IN THE SUPREME COURT OF FLORIDA

CASE NO.

ROBERT OISORIO,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

Florida Constitution

Florida Rules of Appellate Procedure

Florida Rules of Criminal Procedure

I.

INTRODUCTION[1]

Petitioner Robert Oisorio petitions this Court to review the decision of the Third District Court of Appeal reversing the Order of the trial court granting Mr. Oisorio a new trial based on ineffective assistance of counsel. The Panel Opinion of the Third District, issued April 26, 1995, is appended hereto as Exhibit A. The Panel Opinion on Mr. Oisorio's Motion for Certification, issued June 21, 1995, is appended as Exhibit B. The trial court's opinion vacating Mr. Oisorio's judgment of conviction and sentence and granting Mr. Oisorio a new trial, together with findings of fact and conclusions of law, issued January 7, 1994, is appended hereto as Exhibit C.

II.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to Article V, §3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure. The Panel of the Third District Court of Appeal acknowledged that its decision is in direct conflict with the Second District's decision in Gill v. State, 632 So.2d 660 (Fla. 2d DCA 1994), but refused to certify the conflict. See Exhibit B.

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[1] References to the record in this Brief on Jurisdiction are as follows: the symbol "R" refers to the record on appeal as filed in the Third District below. The symbol "T" refers to the transcript of the trial court proceedings on the Rule 3.850 motion. The symbol "ST" refers to the original trial transcript, which was filed by the State as part of the record on appeal below.

III.

STATEMENT OF CASE AND FACTS

In July 1990, after a trial by jury, Petitioner Robert Oisorio and three co-defendants were convicted of trafficking in cocaine and sentenced to fifteen (15) years incarceration. The case against Mr. Oisorio arose out of a reverse sting operation orchestrated by the Metro-Dade Police Department. On December 12, 1989, in response to information provided by a confidential informant, Guillermo Diaz, Francisco Quintana, and Luis Quintana decided to break into a warehouse to steal cocaine supposedly being stored by a Colombian narco-trafficker. (ST:129). In fact, the cocaine had been planted in the warehouse by Metro-Dade Police Detective Luis Fernandez. (ST:125-26). Mr. Oisorio drove them to the warehouse in his rented Ford LTD. (ST:338). The warehouse was under videotape surveillance. (ST:133).

After Diaz pried open the warehouse, he and the two Quintana brothers went inside; one of them removed a gym bag containing the cocaine from the warehouse and placed it in the trunk of the car. (ST:129, 138). Mr. Oisorio did not enter the warehouse, did not carry any bags to the car, and did not see any bags. (ST:240-43). Detective Fernandez had never heard of or seen Mr. Oisorio before that night, (ST:237), nor did Mr. Oisorio communicate with the confidential informant. (T:276). According to Detective Fernandez, Mr. Oisorio never got out of the car. (ST:129, 240). Mr. Oisorio's fingerprints were not found on any bags. (ST:241-43). As the car left the warehouse area, its path was blocked by the police.

(ST:131). All four men were arrested, (ST:150), and according to Detective Fernandez, all four confessed orally to cocaine trafficking. (ST:151-58). These confessions were not witnessed or recorded, nor did any of the defendants sign a waiver of rights form. (ST:253-57).

Mr. Oisorio was represented at trial by Stephen A. Glass, a lawyer who has since been disbarred by this Court. See The Florida Bar v. Glass (Stephen), 651 So.2d 1196 (Fla. 1995). Mr. Oisorio was found guilty. Mr. Oisorio's direct appeal, in which the sole issue raised by Mr. Glass had not even been argued in the trial court, see Exhibit C, at p.500, was affirmed by the Third District Court of Appeal on September 3, 1991. Oisorio v. State, 585 So.2d 942 (Fla. 3d DCA 1991). On May 4, 1992, Mr. Oisorio filed a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. Mr. Oisorio alleged that Glass rendered ineffective assistance of counsel at trial by depriving Mr. Oisorio of his constitutional right to testify, and by failing to investigate the exculpatory testimony of co-defendant Guillermo Diaz. (R:42, 58). After a lengthy evidentiary hearing, at which several witnesses testified (including Mr. Oisorio and trial counsel Stephen Glass), the trial court entered an Order vacating Mr. Oisorio's conviction and granting him a new trial. The Order incorporated findings of fact and conclusions of law. See Exhibit C.

First, the trial court found that Mr. Oisorio wanted to testify in his own defense at trial, but that Mr. Glass actively refused to allow Mr. Oisorio to testify by overbearing his will.

See Exhibit C, at pp. 497-98. Second, the trial court found that Glass did nothing to investigate or utilize the exculpatory testimony of co-defendant Diaz, who signed a statement prior to trial that Mr. Oisorio had no knowledge of his co-defendants' intended wrongdoing. See Exhibit C, at pp. 497-99.[2]

Based on these factual findings, the trial court concluded as a matter of law that Mr. Glass rendered constitutionally inadequate assistance under Strickland v. Washington, 466 U.S. 668 (1984). The trial court, having heard the exculpatory testimony of Mr. Oisorio and Mr. Diaz, further concluded that there was no adequate assurance that the verdict in this case was reliable because the jury never heard Mr. Oisorio's defense. See Exhibit C, at p.501. The trial court concluded, therefore, that Mr. Oisorio satisfied the "prejudice" prong of Strickland. The trial court released Mr. Oisorio on bail pending the new trial.

The State appealed. A panel of the Third District Court of Appeal (hereinafter "the Panel") reversed the Order vacating Mr. Oisorio's judgment of conviction. The Panel held that Mr. Oisorio had failed to satisfy the "prejudice" prong. The Panel held that "[t]he evidence against Oisorio was so overwhelming, and the now asserted defensive materials so patently insubstantial that no rational jury could do anything but convict him." See Exhibit A, at p.2. The Panel revoked Mr. Oisorio's bail. Mr. Oisorio petitions this Court for discretionary review of the Panel Opinion.

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[2] Diaz testified at the evidentiary hearing that neither he nor his codefendants (in Diaz's presence) told Mr. Oisorio that they were intending to steal cocaine. (T:256-61; 277-79).

IV.

SUMMARY OF ARGUMENT

Petitioner Robert Oisorio submits that the decision sought to be reviewed is in direct conflict with Gill v. State, 632 So.2d 660 (Fla. 2d DCA 1994). There, the Second District Court of Appeal held that when counsel deprives a defendant of his constitutional right to testify at trial, prejudice is presumed. The Panel acknowledged direct conflict on this issue, but refused to certify the conflict. Petitioner respectfully submits that this Court should take jurisdiction to resolve a question that has become the subject of extensive post-conviction litigation in the trial courts: the proper framework for analyzing a defendant's claim that trial counsel deprived him of his right to testify.[3]

V.

ARGUMENT

THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE DISTRICTS REGARDING THE STANDARD FOR ASSESSING THE "PREJUDICE" PRONG OF STRICKLAND v. WASHINGTON, 466 U.S. 668 (1984), WHEN AN ATTORNEY DEPRIVES A DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO TESTIFY AT TRIAL

The right to testify is one of the rights that are "essential to due process of law in a fair adversary process." Rock v. Arkansas, 483 U.S. 44, 51 (1987) (quoting Faretta v. California, 422 U.S. 806, 819 n.15 (1975)). It is a fundamental constitutional right, which is found in the Compulsory Process Clause of the Sixth

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[3] By requesting review of only his "right to testify" claim, Mr. Oisorio neither expressly nor impliedly waives his right to seek federal habeas review of all issues raised in the trial court and in the appellate court should such review become necessary.

Amendment, the Due Process Clause of the Fifth Amendment, and as a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. United States v. Teague, 953 F.2d 1525, 1532 (11th Cir.) (en banc), cert. denied, 113 S.Ct. 127 (1992); United States v. Martinez, 883 F.2d 750, 754 (9th Cir. 1989), vac. on other grds., 928 F.2d 1470 (9th Cir.), cert. denied, 111 S.Ct. 2886 (1991).[4] Under the United States Constitution, the right to testify is personal to the accused. Teague, 953 F.2d at 1532. The Florida Constitution also guarantees this right "to be heard in person." Fla. Const. Art. I, §16.

This Court has observed that an ineffective assistance of counsel claim may be stated if counsel "actively refuses" to allow the defendant to testify. Torres-Arboledo, 524 So.2d at 411 n.2. The lower courts have similarly held that counsel may not waive a defendant's right to testify without the defendant's concurrence and understanding. See e.g. Kersey v. State, 636 So.2d 789 (Fla. 2d DCA 1994) (ordering evidentiary hearing on 3.850 motion on whether defendant was deprived of right to testify); Merritt v. State, 642 So.2d 845 (Fla. 4th DCA 1994) (same); Williams v. State, 601 So.2d 596 (Fla. 1st DCA 1992) (same). Counsel's performance is deficient under Strickland if he/she "refuse[s] to accept the

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[4] In State v. Torres-Arboledo, 524 So.2d 403 (Fla.), cert. denied, 488 U.S. 901 (1988), this Court held that the right to testify is not a fundamental constitutional right. Respectfully, the Court appears to have overlooked existing controlling authority that held such a right to be fundamental, including the United States Supreme Court's decision in Rock v. Arkansas, 483 U.S. 44 (1987). In Teague, supra, the United States Court of Appeals for the Eleventh Circuit reaffirmed that the right to testify is a fundamental constitutional right.

defendant's decision to testify," or "never informed defendant of the right to testify." Gill v. State, 632 So.2d 660, 661 (Fla. 2d DCA 1994) (quoting Teague, 953 F.2d at 1534). The right to testify has become the focal point of extensive post-conviction litigation in the lower courts. See Exhibit B, at p.3 n.2.

The trial court found as fact that Stephen Glass actively refused to let Mr. Oisorio testify at trial. Rather than disturb this well-grounded factual finding, the Panel focused on the "prejudice" prong of Strickland, and rejected the trial court's conclusion that the jury's verdict was unreliable.[5] In so doing, the Panel created (and thereafter acknowledged) a direct conflict with Gill, supra, the only Florida appellate decision that has clearly addressed the issue. In Gill, the Second District held that prejudice exists per se when counsel interferes with a defendant's right to testify. The court wrote:

> We believe that Teague forecloses us from requiring that Gill demonstrate that his testimony was of "great and obvious value." Simply put, the defendant is in a different position from other witnesses. His decision whether to testify is of both strategic and constitutional significance. If, deliberately or through negligence, counsel interfered with a right Gill otherwise would have exercised, the trial court must grant relief. Regrettably, in such a setting an attorney whose trial performance is in all other respects above reproach may nevertheless be deemed "ineffective."

Gill, 632 So.2d at 662 (emphasis added) (citations omitted).

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[5] The trial court reached its conclusion that the jury's verdict was unreliable after hearing Mr. Oisorio's intended trial testimony -- e.g., that he did not communicate with the informant, that he did not know that his co-defendants intended to steal cocaine from a warehouse, and that he did not orally confess to Detective Fernandez.

The Second District recognized what courts have been saying for years -- it is the accused "who above all others may be in a position to meet the prosecution's case." Ferguson v. Georgia, 365 U.S. 570, 582 (1961). The testimony of a criminal defendant at his own trial is "unique and inherently significant." Nichols v. Butler, 953 F.2d 1550, 1553 (11th Cir. 1992). "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." Green v. United States, 365 U.S. 301, 304 (1961). "Where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance." Nichols, 953 F.2d at 1554 (citing United States v. Walker, 772 F.2d 1172, 1179 (5th Cir. 1985)).

The Panel's conclusion that Mr. Oisorio failed to satisfy the "prejudice" prong conflicts not only with Gill, but also with the vast majority of federal and state courts that have applied a more defense-friendly standard of prejudice when analyzing claims that a defendant has been deprived of his right to testify. See Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991) (holding that "it is only the most extraordinary of trials in which a denial of the defendant's right to testify can be said to be harmless beyond a reasonable doubt"); United States v. Moskovits, 815 F. Supp 147, 154 (E.D.Pa. 1993) (holding that it is a "rare case in which a court can comfortably say that even though errors prevented defendant from testifying, the outcome of his trial was still fundamentally fair and the verdict not rendered suspect"); LaVigne

v. State, 812 P.2d 217, 221-22 (Alaska 1991) (holding that there "will be relatively few cases in which the reviewing court can confidently assert that the denial of the right to testify was so insignificant as to constitute harmless error beyond a reasonable doubt"); see also United States v. Butts, 630 F. Supp. 1145 (D.Me. 1986) (approving per se rule of prejudice for deprivation of right to testify); cf. Kyles v. Whitley, ____ U.S. ____, 115 S.Ct. 1555 (Opinion filed April 19, 1995) (holding that standard for assessing prejudice prong of Strickland is akin to materiality standard for violation of requirements of Brady v. Maryland, 373 U.S. 83 (1963)). Because of the direct conflict among the districts, the importance of the constitutional right at stake, and the frequency with which this claim is raised on post-conviction review, this Court should exercise its jurisdiction to resolve this issue.

CONCLUSION

For the foregoing reasons, this Court should take jurisdiction and resolve the conflict between the districts regarding the proper standard for assessing a defendant's claim that he has been deprived of his constitutional right to testify in his own defense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF ON JURISDICTION was furnished by mail to Joni Braunstein, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Post Office Box 013241, Miami, FL 33101, on this 7th day of July, 1995.

By: _____
SCOTT A. SREBNICK, ESQ.

IN THE SUPREME COURT OF FLORIDA

ROBERT OISORIO,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

APPENDIX

Exhibit A:	Panel Opinion of April 26, 1995
Exhibit B:	Panel Opinion of June 21, 1995, on Motion for Certification
Exhibit C:	Trial Court's Findings of Fact and Conclusions of Law

Appendix A

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1995

THE STATE OF FLORIDA, **

Appellant, **

vs. ** CASE NO. 94-595

ROBERT OISORIO, **

Appellee. **

Opinion filed April 26, 1995.

An Appeal from the Circuit Court for Dade County, Thomas S. Wilson, Jr., Judge.

Robert A. Butterworth, Attorney General and Joni Braunstein, Assistant Attorney General, for appellant.

Scott A. Srebnick; William P. Cagney, III, for appellee.

Before SCHWARTZ, C.J., and NESBITT and COPE, JJ.

PER CURIAM.

After we per curiam affirmed his drug conviction in Oisorio v. State, 585 So. 2d 942 (Fla. 3d DCA 1991), the trial court, upon an evidentiary hearing, granted the defendant's motion for 3.850 relief on the ground of ineffective assistance of trial counsel. That order is reversed because the record demonstrates, as a matter of law, that Oisorio did not satisfy the second, or "prejudice,"

prong of Strickland v. Washington, 466 U.S. 668, 669, 104 S.Ct. 2052, 2055-56, 80 L.Ed.2d 674, 682 (1984), that, but for "counsel's [alleged][1] unprofessional errors, the result of the proceeding would have been different." The evidence against Oisorio was so overwhelming, and the now-asserted defensive materials so patently insubstantial that no rational jury could do anything but convict him. The trial court is instructed to reinstate the conviction and sentence forthwith.

[1] Although we need not directly consider the issue, we are highly doubtful that the defendant satisfied the first, or "performance," prong of Strickland either.

Appendix B

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1995

THE STATE OF FLORIDA, **

Appellant, **

vs. ** CASE NO. 94-595

ROBERT OISORIO, **

Appellee. **

Opinion filed June 21, 1995.

An appeal from the Circuit Court for Dade County, Thomas S. Wilson, Jr., Judge.

Robert A. Butterworth, Attorney General, and Joni Braunstein, Assistant Attorney General, for appellant.

Scott A. Srebnick; William P. Cagney, III, for appellee.

Before SCHWARTZ, C.J., and NESBITT and COPE, JJ.

On Motion for Certification

PER CURIAM.

Defendant Robert Oisorio has requested that this court certify direct conflict with Gill v. State, 632 So. 2d 660 (Fla. 2d DCA 1994). Gill states that where the defendant claims that he was deprived of the right to testify by reason of ineffective assistance of trial counsel, the defendant need not also satisfy the second prong of Strickland v. Washington, 466 U.S. 668, 687,

104 S.Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), namely, that counsel's deficient performance prejudiced the defense. 632 So. 2d at 661-62. We acknowledge conflict with Gill on this issue. In our view the court in Gill misapprehended the holding of United States v. Teague, 953 F. 2d 1525 (11th Cir.)(en banc), cert. denied, ___ U.S. ___, 113 S. Ct. 127, 121 L. Ed. 2d 82 (1992), which Gill purports to follow. Teague explicitly states that:

> the appropriate vehicle for claims that the defendant's right to testify was violated by defense counsel is a claim of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
>
> In Strickland, the Supreme Court defined two requirements for a claim of ineffective assistance of counsel:
>
> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
>
> Id. at 687, 104 S. Ct. at 2064

953 F. 2d at 1534. Teague and a companion case, Nichols v. Butler, 953 F. 2d 1550 (11th Cir. 1992)(en banc), hold that both prongs of the Strickland test must be satisfied in order to obtain postconviction relief. Teague, 953 F. 2d at 1534; Nichols, 953 F.

2d at 1552-53;[1] accord United States v. Camacho, 40 F. 3d 349, 355 (11th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1810, ___ L. Ed. 2d ___ (1995); State v. Flynn, 527 N.W. 3d 343, 350-51 (Wis. Ct. App. 1994), review denied, 531 N.W. 2d 326 (Wis. 1995), cert. denied, ___ U.S. ___, 115 S. Ct. 1389, 131 L. Ed. 2d 241 (1995).

In the present case, in order to leave the question of further review, if any, entirely discretionary with the Florida Supreme Court, we decline to certify direct conflict. Compare Fla. Sup. Ct. Manual Internal Operating P. § II(A)(1) with § II(A)(2).

Conflict acknowledged;[2] motion for certification of direct conflict denied.

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[1] In Teague, the first prong of the Strickland test was not satisfied; thus the court did not reach the second prong, namely, "whether Teague's defense was prejudiced in this case." 953 F. 2d at 1535 (footnote omitted). In Nichols v. Butler, both prongs of the Strickland test were satisfied. 953 F. 2d at 1552-53.

[2] Cases following Gill include LaTulip v. State, 645 So. 2d 552 (Fla. 2d DCA 1994); Lynn v. State, 645 So. 2d 104 (Fla. 2d DCA 1994); Merritt v. State, 642 So. 2d 845 (Fla. 4th DCA 1994). Compare Williams v. State, 601 So. 2d 596, 599 (Fla. 1st DCA 1992)(both prongs must be met) and Kenney v. State, 650 So. 2d 1136, 1136 (Fla. 1st DCA 1995)(petitioner alleged both prongs met) with Wilson v. State, 647 So. 2d 185, 189 (Fla. 1st DCA 1994)(remanding for evidentiary hearing where petitioner alleged first prong was met).

Appendix C