

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

HENRY MARTIN STEIGER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case Number: SC20-1404

DCA Case Number: 1D19-3217

L.T. Case Number:
172018CF004365XXXAX

PETITIONER'S REPLY BRIEF

On Discretionary Review from the District Court of Appeal, First District

Jared Brown, Esq.

Florida Bar #30075

Brown Legal PLLC

101 N.E. Third Ave

Lobby Suite 110

Fort Lauderdale, FL 33301

Office: (954) 524-6700

Email: jared@jaredbrownlaw.com

Counsel for Appellant

Martin Roth, Esq.

Florida Bar #265004

Martin L. Roth, P.A.

1700 East Las Olas Blvd.

Suite 307

Fort Lauderdale, FL. 33301

Office: (954) 745-7697

Email: mlrpa@msn.com

Counsel for Appellant

RECEIVED, 03/11/2021 02:15:36 PM, Clerk, Supreme Court

TABLE OF CONTENTS

	Page:
Table of Contents.....	ii
Table of Citations.....	ii
Argument.....	1
The Court Should Reverse Mr. Steiger’s Conviction on Direct Appeal Over the Ineffective Assistance of Counsel Apparent on the Face of the Record.....	1
Florida Statutes Cannot Abrogate the United States Constitution, Florida’s Constitution or Florida Rules of Appellate Procedure.....	1
Policy Supports Keeping this Standard in Place.....	4
Mr. Hamlin’s Performance Epitomizes Ineffective Assistance...	6
The Respondent Falsely Argues the 90.403 Issue Isn’t Properly Preserved to Shift the Inquiry to Relevance.....	12
Conclusion.....	14
Certificate of Service.....	15
Certificate of Compliance.....	16

TABLE OF CITATIONS

Cases:	Page:
<i>Agatheas v. State</i> , 77 So. 3d 1232 (Fla. 2011).....	7
<i>Blanco v. Wainwright</i> , 507 So. 2d 1377 (Fla. 1987).....	2
<i>Castor v. State</i> , 365 So. 2d 701 (Fla. 1978).....	2

<i>Cruz v. State</i> , 262 So. 3d 244 (Fla. 2d DCA 2018).....	10
<i>Elmore v. State</i> , 172 So. 3d 465 (Fla. 1st DCA 2015).....	3
<i>Farias v. State</i> , 31 So. 3d 909 (Fla. 4th DCA 2010).....	14
<i>Foster v. State</i> , 387 So. 2d 344 (Fla. 1980).....	2, 5
<i>Gore v. State</i> , 784 So. 2d 418 (Fla. 2001).....	2
<i>Gordon v. State</i> , 469 So. 2d 795 (Fla. 4th DCA 1985).....	8
<i>In re Forfeiture of 1978 Chevrolet Van</i> , 493 So. 2d 433 (Fla. 1986).....	1
<i>Johnson v. State</i> , 238 So. 3d 726 (Fla. 2018).....	2
<i>Lee v. State</i> , 272 So. 3d 827 (Fla. 1st DCA 2019).	6
<i>Marshall v. State</i> , 291 So. 3d 614 (Fla. 1st DCA 2020).....	6
<i>Monroe v. State</i> , 191 So. 3d 395 (Fla. 2016).....	2, 4, 5, 6
<i>Owen v. State</i> , 560 So. 2d 207 (Fla. 1990).....	2
<i>Robinson v. State</i> , 141 So. 3d 656 (Fla. 4th DCA 2014).....	2
<i>Rodriguez v. State</i> , 761 So. 2d 381 (Fla. 2d DCA 2000).....	2
<i>Sanchez-Torres v. State</i> , Nos. SC19-211 and SC19-836 (Fla. Mar. 12, 2020).....	2
<i>Sims v. State</i> , 998 So. 2d 494 (Fla. 2008).....	6
<i>State v. Barber</i> , 301 So. 2d 7 (Fla. 1974).....	2
<i>State v. Jefferson</i> , 758 So. 2d 661 (Fla. 2000).....	2
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	1

Tibbs v. State, 397 So. 2d 1120 (Fla. 1981).....12

Wuornos v. State, 676 So. 2d 972 (Fla. 1996).....2

Statutes and Other Authorities:

Amend. VI, U.S. Const.....1

Fla. Stat. § 90.403.....12, 13

Fla. Stat. § 90.502.....9

Fla. Stat. § 924.051.....1, 2, 3, 7

**THE COURT SHOULD REVERSE MR. STEIGER’S CONVICTION ON
DIRECT APPEAL OVER THE INEFFECTIVE ASSISTANCE OF
COUNSEL APPARENT ON THE FACE OF THE RECORD**

In an effort to undo over forty years of Florida Supreme Court jurisprudence, the Respondent offers an elaborate maze of statutory analysis to avoid acknowledging one law’s subordination to the U.S. and Florida Constitutions. Rather than follow the Respondent’s red herring down the rabbit hole and address each point in kind, this Reply establishes why section 924.051(3), Florida Statutes is not applicable in the context of this appeal and doesn’t alter the “apparent on the face of the record” standard whatsoever.

**Florida Statutes Cannot Abrogate the United States Constitution,
Florida’s Constitution or Florida Rules of Appellate Procedure**

The Respondent’s position rests upon the faulty premise that a statute precludes Mr. Steiger from asserting his constitutional right to effective assistance of counsel on direct appeal.¹ To do so, the Respondent misinterprets section 924.051(3), Florida Statutes and overstates its significance.

¹ The Sixth Amendment right to counsel guarantees the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 669 (1984). As a constitutional guarantee, no statute can abrogate it. See *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 437 (Fla. 1986).

In 1980, this Court reversed *State v. Barber*, 301 So. 2d 7 (Fla. 1974) and authorized defendants to raise ineffective assistance claims on direct appeal. *Foster v. State*, 387 So. 2d 344, 345-6 (Fla. 1980). Although section 924.051(3), Florida Statutes had not been enacted, the contemporaneous objection requirement existed at the time. *Castor v. State*, 365 So. 2d 701, 702 (Fla. 1978). When interpreting section 924.051(3), Florida Statutes, this Court held that this subsection codifies the contemporaneous objection requirement. *State v. Jefferson*, 758 So. 2d 661, 665 (Fla. 2000). Because the contemporaneous objection requirement didn't stop a defendant from raising ineffective assistance claims on direct appeal², this statute doesn't either. See *Sanchez-Torres v. State*, Nos. SC19-211 and SC19-836 (Fla. Mar. 12, 2020); *Johnson v. State*, 238 So. 3d 726, 742 (Fla. 2018); *Monroe v. State*, 191 So. 3d 395, 404 (Fla. 2016); *Gore v. State*, 784 So. 2d 418, 437-38 (Fla. 2001); *Robinson v. State*, 141 So. 3d 656, 657 (Fla. 4th DCA 2014); *Rodriguez v. State*, 761 So. 2d 381, 382 (Fla. 2d DCA 2000). This is why none of these cases undergo a fundamental error analysis. See *supra*.

² See *Wuornos v. State*, 676 So. 2d 972, 974 (Fla. 1996); *Owen v. State*, 560 So. 2d 207, 212 (Fla. 1990); *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987).

It makes perfect sense that the contemporaneous objection requirement codified in section 924.051(3) Florida Statutes doesn't limit or control ineffective assistance claims as this is the one claim predicated upon the failure to contemporaneously object.³ Ineffective assistance claims exist in a wholly different vertical than preserved claims and should continue to be treated as such. Accordingly, a statute which codifies the contemporaneous objection requirement wouldn't affect this line of jurisprudence whatsoever.

Effectively, the standard set by Court precedent for raising ineffectiveness of counsel on direct appeal addresses the requirements of section 924.051 Florida Statutes. First, the showing of ineffectiveness must be clear and apparent from the trial record. This requirement addresses the

³ Ineffective assistance claims, although vehicles to raise unpreserved errors, cannot be confused with, and treated like, claims addressing preserved errors. Under section 924.051, Florida Statutes they aren't preservable as objecting transforms potential ineffective assistance to a preserved ground for appeal. Its application would obviate all direct appeal ineffective assistance claims as they are by definition unpreserved. Judge Clark points out the absurdity of the Respondent's demand for preservation. *Elmore v. State*, 172 So. 3d 465, 468 n.2 (Fla. 1st DCA 2015) (Clark, J. Dissenting) ("Taken to its end, this presents a dangerous, slippery slope where every ineffective assistance of counsel claim is subject to the preservation requirement of contemporaneous objection. It would be fantastical to suggest the ineffective counsel or the defendant himself would have to object at trial to the very thing it then claims counsel was ineffective for doing or not doing. Ineffective assistance claims would become meaningless. We now start down that path.").

core principle of the contemporaneous objection rule, that the error be set out with clarity before the trial court and not sprung later for appellate advantage, too late for any possible corrective instruction or other method that might have remedied the problem during the trial. It is illogical that a lawyer might object during the trial on the ground that he himself is ineffective. If counsel perceived his or her ineffectiveness counsel would have avoided such deficiency in the first place. Secondly, the standard for direct appeal requires a showing of prejudice thereby meeting the second requirement of section 941.051, Florida Statutes. The concern about multiple references to prior bad acts and Mr. Steiger's felony conviction was reviewed and addressed by the trial court only to be brushed off by defense counsel. As to this issue the trial court was fully apprised of the issue only to be thwarted by a constitutionally deficient defense lawyer.

Policy Supports Keeping this Standard in Place

As a matter of policy, "grant[ing] relief for ineffective assistance of counsel where the ineffectiveness of counsel is apparent from the face of the record before the appellate court and a waste of judicial resources would result from remanding the matter to the lower court for further litigation" is the right course of action for all involved. *Monroe*, 191 So. 3d at 404. The justice system has nothing to lose and everything to gain from it.

This ruling wouldn't perversely reward incompetence as objecting increases the likelihood of fair verdicts at trial, increases the likelihood of an acquittal and simplifies an appeal. It also affords defendants more favorable standards of review. There's no reason for a diligent lawyer to choose not to object to preserve errors.

But if the error is apparent on the face of the record, then this standard reinforces the notion of justice in the justice system. It saves the trial court from holding a pointless hearing. It prevents the need for all of the preparatory work that precedes and follows the hearing. It prevents a district court from potentially reviewing a second appeal from the same case. It's more practical than the Respondent's position, which would force a defendant to argue a potentially meritless direct appeal on a preserved issue over a meritorious ineffective assistance claim. Most importantly, it saves defendants definitively deserving of reversals from languishing unnecessarily behind bars while they wait for the ability to collaterally attack.⁴ This epiphany appears to be at the heart of the rule change in *Foster*. It guides *Monroe* too. Therefore, this Court should unequivocally

⁴ It seems like a Due Process violation and unjust to detain a person with an apparently meritorious ineffective assistance claim by making the person wait in jail for the court system to address a 3.850.

announce the right to assert ineffective assistance of counsel on direct appeal.⁵

Mr. Hamlin's Performance Epitomizes Ineffective Assistance

Because Mr. Steiger raised ineffectiveness on direct appeal, he must prove “the ineffectiveness of counsel is apparent from the face of the record before the appellate court and a waste of judicial resources would result from remanding the matter to the lower court for further litigation.”

Monroe, 191 So. 3d at 403.⁶

In *Monroe*, this Court reversed an unpreserved, non-fundamental error raised as ineffective assistance of counsel on direct appeal. *Id.* at 404. Counsel failed to move for a judgment of acquittal even though the prosecution charged a defendant with an offense which must be committed

⁵ A criminal defendant has the right to effective assistance at trial. *Strickland*, 466 U.S. at 669. “A criminal defendant pursuing a first appeal as a matter of right is guaranteed the right to effective assistance of appellate counsel.” *Sims v. State*, 998 So. 2d 494, 498 (Fla. 2008). Then how is Mr. Steiger guaranteed these rights if he can’t assert ineffectiveness on direct appeal?

⁶ The Respondent includes an alternative standard to demonstrate ineffective assistance on direct appeal which has never been adopted by this Court. See *supra*. It requires “ineffectiveness on the face of the record, indisputable prejudice, and an inconceivable tactical explanation for the conduct.” The First District stands by this incorrect standard even after this Court issued *Monroe*. See *Marshall v. State*, 291 So. 3d 614, 616 (Fla. 1st DCA 2020); *Lee v. State*, 272 So. 3d 827, 827 (Fla. 1st DCA 2019).

by someone eighteen or older without proving whether the defendant was seventeen or eighteen at the time the crime was committed. *Id.* at 397-98, 404. Not only does this Court rule without reference to section 924.051, Florida Statutes, it rests on the prejudicial nature of the error in light of the ineffectiveness apparent on the record's face and a desire not to waste resources. *Id.* at 403-404.

In this case, the primary, compound error of letting in numerous references to a collateral federal crime, if objected to, would presume harm. *Agatheas v. State*, 77 So. 3d 1232, 1240 (Fla. 2011) (“In fact, this Court has consistently held that the erroneous admission of irrelevant collateral crimes evidence is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt.” (internal citation omitted)).

The harm is magnified because this wasn't a spontaneous failing. Mr. Hamlin should have known what was on a recording admitted into evidence. He should have objected after hearing the first improper statement as Mr. Steiger talks about being charged by the Feds. (Tr. 600:1-7). He didn't. (Tr. 600:1-25). Then additional prejudicial references followed without objection. (Tr. 600:1-602:8; 611:12-22; 621:3-7; 662:4-25). This wasn't an isolated failing. This was a continuous failing by Mr. Steiger's

ostensible fiduciary. Then, oddly tight-lipped when the moment unquestionably called for action, Mr. Hamlin comes alive to literally talk Mr. Steiger into waiving any objection to the presumptively harmful error instead of actually objecting. (Tr. 667:14-670:6).

Furthermore, the prosecution failed Mr. Steiger and the justice system too. This isn't a challenge to choices solely made by Mr. Hamlin, as if he had failed to try to locate a material witness. This is a challenge to Mr. Hamlin's responses, or lack thereof, to the prosecution's behavior. "It is axiomatic that a prosecutor must refrain from conduct which would deprive an accused of a fair impartial trial." *Gordon v. State*, 469 So. 2d 795, 796 (Fla. 4th DCA 1985). Yet it didn't.

No one made the prosecution introduce collateral crime evidence. It chose to do so. It could have properly redacted the evidence. It didn't. Instead, it made some redactions because of the prejudicial nature of the statements; but it admits failing to exclude all of the prejudicial evidence. (Tr. 667:16-18). The prosecution could have stopped the recording after hearing the first improper statement. It didn't even though the error is obvious. It continued onward, playing the presumptively harmful recording, knowingly admitting collateral crime evidence as Mr. Hamlin sat silently.

Similarly, the prosecution admitted proof insinuating that Mr. Steiger couldn't get a driver's license due to out of state misconduct without objection. This is another collateral crime issue. (Tr. 621:3-7).

The prosecution called Mr. Steiger's lawyer Erica Reed ("Ms. Reed") to testify against him to their communications without objection. Mr. Hamlin never filed a motion in limine regarding this testimony. (R. 7-11). The Respondent rationalizes this testimony by arguing that Ms. Reed now works for Baptist Health Care. (RB. 39). But her employment at the time of trial doesn't matter as she admits that she was Mr. Steiger's attorney when the communication she testified to occurred. (Tr. 187:24-188:1). No part of the privilege says that it terminates upon a subsequent change of the lawyer's employment. The privilege can be invoked at any time by Mr. Steiger and Ms. Reed. Fla. Stat. § 90.502.

The Respondent also incorrectly asserts that a third party broke the privilege. (RB. 40). Unlike the references to a run-in where Ms. Reed's mother is nearby, Mr. Steiger says the tremendously damning things to his lawyer during a phone call to his lawyer. (Tr. 191:18-192:20). There's no testimony that anyone else is present this time. (Tr. 191:18-192:20). On this call after the deceased has disappeared without a trace, the lawyer describes Mr. Steiger as "panicked" over not being on his daughter's birth

certificate and concerned that local authorities were snooping into him. (Tr. 191:18-192:20). Mr. Steiger tells his lawyer that the listed victim is missing and when optimistically reassured by his lawyer that the deceased will return, he strongly assures her that the missing woman won't be coming back. (Tr. 191:18-192:20). This is as much a confession if ever there was one and Mr. Hamlin let it in. The prosecution didn't have to ask these inappropriate questions. Yet, it did.

The prosecution admitted the initial recorded interview with Mr. Steiger without the witness who could authenticate the conversation without objection. (Tr. 142:1-172:3). The Respondent rationalizes this error by arguing that Mr. Steiger laid the foundation for this exhibit while testifying. (RB. 36). Whatever occurs in the defense case doesn't excuse the prosecution's behavior during its case in chief. The prosecution can't conditionally admit Detective Galloway's statement intending to later call Mr. Steiger to authenticate the recording. It should not have been admitted.

The prosecution admitted more evidence without laying the proper predicate. (Tr. 309:6-327:9). For instance, the prosecution admitted DNA statistics testimony without establishing the expert's basis for the testimony. *Cruz v. State*, 262 So. 3d 244, 249-50 (Fla. 2d DCA 2018).

In closing, the prosecution shifted the burden by asking the jury to convict Mr. Steiger for creating the condition that hindered the medical examiner's ability to evaluate the body. (Tr. 896:15-21). Mr. Hamlin failed to object. (Tr. 896:15-21). The respondent erroneously claims this proves consciousness of guilt and was invited because Mr. Hamlin commented on the evidentiary ambiguities surrounding the cause of death. (RB. 42-3). Telling the jury to change the legal standard over an inability to determine cause of death has nothing to do with consciousness of guilt. Furthermore, Mr. Hamlin never invited the prosecution's comment during closing. He merely discussed the objective failing in the prosecution's case. (Tr. 882:2-10). Even if Mr. Steiger is to blame for the body's decomposition, the prosecution takes the proof of guilt as is. It can either prove a case or it can't. It can't shift the burden to account for a shortcoming in its proof of guilt.

None of these failures to object should surprise as Mr. Hamlin did very little to challenge the prosecution's case. Enough can't be made of the fact that he asked nothing of eight of the twenty-four witnesses, two of whom introduced Mr. Steiger's recorded statements. (Tr. 141:13-145:25; 231:5-241:8; 243:24-254:10; 286:18-301:24; 302:4-306:17; 411:4-418:23; 428:4-431:7; 450:13-672:10). He didn't ask the lead detective a single

question. (Tr. 450:13-672:10). He only started to scratch the surface with two witnesses and neither cross examination established anything prolific. (Tr. 391:1-406:22, 410:2-20, 714:1-742:11). Not doing anything isn't a strategy. It's the absence of strategy. It's the absence of effectiveness. The fact that almost the entire brief is devoted to Mr. Hamlin's failings while there is only one preserved error speaks the volumes that Mr. Hamlin never spoke.

Simply put, Mr. Steiger has the constitutional right to a fair trial. He didn't get one. Mr. Steiger has the constitutional right to the effective assistance of counsel. He didn't get it. This is exactly what ineffectiveness apparent on the face of the record looks like and it would be a waste of judicial resources to require the trial court to address the issue.⁷

THE RESPONDENT FALSELY ARGUES THE 90.403 ISSUE ISN'T PROPERLY PRESERVED TO SHIFT THE INQUIRY TO RELEVANCE

The Respondent speciously argues that Mr. Hamlin failed to preserve a F.S. Section 90.403 argument. (RB. 45). To Mr. Hamlin's credit, he actually argues that the crime scene photographs, if relevant, were too inflammatory for the jury to see. (Tr. 689:10-19). That's the crux of a

⁷ On a related note, this Court has the power to reverse a conviction "in the interest of justice" and the interests of justice merit reversal here. *Tibbs v. State*, 397 So. 2d 1120, 1126 (Fla. 1981).

challenge under 90.403, which is exactly what Mr. Steiger argued on appeal. At the onset, the trial court confines its evidentiary consideration to relevancy, rather than 90.403, before overruling the objection by specifically finding the probative value of the evidence outweighs the prejudice. (Tr. 689:24-690:15, 697:24-699:1). As the trial court ruled using the 90.403 standard, the issue is clearly preserved for review.

Nevertheless, the Respondent sidesteps the trial court's ruling to introduce relevance as the legal standard for admission. (RB. 47). The relevance suggested by the Respondent, for instance, the condition of the body when received by the medical examiner, wasn't in dispute. (RB. 47). Neither was the fact that the bodily decay affected the medical examiner's ability to make certain assessments about what happened to the body. (RB. 47). The medical examiner ruled the cause of death as homicidal violence of undetermined means because "this is a case involving clandestine burial, burial inside of a barrel, and therefore, it is my opinion that the cause of death is homicidal violence of undetermined means." (Tr. 731:5-8). There was no dispute that the body was found in a barrel and the prosecution had already admitted pictures and testimony that demonstrate the deceased was found in a barrel with a plastic grocery bag over her head. (Tr. 717:3-25, 725:5-23). These pictures cross the line.

Showing a decaying body to people who have never seen a decaying body intentionally inflames the jury, while providing no probative evidence as the pictures don't establish how Ms. Robinson died. Including pictures with breastfeeding pads and explaining what they are further invokes improper sympathy.⁸ (Tr. 717:16-21, 728:10-19). Mr. Hamlin at least raised this point. (Tr. 694:6-13). There's no reason whatsoever for the medical examiner to discuss the fact that the deceased was breastfeeding. These decisions to inflame the jury take the case within the province of *Farias* and mandate reversal. *Farias v. State*, 31 So. 3d 909, 913 (Fla. 4th DCA 2010).

CONCLUSION

For both claims, the appropriate remedy is the reversal of Mr. Steiger's conviction.

⁸ The prosecution manufactures the inclusion a lot of unobjected to, prejudicial evidence regarding breastfeeding, during its case in chief, including an improper opinion from a medical expert that breastfeeding would likely indicate the deceased didn't die from an overdose. (Tr. 123:19-25; 127:2-6; 149:7-12; 177:22-23; 202:8-12; 238:18-20; 351:15-18; 506:9-14; 692:13-25; 717:16-21; 728:11-19) The probative value of the breastfeeding evidence is substantially outweighed by the unfair prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to the Clerk of Court and Office of the Attorney General via the electronic filing portal this 11th day of March, 2021.

Respectfully Submitted,

/s/ Jared Brown

Jared Brown, Esq.
Florida Bar #30075
Brown Legal PLLC
101 N.E. Third Ave
Lobby Suite 110
Fort Lauderdale, FL 33301
Office: (954) 524-6700
Email: jared@jaredbrownlaw.com

/s/ Martin Roth

Martin Roth, Esq.
Florida Bar #265004
Martin L. Roth, P.A.
1700 East Las Olas Blvd.
Suite 307
Fort Lauderdale, FL. 33301
Office: (954) 745-7697
Email: mlrpa@msn.com

Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Florida Rules of Appellate Procedure 9.045(e) and 9.210(a)(2), Appellant's Reply Brief written in Arial 14 complies with the font requirements of this rule and does not exceed 4,000 words.

/s/ Jared Brown

Jared Brown, Esq.
Florida Bar #30075
Brown Legal PLLC
101 N.E. Third Ave
Lobby Suite 110
Fort Lauderdale, FL 33301
Office: (954) 524-6700
Email: jared@jaredbrownlaw.com

/s/ Martin Roth

Martin Roth, Esq.
Florida Bar #265004
Martin L. Roth, P.A.
1700 East Las Olas Blvd.
Suite 307
Fort Lauderdale, FL. 33301
Office: (954) 745-7697
Email: mlrpa@msn.com

Counsel for Petitioner