IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-97

ROBERT CARRATELLI,

Petitioner/Appellant,

v.

STATE OF FLORIDA,

Appellee.

PETITIONER/APPELLANT'S AMENDED REPLY BRIEF ON THE MERITS

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

MARCIA J. SILVERS, ESQ.
Florida Bar No. 342459
DUNLAP & SILVERS, P.A.
Attorney for Robert Carratelli
2601 South Bayshore Drive, Suite 601
Miami, Florida 33133
305/854-9666

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Rules

STATEMENT OF THE CASE AND FACTS

The Appellee's brief does not accurately portray the evidence presented at the trial. As previously explained in Mr. Carratelli's initial brief at 3-4, Corporal Allen's accident reconstruction diagram was based on a skid mark that he attributed to this accident. (T. 1055-57, 1115, 1140-41, 1151). But Allen, who never saw or measured that skid mark, was only brought in to complete the report after the investigating officer, Corporal Watts, died. (T. 895, 1000).

Allen was given a file on this accident from Watts' home which included preliminary sketches that were not signed, dated, or clearly labeled as belonging to this accident. (T. 1109-10; SE 42, 43). The sketch Allen relied upon had no street names and appeared to show a skid mark beginning in the right-hand through lane, curving left, and ending ten feet before the point of impact. (SE 42). The skid mark was not at the scene when Allen went there. (T. 1027, 1039). ***There were no photographs of that skid mark***. (T. 901). Although the Appellee asserts that this skid mark was visible in a videotape of the scene, the officer who made the videotape conceded at the trial that he could not "swear to that." (T. 959-61, 982). Allen also knew a police car may have been parked over the area where the skid mark allegedly was while the accident investigation was going on. (T. 787-799, 1006).

None of the other officers who testified ever measured this skid mark. (T. 882, 896, 902, 958-59, 986-87). Moreover, Corporal Hylton stated that he did not

think Watts took measurements at the scene. (T. 1892). Although officers other than Allen testified that they saw a skid mark at the scene, (T. 1062-63; 1895-1900), these officers did not agree with each other or the sketch about the physical characteristics and placement of the marks they saw. None of these officers testified that the mark in the sketch accurately represented what they saw at the scene.

The intersection was covered with many marks, most of which had nothing to do with this accident. (T. 927). Rogers saw a skid mark that was a single solid line beginning in the right-hand through lane and turning left. (T. 892, 894-95, 906-07, 909, 911-12). Even though Rogers did not measure it or participate in the actual investigation, he opined that Mr. Carratelli applied his brakes. (T. 882, 885-90, 894). Sergeant Davis testified that he saw dual, parallel skid marks that were so faint he had to get down on the ground to see them. (T. 929-30, 962). The marks began in the right-hand through lane and angled off to the left. (T. 940, 970). Neither Davis nor Corporal Hylton measured the skid marks. (T. 932, 958-59). After Watts' death, Davis could only give Allen an approximation of where the marks began and ended. (T. 961, 1024.1026). For that reason, Allen did not use Davis' description of dual skid marks, but instead used the skid mark sketch. (T. 1028).

The defense presented evidence from an accident reconstruction expert that,

based on the physical evidence and the fact that Mr. Carratelli's car should have made a broken, staccato line, if any, Mr. Carratelli's car could not have left the skid mark shown in the preliminary sketch relied upon by Allen. (T. 1364). None of the eyewitnesses who testified at the trial saw brake lights on Mr. Carratelli's car. Only one eyewitness heard brakes, but he testified at the trial that the squealing brakes that he heard could have been from the tires of the car that was struck by Mr. Carratelli's car. (T. 703). As previously explained in Mr. Carratelli's initial brief, other eyewitness testimony showed that Mr. Carratelli was not braking as he went into the intersection and that he was in the left-hand through lane so he could not have made the skid mark relied upon by Allen. (T. 648, 650, 667, 671, 689, 715).

Juror Inman

The Appellee focuses on certain statements of Juror Inman in isolation instead of looking at the whole voir dire in the context in which trial counsel's objections were made. For example, the Appellee asserts that "Inman told defense counsel that the only things that he remembered from the [Palm Beach Post] article was that the accident had happened and the results of that accident." Answer Brief at 4. However, the Appellee ignores that this article belittled Mr. Carratelli's defense and that Inman was aware of and admitted that this article took the position that Mr. Carratelli was guilty. (T. 367-68). Inman acknowledged that in a

pure world he should be able to put things like the Palm Beach Post article out of his mind but stated that "obviously it's in there." (T. 369).

For further example, the Appellee asserts that, "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." Answer Brief at 5. However, during voir dire, Inman conceded 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 conceded that, after listening to the barbershop discussion, he felt that Mr. Carratelli's defense did not make sense. (T. 366-67). Moreover, Inman unequivocally stated that he had formed an opinion about the defense and that "it would certainly be more difficult for Mr. Carratelli to convince [him] of his innocence now than if [he] had not read the article, had not been involved in that discussion." (T. 368-69).

Thus, Inman was biased because, as Judge Hazouri recognized, despite the trial court's attempt to rehabilitate him, Inman plainly expressed his "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...." *State v. Carratelli*, 832 So.2d

850, 864 (Fla. 4th DCA 2002).

ARGUMENT

I.
WHEN TRIAL COUNSEL HAS BEEN EFFICACIOUS 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

The Supreme Court should accept jurisdiction of this case for several important reasons: (1) the Fourth District Court of Appeal sitting *en banc*, has certified that its decision is in direct conflict with a decision of the Fifth District Court of Appeal, (2) the case holding expressly and directly conflicts with the Fifth District case, and (3) in order to the remove the confusion and unfairness that exists in the very important area of the law relating to a defendant's rights to adequate legal representation as required by the Constitutions of the United States of America and the State of Florida.

Appellee's argument that this Court should decline to accept jurisdiction (Answer Brief at 13-15) fails. The majority of the Fourth District sitting *en banc* expressly certified that its decision in this case is in direct conflict with the Fifth District's decision in *Austing v. State,* 804 So.2d 603 (Fla. 5th DCA 2002). *See Carratelli v State*, 915 So.2d 1256, 1263-64 (Fla. 4th DCA 2006) (*en banc).* This

reason alone is a sufficient basis for this Court to accept jurisdiction. *See* Fla. R. App. P. 9.030(a) (2) (A) (vi) ("The discretionary jurisdiction of the supreme court may be sought to review decisions of district courts of appeal that ... are certified to be in direct conflict with decisions of other district courts of appeal.")

The Fourth District's majority was correct when it held that its holding in this case expressly and directly conflicts with the holding of *Austing*. The Fourth District's majority explained this conflict as follows:

> We certify conflict with *Austing v. State*, 804 So.2d 603 (Fla. 5th DCA 2002). That case involved a postconviction relief motion which contended that defense counsel failed to preserve the issue of the state's erroneous *Neil* objection to the defendant's exercise of a peremptory challenge. The fifth district gave the defendant a new trial, reasoning that he had demonstrated prejudice under *Strickland*, because "the result would have been different, i.e., reversal on appeal-had trial counsel been effective." *Id*. at 605. *Austing* holds that, for postconviction relief motions based upon the failure to preserve objections pertaining to jury selection, the prejudice prong of the *Strickland* test is determined by the effect of counsel's mistake on the defendant's appeal, and not his trial.

Carratelli, 915 So.2d at 1263-64. Thus, *Austing* holds that where, as in the instant case, a postconviction relief motion is based upon trial counsel's failure to preserve for appellate review objections pertaining to jury selection, the prejudice prong of

the *Strickland*[1] **test is satisfied if the appellate court would have otherwise reversed the defendant's conviction on direct appeal based upon the jury selection issue.**

In contrast, the Fourth District's majority held that, whenever trial counsel fails to preserve for appellate review objections pertaining to jury selection, the test for determining whether *Strickland's* prejudice prong is satisfied is not "whether the appellate court would have reversed the conviction had the objection been preserved" but, rather, "whether the failure to preserve that issue resulted in a biased juror sitting on the jury." *Carratelli,* 915 So.2d at 1260. This express and direct conflict between the Fourth and the Fifth Districts is yet another reason why this Court has jurisdiction. *See* Fla.R.App.P. 9.030(a)(2)(A)(iv)("The discretionary jurisdiction of the supreme court may be sought to review decisions of district courts of appeal that ... expressly and directly conflict with a decision of another district court of appeal ... on the same question of law.").

The Appellee argues that this case and *Austing* do not involve the same question of law because, in *Austing,* trial counsel did not "put the trial court on notice of the alleged [jury selection] error." Answer Brief at 14. This argument blinks reality. In *Austing,* defense counsel sought to exercise a

---

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

peremptory challenge against a prospective juror but the prosecutor objected and demanded that defense counsel provide a nonracial basis for the challenge. Defense counsel then expressly argued to the trial court that the trial court should permit him to exercise his peremptory challenge because it was based upon the nonracial reason that the prospective juror was the cousin of a stern Florida circuit judge who may have influenced the prospective juror. Thus, in *Austing,* defense counsel put the trial court on notice that it would be error for the trial court to deny Austing the peremptory challenge. However, defense counsel "fail[ed] to timely renew his objection to the jury as impaneled." *Austing,* 804 So.2d at 604 n.1. Thus, defense counsel in *Austing,* like defense counsel in this case and defense counsel in *Davis v. Secretary for the Department of Corrections,* 341 F.3d 1310, 1316(11th Cir. 2003), although efficacious in bringing the jury selection issue to the attention of the trial court, failed to preserve the issue for appellate review.

The Appellee's argument against jurisdiction incorrectly presupposes that Mr. Carratelli is not contending that this holding of the Fourth District's majority is erroneous. However, it has always been Mr. Carratelli's position that, not only is this holding of the Fourth District's majority erroneous but, in his particular circumstance, it is nonsensical and fundamentally unfair because the result of his counsel's deficient performance in failing to preserve

the jury selection issues was to deny him an automatic reversal of his convictions on his appeal and the trial judge was well aware of defense counsel's objections during jury selection which were renewed before the jury was sworn. Therefore, jurisdiction should be exercised to resolve the actual conflict and to rectify the fundamentally unfair result in this case.

The Appellee does not dispute that the performance of Mr. Carratelli's trial attorneys was deficient because they failed to preserve for appellate review the trial court's erroneous denial of Mr. Carratelli's cause challenges. Instead, the Appellee argues that the appropriate prejudice inquiry for evaluating Mr. Carratelli's ineffective assistance of counsel claim is whether a biased juror actually served on the jury. In an attempt to support this argument, the State contends that, in *Strickland, supra*, the Supreme Court made 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." Answer Brief at 11. However, the *Strickland* Court never so held. The *Strickland* Court simply established a two-pronged test that a habeas petitioner must satisfy to obtain relief based upon ineffective assistance of counsel. The *Strickland* Court held that the petitioner "must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Id.* at 687.

Furthermore, as recognized by the Eleventh Circuit in *Davis*, 341 F.3d at 1315, the holding of the Supreme Court in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), established that, in applying this *Strickland* test, "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." (emphasis in text).

Moreover, if the Appellee's contention about *Strickland* was correct, defendants whose trial attorneys raised issues in the trial court but failed to preserve them for appeal would have no remedy for their attorneys' omissions even if those issues would have resulted in reversal of their convictions on appeal. However, the Eleventh Circuit in *Davis*, *supra*, and numerous Florida courts have held that the failure of trial counsel to properly preserve an issue for appellate review warrants post-conviction relief if there is a reasonable likelihood that the issue would have resulted in reversal on appeal. *See*, *e.g.*, *Austing v. State*, 804 So.2d 603 (Fla. 5th DCA 2002); *Vaz v. State*, 626 So.2d 1022 (Fla. 3d DCA 1993); *Daniels v. State*, 806 So.2d 563 (Fla. 4th DCA 2002); *Dwyer v. State*, 716 So.2d 1082 (Fla. 4th DCA 2001); *Thomas v. State*, 700 So.2d 407 (Fla. 4th DCA 1997); *Eure v. State*, 764 So.2d 798, 801 (Fla. 2d DCA 2000); *Tidwell v. State*, 844 So.2d 701 (Fla. 1st DCA 2003); *Crumbley v. State*, 661 So.2d 383 (Fla. 1st DCA 1995).[2]

[2] The Appellee's reliance upon *State v. Bouchard*, 922 So.2d 424 (Fla. 2d DCA 2006) is misplaced because *Bouchard* was decided after the decision of

The Appellee does not dispute that *Davis, supra,* is directly on point with the instant case or that the *Davis* Court has 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 1316. Instead, the Appellee contends that this Court should reject the Eleventh Circuit's decision in *Davis* as bad law. However, as Judge Warner wrote in the minority opinion of the Fourth District in this case, "the principles of *Davis* ... ought to apply in this case." *See Carratelli*, 915 So.2d at 1264.

***Davis* is an indistinguishable decision of the Eleventh Circuit, the federal court of appeals in which Florida is located, concerning the same federal constitutional provision at issue in this case, namely, the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. In Florida, "federal courts are the final word on federal constitutional law." *Howell v. State*, 418 So.2d 1164, 1168 n. 2 (Fla. 1st DCA 1982); *Wright v. State*, 418 So.2d 1087, 1091 (Fla. 1st DCA 1982). Accordingly, the Fourth District's majority should have**

---

the Fourth District's majority in this case and was entirely based upon that holding. However, this Court has yet to decide whether or not that holding was correct.

followed the *Davis* Court's holding.

The Appellee claims that this Court should reject *Davis* because the *Davis* Court incorrectly interpreted *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). However, as recognized by the *Davis* Court, *Flores-Ortega* established 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 Appellee repeatedly claims that the *Flores-Ortega* Court distinguished the circumstances of that case from those of this case. However, ***nowhere*** did the *Flores-Ortega* Court discuss any such distinction and the Eleventh Circuit in *Davis*, 341 F.3d at 1315-16, held that there was no such distinction. The Appellee notes that *Flores-Ortega* involved trial counsel's failure to file a timely notice of appeal. However, as explained by the *Davis* Court, the circumstances in *Flores-Ortega* and *Davis* are indistinguishable. Indeed, the *Davis* Court pointed out that, in *Flores-Ortega*, the effect of trial counsel's failure to file a timely notice of appeal was on the defendant's ***appeal***. The *Davis* Court further noted that, where trial counsel brings a jury selection issue to the attention of the trial court but fails to preserve it for appellate review, the effect of that conduct is on the defendant's ***appeal***. The *Davis* Court then logically reasoned that since, in both situations, the result of trial counsel's negligence is on the appeal, it is only fair in such situations to apply a prejudice inquiry that assesses prejudice by

evaluating the effect of counsel's negligence on the defendant's appeal. *See Davis*, 341 F.3d at 1315-16. As stated by the *Davis* Court:

> As in *Flores-Ortega*, the attorney error Davis identifies [the failure to preserve the jury selection issue for appeal] was, by its nature, unrelated to the outcome of his trial. To now require Davis to show an effect upon his trial is to require the impossible. Under no readily conceivable circumstance will a simple failure to preserve a claim -- as opposed to a failure to raise that claim in the first instance -- have any bearing on a trial's outcome. Rather, as when defense counsel defaults an appeal entirely by failing to file timely notice, the only possible impact is on the appeal.

Id. at 1316.

Thus, in writing that the principles of *Davis* apply to this case, Judge Warner correctly recognized in her minority opinion 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, his trial 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. *See Carratelli*, 915 So.2d 1264-65.

The Appellee ignores that Mr. Carratelli's trial counsel "did renew his objection before the jury was sworn." *Carratelli*, 915 So.2d at 1264. Indeed, in her minority opinion in this case, Judge Warner correctly found that Mr. Carratelli

"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." *Id*.

The trial court was well aware of the problems defense counsel had with both numerous individuals challenged for cause and the jury as a whole. Virtually every member of the venire had either read or seen at least one of the numerous news reports about this case. Because of the problem caused by the extensive pretrial publicity, defense counsel moved to strike all members of the venire who had been exposed to that publicity (T. 444), moved to strike numerous individual jurors on that basis, and moved for a change of venue. All those motions were denied. Defense counsel also restated his objection to the jury as a whole before it was sworn. (T. 448). Defense counsel used peremptory challenges to strike the three jurors who the Fourth District ultimately ruled should have been excused for cause. (T. 210-219).

The key motions and rulings on the second day of the voir dire happened very quickly, recorded in less than five pages of transcript, as part of the same dialog with the trial court.[3] **The trial court had just denied defense counsel's request for additional peremptories; there was no new information to add to change the trial court's mind. Indeed, just after the trial judge denied defense**

[3] For this Court's convenience, those five transcript pages are attached in an appendix to this reply brief.

counsel's request for additional peremptories, he stated that he was "confident in each and every decision" he had made pertaining to the jurors. In fact, he stated that he had "**no reasonable doubt**" about his rulings on the challenges made to the jurors. (T. 447). (emphasis added). Thus, the trial judge plainly was aware of what counsel's objections were and had made his final ruling. When counsel failed to make an adequate request for additional peremptories or receive a definite ruling on his request just minutes later after using the last peremptory but thereafter renewed his objection to the jury, this "deficient performance ... 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.

For all of these reasons and the reasons set forth in Mr. Carratelli's initial brief on the merits at 32-35, Judge Warner correctly wrote in the Fourth District's minority opinion that *Jenkins v. State*, 824 So.2d 977 (Fla. 4th DCA 2002) is not controlling in this case and that defense counsel's failure to preserve the juror challenges for appellate review constituted ineffective assistance of counsel.

CONCLUSION

Based on the foregoing, Petitioner/Appellant Robert Carratelli respectfully submits that this Court should reverse the decision of the Fourth District.

Respectfully submitted,

MARCIA J. SILVERS, ESQUIRE
Attorney for Petitioner/Appellant
Dunlap & Silvers, P.A.
2601 South Bayshore Drive, Suite 601
Miami, Florida 33133
Telephone: 305/854-9666

CERTIFICATE OF SERVICE

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

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.

MARCIA J. SILVERS

INDEX OF APPENDIX