IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,034

ROBERT OISORIO,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

**********

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

**********

# BRIEF OF RESPONDENT ON JURISDICTION

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## INTRODUCTION

The Petitioner, ROBERT OISORIO, was the defendant in the trial court and the Appellant in the District Court of Appeal of Florida, Third District. The Respondent, The STATE OF FLORIDA, was the prosecution in the trial court and the Appellee in the District Court of Appeal. In this brief the symbol "A" will be used to designate the appendix.

## STATEMENT OF THE CASE AND FACTS

Respondent rejects Petitioner's Statement of the Case and Facts as inaccurate, irrelevant, and totally outside the scope of a jurisdictional brief pursuant to Fla.R.App.P. 9.120(d). The pertinent facts to be considered by this Court in the context of a jurisdictional brief are as follows:

The State of Florida appealed from a lower court order granting Petitioner's Motions For Postconviction Relief under Rule 3.850, Fla.R.Cr.P., based upon a finding of ineffective assistance of trial counsel. The Third District Court of Appeal reversed the lower court's order in a per curiam opinion on April 26, 1995, holding that "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' [alleged] unprofessional errors, the result of the proceeding would have been different.'" The court held that the evidence adduced against Petitioner at trial was "so overwhelming, and the now asserted defensive materials so patently insubstantial that no rational jury could do anything but convict him", and ordered that Petitioner's conviction and sentence be reinstated. (A-1). The court further noted in a footnote that while not directly considering the issue, it was unlikely that Petitioner satisfied the "performance" prong of Strickland as well.

Petitioner then moved for certification to this Court based on a perceived direct conflict with Gill v. State, 632 So.2d 660 (Fla. 2d DCA 1994). The Third District, in a per curiam opinion, acknowledged said conflict, but denied the motion for certification. (A-2). The Third District concluded in the four corners of the opinion that the Gill court "misapprehended the holding of United States v. Teaque, 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", and that, contrary to Gill, both prongs of the Strickland test must be satisfied in order to obtain postconviction relief for alleged ineffective assistance of counsel. (A-2). The Third District concluded that further review of this question should be left entirely up to the discretion of this Court in declining to certify direct conflict. (A-2). Petitioner then filed notice to invoke the discretionary jurisdiction of this Court. This brief on jurisdiction follows.

## QUESTION PRESENTED

I.

WHETHER THIS COURT SHOULD DECLINE TO RESOLVE THE CONFLICT BETWEEN THE DISTRICTS REGARDING THE NECESSITY OF ASSESSING THE "PREJUDICE" PRONG OF STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984), WHERE A DEFENDANT CLAIMS THAT HIS ATTORNEY DEPRIVED HIM OF THE RIGHT TO TESTIFY ON HIS OWN BEHALF AT TRIAL? (Restated).

## SUMMARY OF ARGUMENT

This Court should decline discretionary review in this cause, as the opinion of the Third District Court of Appeal on Motion for Certification (A-2) is a correct interpretation of the law in Florida regarding the requirements for obtaining postconviction relief based on claims of ineffective assistance of counsel, and need not be disturbed by this Court. By declining to exercise discretionary jurisdiction in this cause, this Court will implicitly acknowledge its agreement with the position/interpretation espoused by the Third District (A-2), as the correct statement of the law in Florida on this issue, and Respondent urges this Court to so hold.

## ARGUMENT

I.

THIS COURT SHOULD DECLINE TO RESOLVE THE CONFLICT BETWEEN THE DISTRICTS REGARDING THE NECESSITY OF ASSESSING THE "PREJUDICE" PRONG OF STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984), WHERE A DEFENDANT CLAIMS THAT HIS ATTORNEY DEPRIVED HIM OF THE RIGHT TO TESTIFY ON HIS OWN BEHALF AT TRIAL.(Restated).

Respondent submits that the Third District Court of Appeals correctly interpreted and set forth the law in Florida with regard to the standard for obtaining postconviction relief based on a claim of ineffective assistance of counsel in denying Petitioner's motion for certification. (A-2). Although the court, in its opinion, acknowledged conflict with Gill v. State, 632 So.2d 660 (Fla. 2d DCA 1994), which holds that a defendant's claim that he was deprived of the right to testify by reason of ineffective assistance of trial counsel alleviates the need for that defendant to satisfy the second prong of Strickland v. Washington, 466 U.S. 668, 669, 104 S.Ct. 2052, 2055-56, 80 L.Ed.2d 674, 682 (1984), the Third District concluded that Gill incorrectly interpreted 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), upon which Gill's holding is predicated. As noted by the court, Teague explicitedly 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,(citations omitted).
>
> 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 a

> 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.

The Third District further noted that both Teague, and companion case Nichols v. Butler, 953 F.2d 1550 (11th Cir. 1992)(en banc), require that both prongs of Strickland be met in order to obtain postconviction relief, despite Gill's interpretation of these cases to the contrary, a holding which has been reinforced in United States v. Camacho, 40 F.3d 349, 355 (11th Cir. 1994), cert. denied, ___U.S.___, 115 S.Ct. 1810, ___ L.Ed.2d ___(1995), and State v. Flynn, 527 N.W.3d 343, 350-51 (Wis. Ct.App. 1994)' rev.denied, 531 N.W.2d 326 (Wis. 1995); cert. denied, ___U.S.___, 115 S.Ct.1389, 131 L.Ed.2d 241 (1995).

Respondent submits that the Third District's interpretation of Teague is clearly correct, as is their conclusion that "the court in Gill misapprehended" this holding. By declining to exercise discretionary jurisdiction in this cause, this Court will implicitly acknowledge its agreement with the position/interpretation espoused by the Third District (A-2), as the correct statement of the law in Florida on this issue, and Respondent urges this Court to so hold.

## CONCLUSION

Based upon the foregoing arguments and citations of authority, the Petition for Discretionary Review should be dismissed with prejudice.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was furnished by mail to **WILLIAM P. CAGNEY III**, 3400 First Union Financial Center, 200 South Biscayne Blvd., Miami, Florida 33131-2393 on this 27th day of July, 1995.

**JONI BRAUNSTEIN**
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,034

ROBERT OISORIO,

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**********

APPENDIX

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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.

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[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.

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).