr. Carratelli's direct appeal made it clear that, if the juror challenges had been properly preserved in all respects, then he would have received a new trial as an objectionable juror sat on his case. Accordingly, she wrote that the *Davis* standard should apply. *Carratelli*, 915 So.2d 1264-65.

Judge Warner's reasoning is correct because, as in the instant case, where a trial attorney is efficacious in raising an issue related to jury selection and even

renews his objection to the jury before it is sworn but fails to preserve that issue for appellate review, the effect of that trial attorney's negligence is on the defendant's ***appeal***. Accordingly, the appropriate and most logical prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved.

ARGUMENT

I.

WHEN TRIAL COUNSEL HAS BEEN EFFICACIOUS IN IN RAISING AN ISSUE PERTAINING TO JURY SELECTION BUT FAILS TO PRESERVE THE ISSUE FOR APPEAL, THE APPROPRIATE PREJUDICE INQUIRY IS WHETHER THE APPELLATE COURT WOULD HAVE REVERSED THE DEFENDANT'S CONVICTION HAD THE OBJECTION BEEN PRESERVED

A. Standard of Review

The question presented is one of law, which is accordingly reviewed *de novo*.

B. Argument on the Merits

In *Strickland v. Washington*, 466 U.S. 668, 685 (1984), the United States Supreme Court established a two-pronged test for determining whether a defendant has received ineffective assistance of counsel. Under the first prong, the court must determine "whether counsel's performance was deficient." *Strickland*, 466 U.S. at 687. *Accord Provenzano v. State*, 616 So.2d 428, 431 (Fla. 1993). Counsel's performance is deficient where it falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. Under the second prong, the court must determine whether the deficient performance of counsel prejudiced the

defendant's case. To satisfy the prejudice prong of the test, a defendant must show that "there is a reasonable probability, that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 693; *McLin*, 827 So.2d at 958.

As previously explained, the majority of the Fourth District held that the failure of Mr. Carratelli's trial attorneys to preserve the cause challenges to the jurors at issue could only be deemed to be prejudicial under *Strickland* if a biased juror served on his jury. However, this holding defies common sense because the result of this failure of Mr. Carratelli's counsel was to deny Mr. Carratelli an automatic reversal of his convictions on appeal and this failure did not deprive the trial court of its ability to reconsider its prior rulings on the cause challenges because even a casual reading of the voir dire transcript shows that the trial court was well aware of the problems defense counsel had with prospective jurors challenged for cause and defense counsel renewed Mr. Carratelli's objection to the denial of those challenges before the jury was sworn. *See Carratelli*, 915 So.2d at 1258-64. Thus, the proper inquiry in this case for evaluating whether prejudice occurred under *Strickland* logically is whether the appellate court would have reversed the conviction had the objection been preserved.

Furthermore, as explained below, this nonsensical holding of the Fourth District's majority directly conflicts with the Fifth District's decision in *Austing v. State*, 804 So.2d 603 (Fla. 5th DCA 2002), the Eleventh Circuit's decision in *Davis v. Secretary for the Department of Corrections*, 341 F.3d 1310 (11th Cir. 2003) and the well-reasoned dissenting opinion in this case. *See Carratelli*, 915 So.2d at 1264-65. In addition, the Fourth District's holding relies upon *Jenkins v. State*, 824 So.2d 977 (Fla. 4th DCA 2002) and *Joiner v. State*, 618 So.2d 174 (Fla. 1993) although these decisions are plainly inapposite.

The Appropriate Prejudice Inquiry In This Case Is That Enunciated By The Fifth District and The Eleventh Circuit

In evaluating Mr. Carratelli's claim that his trial attorneys rendered ineffective assistance of counsel in failing to preserve for appellate review the trial court's erroneous denial of his cause challenges, the appropriate prejudice inquiry is that enunciated by the Fifth District and the Eleventh Circuit: whether there was a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved. In *Davis v. Secretary for the Department Of Corrections*, 341 F.3d 1310, 1316 (11th Cir. 2003), the Eleventh Circuit held that "when 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* is strikingly similar to this case. In *Davis*, Defendant Davis was indicted in a Florida state case and proceeded to a trial before a jury. At Davis' trial, his attorney objected to the prosecutor's striking of a prospective juror under *Batson v. Kentucky*, 476 U.S. 79 (1986) but his objection was overruled.[3] **Thereafter, Davis' attorney failed to renew his *Batson* challenge or reserve his *Batson* claim before accepting the jury. After Davis was convicted, he raised his *Batson* claim on appeal. Although the Third District Court of Appeal found that Davis' *Batson* claim was well taken, it declined to address that claim because, under Florida law, in order to preserve a *Batson* challenge for appellate review, trial counsel must press an already rejected *Batson* challenge a second time at the conclusion of voir dire, either by expressly renewing the objection or by accepting the jury pursuant to a reservation of this claim and Davis' trial counsel did neither.**

Subsequently, in a motion for post-conviction relief pursuant to Rule 3.850, motion, Davis claimed that his trial attorney rendered ineffective assistance of counsel because he failed to preserve the *Batson* claim for appellate review. That motion was denied and the appellate court affirmed

[3] In *Batson*, *supra*, the Court held that it is improper to use a peremptory challenge based solely on race.

that denial. Davis then made the identical claim in federal court by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On appeal to the Eleventh Circuit, Davis raised this same claim. In reviewing Davis' claim, the Eleventh Circuit held, as was previously determined by the Third District, that Davis' trial counsel performed deficiently when he did not renew the *Batson* challenge before accepting the jury and, thereby failed to preserve that issue for appellate review. In addressing the prejudice showing required by *Strickland*, the *Davis* Court discussed whether a reviewing court should look to the outcome of the trial or whether it should look to the outcome of the appeal in determining whether a defendant was prejudiced by his trial counsel's performance in failing to properly preserve an issue for appeal. In answering this question, the *Davis* Court relied upon *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), which held 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." 341 F.3d at 1315 (emphasis in text).

The *Davis* Court then noted that the circumstances in the *Davis* case were unusual because "Davis faults his trial counsel not for failing to raise a *Batson* challenge - which counsel did - but for failing to preserve it." 341 F.3d at 1315.

The *Davis* Court explained that where the issue is ***not*** trial counsel's failure to bring an issue to the attention of the trial court but is trial counsel's "failure in his separate and distinct role of preserving error for appeal," the effect of trial counsel's negligence is on the defendant's ***appeal***. *Id*. Accordingly, the *Davis* Court held that "when a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nevertheless 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." 341 F.3d at 1316.[4] **Because there was a reasonable probability that the Third District would have reversed Davis' conviction had his trial attorney preserved the *Batson* challenge, the Eleventh Circuit held that Davis was entitled to either a new trial or an opportunity to take an out-of-time appeal wherein his *Batson* challenge could be decided by the Third District on the merits.**

Just like Davis' trial attorney, Mr. Carratelli's trial attorneys raised a jury challenge in the trial court but failed to preserve the issue for appellate

[4] Notably, this holding in *Davis* was not based on the fact that the issue that Davis' trial counsel failed to preserve was a *Batson* violation. Rather, the *Davis* Court explained that its holding was based solely upon the fact that, whenever trial counsel raises an issue in the trial court ***but*** fails to preserve that issue for appellate review, the negative effect of trial counsel's negligence is on the defendant's appeal. *Id*. at 1315-16.

review. Indeed, Mr. Carratelli's trial attorneys moved to strike all members of the venire who had been exposed to the extensive pretrial publicity, moved to strike numerous individual jurors for cause on that basis, moved for a change of venue, requested additional peremptory challenges just prior to using Mr. Carratelli's last peremptory challenge and renewed Mr. Carratelli's objection to the jury before the jury was sworn. However, because Mr. Carratelli's trial attorneys did not make an adequate request for additional peremptories or receive a definitive ruling on his request, they did not preserve the issue for appeal. Thus, as Judge Warner wrote in the dissenting opinion, "[c]learly, counsel's deficient performance in this case consisted of his failure to properly preserve the juror challenges for appeal, not his trial performance of bringing this to the attention of the trial judge to reconsider his prior rulings." *Carratelli,* 915 So.2d at 1265. Accordingly, as Judge Warner wrote, under *Davis,* the appropriate prejudice inquiry that the Fourth District should have applied to Mr. Carratelli's ineffective assistance of counsel claim was "whether there [was] a reasonable likelihood of a more favorable outcome on appeal had the claim [of the improper denial of cause challenges] been preserved." *Id.*

The Fifth District, in *Austing v. State*, 804 So.2d 603 (Fla. 5th DCA 2002) likewise recognized that, where as in Mr. Carratelli's case, defense counsel seeks to strike a juror at trial but is erroneously prevented from doing so, and the defendant would have obtained a reversal on appeal based upon this error but for defense counsel's failure to take the proper action to preserve this error for appellate review, the prejudice prong of *Strickland* has been met. In *Austing*, defendant Austing alleged in a Rule 3.850 motion that his trial counsel had been ineffective because he failed to preserve for appellate review the trial court's erroneous denial of his peremptory challenge of a prospective juror who ultimately served on the jury. At the hearing on the Rule 3.850 motion, the judge ruled that the trial court had erred in denying the defendant's peremptory challenge and that defendant's trial counsel had failed to preserve this error for appeal but denied the Rule 3.850 motion on the basis that the error was harmless because the defendant had not proven that the outcome would have been different with a different jury. On appeal, the Fifth District reversed the denial of the Rule 3.850 motion and explained as follows:

> **The trial court's erroneous denial of Austing's peremptory challenge was per se reversible error, and, if properly preserved would have resulted in a reversal by this court on direct appeal. Therefore, it**

> **is apodictic that the result would have been different--i.e. reversal on appeal--had trial counsel been effective; therefore, the two-pronged *Strickland* test has been met.**

804 So.2d at 604-05 (citations omitted).

When the prejudice inquiry of *Davis* and *Austing* is applied to this case, it is clear that Mr. Carratelli satisfied the prejudice prong of his ineffective assistance of counsel claim. Indeed, in ruling on Mr. Carratelli's direct appeal, the Fourth District pointed out that, if Mr. Carratelli's trial attorneys had preserved for appellate review the issue of the denial of Mr. Carratelli's cause challenges, the Fourth District would have reversed Mr. Carratelli's convictions. *See Carratelli v. State*, 832 So.2d at 857 (Fla. 4th DCA 2002). Therefore, both prongs of the *Strickland* test have been met.

The Fourth District's Misplaced Reliance Upon *Jenkins v. State*, 824 So.2d 977 (Fla. 4th DCA 2002) and *Joiner v. State*, 618 So.2d 174 (Fla. 1993)

The Fourth District's majority held that this case was controlled by *Jenkins v. State*, 824 So.2d 977 (Fla. 4th DCA 2002) and *Joiner v. State*, 618 So.2d 174 (Fla. 1993). However, as Judge Warner wrote in the dissenting opinion, the trial court's reliance upon *Jenkins* and *Joiner* was misplaced because these cases involved completely different situations than this case. Therefore, the Fourth District's majority erred in relying upon these cases to apply a prejudice standard in a way that has never been applied before and that is contrary to law.

In *Jenkins*, *supra*, the defendant complained that his trial attorney rendered ineffective assistance of counsel in ***completely failing*** to make any cause challenge to a juror who served on his jury. Defendant Jenkins' trial attorney made no attempt at trial to challenge this juror for cause or to excuse him with a peremptory challenge. Indeed, Jenkins' trial attorney used only seven of Jenkins' ten peremptory strikes during voir dire. The Fourth District's majority held that, under these circumstances where Jenkins' trial attorney ***completely failed*** to bring to the trial court's attention the issue of the juror's ability to be fair and impartial, Jenkins could only satisfy *Strickland's* prejudice prong by showing that this juror who

served on his jury was actually biased against him. The *Jenkins* Court based its decision on its concern for judicial economy and function:

> The requirement of a timely objection to preserve the denial of a cause challenge for appeal serves a number of functions in our legal system. An objection during jury selection promotes judicial economy by allowing the court to remove an unqualified juror before the trial has begun, when other jurors are available for selection. A timely objection alerts the court and the other party to a problem, making possible further questioning to shed light on a potential juror's fitness to serve. A ruling on a juror's qualifications may turn on the way a juror answers a question; a trial judge is best able to evaluate a juror's qualifications when the juror's facial expression and tone of voice are fresh in the judge's mind. Seating a juror who does not pass the *Singer*[5] **test for juror competency creates an error not subject to harmless error analysis. For this reason, it is important for a court to rule on a juror's qualifications before a trial begins.**
>
> **Finally, requiring the parties to voice challenges to objectionable jurors places the power of the jury selection in the hands of the parties, not the judge. The methods of jury voir dire are subjective and individualistic. Recognizing that the parties in a trial should have a large say in the choice of jurors, Florida**

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[5] In *Singer v. State*, 109 So.2d 7, 23-24 (Fla. 1959), the Court held:

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial[,] he should be excused on motion of a party, or by the court on its own motion.

> **has preserved the right of the parties to individually examine jurors. A legal system that routinely used post-conviction relief as a vehicle for second guessing juror qualifications *in the absence of a timely objection*** would encourage trial judges to intervene in the jury selection process and impose their views regarding which jurors satisfied objective standards of fairness.

824 So.2d at 980-981 (emphasis added; citations omitted).

However, these concerns for the functions of our legal system do not apply where, as here, it is clear that defense counsel requested more peremptories before using the last one and his comments just after that were of the same mind. As a matter of common sense, it would have been useless for defense counsel to ask for more peremptories because the judge had just denied the request. Furthermore, in this case, unlike *Jenkins*, because cause challenges of the jurors at issue were, in fact, made by defense counsel at trial, the trial court had the opportunity to engage in further questioning of the relevant jurors regarding their fitness to serve and the trial court had the opportunity to remove those jurors before the trial began. Indeed, in this case, the qualifications of the relevant jurors were fully explored by both parties and the trial judge. Therefore, unlike *Jenkins*, Mr. Carratelli did not use Rule. 3.850 as a "vehicle for second guessing juror qualifications." 824 So.2d

at 981. Here, unlike *Jenkins*, the record is complete so the *Jenkins* rationale does not apply.[6]

Indeed, Judge Warner wrote in the dissenting opinion in this case that *Jenkins* is not controlling:

> **In my opinion, *Jenkins v. State*, 824 So.2d 977 (Fla. 4th DCA 2002), is not controlling because a lawyer's failure to challenge a juror may be a matter of trial strategy, as was pointed out in the case. Therefore, *having failed to make any argument whatsoever in the trial court regarding a juror, so that the trial court could inquire further or examine the juror's qualifications***, the appropriate standard should be to determine from the record whether a biased juror sat on the case. To the contrary, under the facts of this case the failure [of Mr. Carratelli's trial counsel] to preserve a cause challenge is simply not a matter of trial strategy.

915 So.2d at 1265. (emphasis added).

The majority opinion's reliance upon this Court's decision in *Joiner v. State*, 618 So.2d 174 (Fla. 1993) was similarly misplaced. In *Joiner*, the issue was whether there had been a sufficient objection to the trial court allowing the State to

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[6] Furthermore, in reaching its holding, the *Jenkins* Court relied upon *Goeders v. Hundley*, 59 F.3d 73, 75 (8th Cir. 1995) and *Hughes v. United States*, 258 F.3d 453, 458 (6th Cir. 2001), both of which concerned ineffective assistance of counsel claims grounded upon the claim that, at trial, defense counsel ***completely failed to exercise a cause challenge to a biased juror who served on the jury***. *Miller v. Webb*, 385 F.3d 666, 674 (6th Cir. 2004), also relied upon by the Fourth District's majority, is similar in that it concerned trial counsel's complete failure to challenge a juror.

exercise a peremptory challenge to a juror. Defense counsel voiced disagreement with the prosecutor's reason for exercising that peremptory but never requested ***any*** remedy for this error and ***at the end of the jury selection he said that the jury was acceptable***. Accordingly, this Court held that, since the trial judge was not apprised that Joiner still believed reversible error had occurred, Joiner waived his objection to the State's exercise of that peremptory challenge.

However, in this case, as Judge Warner wrote in the dissenting opinion, "the defendant did renew his objection before the jury was sworn" and "did everything required under *Joiner v. State*, 618 So.2d 174 (Fla. 1993), except secure an express ruling from the trial court rejecting his request for additional challenges." *Carratelli*, 915 So.2d at 1264. Therefore, "counsel's deficient performance in this case consisted of his failure to properly preserve the juror challenges for appeal, not his trial performance of bringing this to the attention of the trial judge to reconsider his prior rulings." *Id*. For this reason, the Fourth District's majority opinion plainly erred in failing to apply the *Davis* and *Austing* standards for evaluating prejudice in this case.[7]

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[7] Mr. Carratelli additionally maintains that, even assuming *arguendo* that the proper inquiry for evaluating the prejudice required by *Strickland* is whether a biased juror served on the jury, Mr. Carratelli has still satisfied *Strickland's* prejudice prong because Juror Inman, a biased juror, served on his jury. Indeed, as previously explained, Judge Hazouri expressly determined in this

CONCLUSION

Based on the foregoing facts and authorities, Appellant Robert Carratelli respectfully submits that this Court should reverse the decision of the Florida Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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case that the trial court should have excused Inman for cause. *Carratelli v. State*, 832 So.2d at 864 (J. Hazouri concurring). Although the trial court subsequently attempted to rehabilitate Juror Inman and Inman eventually stated that he would listen to the evidence and then make up his mind, Judge Hazouri correctly determined that, because Juror Inman had expressed his view that it would be more difficult for Mr. Carratelli to convince him of his innocence because he had read the article and listened to the discussion at the barbershop, there was a reasonable doubt that Juror Inman could be fair and impartial and the trial court's attempt to rehabilitate Inman did not dispel that reasonable doubt.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed the 27th day of February 2006 to David Schultz, Assistant Attorney General, 1515 North Flagler Avenue, Suite 900, West Palm Beach, Florida 33401.

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MARCIA J. SILVERS

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief complies with the font requirements of Fla.R.App.P. 9.210(a)(2) for computer-generated briefs.

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MARCIA J. SILVERS