IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,034

ROBERT OISORIO,

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature Of The Case

Robert Oisorio (hereinafter "Oisorio") petitions the Florida Supreme Court to reverse the decision of the Third District Court of Appeal ("the Panel") in State v. Oisorio, 657 So.2d 4 (Fla. 3d DCA 1995), and reinstate the Order entered by Dade County Circuit Court Judge Thomas S. Wilson ("the trial court") vacating Oisorio's judgment of conviction and sentence under Fla. R. Crim. P. 3.850. The trial court held that Oisorio's now-disbarred[1] trial counsel, Stephen A. Glass, rendered constitutionally ineffective assistance under Strickland v. Washington, 466 U.S. 668 (1984), at Oisorio's trial on drug charges in July 1990.

The basis for the trial court's decision was twofold: 1) Glass actively refused to let Oisorio testify in his own defense; and 2) Glass failed to investigate and utilize the credible, exculpatory affidavit and testimony of a codefendant, and failed to move for a severance on that basis. The trial court also found that Oisorio had satisfied the prejudice prong of Strickland by demonstrating that the verdict was unreliable in light the exculpatory testimony that was never presented to the jury. (T:501).[2] The trial court reached these conclusions after conducting a lengthy evidentiary

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[1] See The Florida Bar v. Glass (Stephen), 651 So.2d 1196 (Fla. 1995).

[2] References to the record in this Brief on the Merits will be as follows: The symbol "R" refers to the record on appeal. 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 as part of the record on appeal.

hearing. (T:64-478). The court assessed the credibility of the witnesses who testified at the hearing, and specifically found attorney Glass' testimony to be unworthy of belief. (T:495-500).

The Panel reversed the trial court's Order. The Panel concluded that Oisorio had failed to satisfy the prejudice prong of Strickland, reasoning that the evidence presented against Oisorio at his trial was so overwhelming that his "now-asserted defensive materials" could not have made a difference. Oisorio, 657 So.2d at 5. However, the Panel acknowledged, but declined to certify, that its standard for assessing prejudice conflicts with the standard applied by the Second District Court of Appeal in Gill v. State, 632 So.2d 660 (Fla. 2d DCA 1994). Oisorio, 657 So.2d at 6. This Court accepted jurisdiction to resolve the conflict between the districts and determine the appropriate standard for evaluating prejudice to a defendant from his counsel's refusal to let him testify. Oisorio is in custody.

Statement Of The Facts

The case against Oisorio arose out of a relatively simple reverse sting orchestrated by the Metro-Dade Police Department. On December 12, 1989, Detective Luis Fernandez placed a gym bag containing cocaine in a warehouse in Miami, Florida. (ST:120-30). A confidential informant working with Detective Fernandez contacted codefendants Guillermo Diaz and Francisco Quintana, and informed them that cocaine was being stored in the warehouse by a Colombian narco-trafficker. There was no evidence that defendant Robert Oisorio had any contact with the confidential informant, nor was

there any evidence that Oisorio was under investigation for narcotics-related activity. (ST:230-38, 275-80).

That night, Oisorio drove Diaz, Francisco Quintana, and Luis Quintana (Francisco's brother), to the warehouse in a Ford LTD leased in Oisorio's name. (ST:335-40). The warehouse was under videotape surveillance, and was surrounded by at least twenty police officers. (ST:130-35). Diaz and the two Quintana brothers got out of the car and, after Diaz pried open the warehouse with a crowbar, entered the warehouse. (ST:125-40). One of them removed the gym bag containing the cocaine from the warehouse and placed it in the trunk of the car. (ST:125-40). 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 Oisorio before that night. (ST:237). According to Detective Fernandez, Oisorio never got out of the car, (ST:129, 240), although another officer testified that he did. 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:130-35). All four men were arrested and transported back to the police station. (ST:148-55). According to one officer, a handgun was recovered from the passenger seat of the vehicle.[3] Furthermore, Detective Fernandez testified that he interrogated all four men individually, and that all four confessed orally to cocaine trafficking. (ST:151-90).

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[3] Only one defendant, Luis Quintana, was charged with possession of a firearm during the commission of a felony under Fla. Stat. 775.087, and was acquitted of that charge.

These oral statements were not witnessed or recorded, nor did any of the men sign a waiver of rights form. (ST:250-60).

Course Of Proceedings And Disposition Below

The State charged all four men with trafficking in over 400 grams of cocaine, in violation of Fla. Stat. §893.135. (R:1-4). Oisorio retained Glass for $15,000. (T:85). At trial, the State played the videotape for the jury, and presented the testimony of the surveilling officers. (ST:107-315, 317-69, 370-98). The States also offered the testimony of Detective Fernandez that Oisorio (and the three others) had made oral inculpatory statements admitting guilt to cocaine trafficking. (ST:151-90). None of the defendants presented any evidence or testified in his own defense. (ST:400-11). On July 13, 1990, a jury found all four defendants guilty. (R:30-31). The trial court sentenced Oisorio to a mandatory term of fifteen years. (R:305). Oisorio appealed to the Third District Court of Appeal, which affirmed without an opinion. Oisorio v. State, 585 So.2d 942 (Fla. 3d DCA 1991).

On May 4, 1992, Oisorio filed a Motion for Post Conviction Relief pursuant to Fla. R. Crim. P. 3.850, and thereafter, amended the motion. (R:39-44; R:50-58). Oisorio alleged that Glass rendered constitutionally ineffective assistance of counsel at trial by: 1) actively refusing to allow Oisorio to testify; and 2) failing to move for a severance of Oisorio's trial based on an exculpatory affidavit signed by codefendant Guillermo Diaz. (R:42, 58). On December 9, 1992, the trial court granted an evidentiary hearing on the 3.850 motion. (T:50).

1. The Evidentiary Hearing

The evidentiary hearing commenced on February 12, 1993, and resumed on May 28, 1993. (T:64-478). The defense called Oisorio, offered the testimony of Laurie Beloff, Esq. (counsel for codefendant Francisco Quintana),[4] and submitted affidavits of codefendant Guillermo Diaz and Oisorio's parents, Robert Oisorio, Sr., and Diana Oisorio. (R:321-324). When the State objected to the admissibility of Diaz's affidavit, the court called Diaz as a witness.[5] The State called two witnesses: Glass and Ron Gainor, Esq. (Diaz's lawyer).

Oisorio testified that he did not know about the cocaine in the warehouse or his codefendants' plans to break into the warehouse. (T:141-51). Oisorio testified that, on the night of the arrest, he was intending to return his leased Ford LTD to the rental car agency because his company car (a Mitsubishi) had finally arrived. (T:144-50). Oisorio drove to the home of Luis Quintana, who had agreed to meet Oisorio at the rental car agency so that Oisorio would have a ride home after he returned the Ford LTD. (T:144-51). Before Oisorio left for the rental car agency, Francisco Quintana and Guillermo Diaz, who were at Luis' home, requested a ride to a warehouse near the rental agency to meet

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[4] Ms. Beloff testified by deposition pursuant to court order, because of her unavailability for the hearing. (R:92-95, 213-77).

[5] Oisorio's counsel offered to take Diaz's testimony by deposition because Diaz, in prison in Arcadia, Florida, voiced his opposition to being transported to Miami (where he would lose gain time). Consistent with his search for truth, the trial court demanded to hear Diaz's live testimony so that he could observe Diaz's demeanor on the stand. (T:224-28).

someone. (T:144-51). Oisorio drove the two men to the warehouse in the Ford LTD, at which point Luis Quintana met up with them. (T:145-52). Oisorio never asked the codefendants who they needed to meet at the warehouse. (T:145-52). Oisorio testified that as the men got out of his car, he popped open the trunk of the car at their request, but he remained at the car and did not enter the warehouse. (T:130-50). Oisorio's testimony was corroborated by Diaz, who testified that Oisorio was never present when the break-in was discussed among the codefendants, and that he never said anything to Oisorio about the intended break-in. (T:256-79).

Oisorio testified that he did not confess to Detective Fernandez, and that Detective Fernandez's testimony was false. (T:95-99). Diaz also stated that he (Diaz) did not confess to Detective Fernandez. (T:254-56).

Oisorio testified that he repeatedly told Glass that he was innocent. (T:87). Laurie Beloff recalled that Glass believed Oisorio was "a dream defendant" who had no prior arrests. (R:220-25). By contrast, Glass testified that Oisorio admitted his guilt at their first attorney-client meeting. (T:360-61, 393, 470).

Glass acknowledged that he did not attend any depositions prior to trial, (T:417), but explained that he paid Ms. Beloff to cover for him. (T:331). Ms. Beloff contradicted Glass, stating that she had no agreement with Glass to cover the depositions for him. (R:218). Glass did not file any substantive pretrial motions and, in particular, did not file a written motion to suppress Oisorio's alleged oral statement. (T:377). Glass testified that he

did not think a motion to suppress "would fly" and he did not want to lose credibility with the court. (T:377-78). Glass did not explain why he sought to litigate an oral motion to suppress during the middle of the trial. (ST:157-83).

Oisorio testified that he told Glass that his codefendants could exculpate him and that Glass gave him an affidavit for his codefendants to sign. (T:87-88). This was corroborated by Ms. Beloff, who testified that she provided Glass with a form Byrd affidavit at his request, and discussed the affidavit with him. (R:225). Glass, by contrast, maintained that he never discussed a Byrd affidavit with Ms. Beloff and never gave Oisorio such an affidavit to take to his codefendants. (T:390).

Oisorio testified that he and his father brought the affidavit to codefendant Guillermo Diaz in the stockade, and a corrections officer translated the affidavit to Diaz, who signed it.[6] (T:89-91). This testimony was verified by Diaz. (T:244). Diaz told Oisorio that he would testify for Oisorio to clear him of any wrongdoing. (T:156; R:211). Glass stated that Oisorio gave him the signed affidavit prior to trial, (T:362), and acknowledged the affidavit was exculpatory. (T:472). Glass admitted that he did not seek to confirm the veracity of the affidavit with Diaz's attorney, nor did he seek permission to speak with Diaz to determine what other exculpatory testimony Diaz could offer. (T:391-92). Glass explained that he knew the affidavit was false because Oisorio had

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[6] Although the original statement signed by Diaz was not notarized, (R:204), it will be referred to throughout as an "affidavit" for the sake of uniformity.

confessed to him. (T:391-93). Glass never informed Gainor, Diaz's lawyer, that he had obtained an affidavit from Diaz. (T:310).

Oisorio testified that he assumed Glass would know how to use the affidavit to help him, (T:156), and Glass acknowledged that Oisorio did not understand the legal significance of a Byrd affidavit. (T:392). Glass explained that he did not use the affidavit because Oisorio told him that its purpose was to prevent Diaz from "flipping" against Oisorio, and because Glass refused to suborn perjury. (T:364-66, 469, 472-73).

Oisorio testified that he repeatedly told Glass during the trial that he wanted to testify in his own defense, (T:99, 104), but that Glass told him that he "could not testify" and "was not allowed to testify." (T:116-17). Oisorio testified that he "was not an expert on the law," (T:118), and "was not aware whether I could or couldn't ... [a]ll I said to him was that I wanted to testify." (T:123). By contrast, Glass testified that Oisorio indicated "from day one" that he did not want to testify. (T:368-70, 456). Glass further testified that he was ethically constrained to advise Oisorio not to testify because Oisorio had confessed to him. (T:366-71). Glass did not explain why, on the first day of trial, he stood up before the trial court and stated: "While we're on that subject, though, I am contemplating my client taking the stand." (ST:9; T:383).

Oisorio testified that he and his parents huddled with Glass in the hallway during the recess after the State rested its case, and had a heated discussion, during which Oisorio again told Glass

that he wanted to testify. (T:104). This incident was corroborated by the affidavits of Oisorio's parents. (R:321-324). Moreover, Ms. Beloff recalled the huddle in the hallway and remembered that Oisorio's parents were present, (R:248), as did Ron Gainor, who testified that he saw Glass, Oisorio, "and some other people" huddled together in the hall during the recess. (T:291). Glass denied that there was a heated discussion and denied that Oisorio's parents would have been present. (T:371, 455).

Oisorio testified that, during this discussion in the hallway, Glass poked his finger into Oisorio's chest, told him it was "too late" to testify, and threatened to walk away from the case. (T:104-06, 118). This was corroborated by the affidavits of Oisorio's parents and by Ms. Beloff, who recalled that Glass may have "put his fingers" to Oisorio's chest. (R:253). Glass denied poking Oisorio in the chest. (T:371).

Although Glass insisted that he was a "very ethical" lawyer, he admitted that he had borrowed $7500 from a client, failed to repay the entire amount, and bounced a check in the process. (T:428-32). Glass also admitted that Roy Gelber, his former law partner, solicited kickbacks from him in exchange for court appointments when Gelber was a circuit court judge. (T:410-15). Glass admitted that he never reported this activity to the Florida Bar. (T:439-41). Glass also admitted that he had besmirched the names of Judge Milton Starkman and Judge Arthur Snyder. (T:438).

Glass was also confronted with more than ten (10) Florida Bar complaints that had been filed against him in less than two years.

(T:397-408). In at least three of his responses to those complaints, Glass' defense was that his client had confessed guilt -- either to having engaged in a 200 kilogram cocaine deal, (T:400-01), to having stolen $12 million worth of securities, (T:402), or to having purchased property with drug money. (T:403).

2. Disposition In The Lower Tribunals

After receiving all the evidence, the trial court took the case under advisement.[7] On January 13, 1994, the trial court issued an Order vacating Oisorio's judgment of conviction, and incorporating findings announced in open court. (R:157; T:494-501). The trial court resolved the conflicting evidence in Oisorio's favor. The trial court specifically found that Oisorio wanted to take the stand in his own defense at trial, told Glass that he wanted to take the stand, and that Glass "refused to allow his client to testify." (T:497). The court emphatically rejected Glass' claim that Oisorio did not want to testify, and wrote that "I do not find Mr. Glasses' [sic] testimony credible." (T:498). The court found that there "was a fight in the hall with his family, contrary to what Mr. Glass testified to." (T:498). The court credited the testimony of Oisorio and his parents, which was corroborated by Laurie Beloff. (R:248-49).

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[7] On October 21, 1993, Oisorio moved the trial court to reopen the hearing based on new evidence that the State had misrepresented to the defense that Glass was not the target of a state criminal investigation at the time he testified for the State. (R:132-45). The State conceded that Glass may have been informed that he was a target of a criminal investigation prior to testifying. (R:148). The State also conceded that the evidentiary hearing should be reopened so that Oisorio could further explore Glass' bias. (R:146). The trial court did not reopen the hearing.

The trial court stated that "Glass did nothing with that Byrd affidavit. He didn't investigate it. He didn't try to talk to anybody about it. He did nothing." (T:497). The court noted that Glass failed to file a severance motion and "never even bothered to think about" filing such a motion. (T:497). The court rejected Glass' "my client confessed" excuse for not investigating the exculpatory testimony. (T:499-500). The court observed: "Sort of like crying wolf, he has used that defense far to [sic] often." (T:500). By contrast, the court credited the testimony of Guillermo Diaz, noting that if Glass had presented a mere presence defense (at a severed trial), "Mr. Diaz could have been called as a witness." (T:499).

Based on these factual findings, the trial court concluded that Glass' performance was constitutionally deficient under Strickland. The trial court also found that Oisorio established prejudice under Strickland. The court considered the material and exculpatory nature of Oisorio's testimony and Diaz's testimony. The court concluded that because Glass' errors prevented Oisorio from presenting this testimony to the jury, the reliability of this verdict was suspect. (R:501).

The court ordered Oisorio's release on bail pending his retrial. (T:487-92). The State appealed. (R:309). The Panel reversed, concluding as a matter of law that Oisorio failed to establish prejudice as a result of trial counsel's unprofessional

errors.[8] The Panel revoked Oisorio's bail. Thereafter, Oisorio invoked the discretionary jurisdiction of this Court, and on October 11, 1995, this Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

The Panel applied the wrong standard for assessing the prejudice to a defendant resulting from his trial counsel's deprivation of his right to testify. Although the Panel purported to apply a standard of prejudice consistent with Strickland v. Washington, 466 U.S. 668, 687-88 (1984), the Panel failed to appreciate the inherent significance of a defendant's testimony and the unique importance of his decision to testify. When a defendant is deprived of his right to testify, prejudice to the defendant should either be presumed, see Gill v. State, 632 So.2d 660 (Fla. 2d DCA 1994), or be viewed as so substantial that only in the rarest of cases can the deprivation be considered harmless.

This case is not such a rare case. The only direct evidence of Oisorio's knowledge of the cocaine in the warehouse was the testimony of one officer that Oisorio made an oral, unrecorded, inculpatory statement. The circumstantial evidence -- Oisorio's association with the other three defendants at the scene and time of the break-in -- was equally consistent with mere presence and lack of knowledge. Glass' failure to permit Oisorio to testify

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[8] Although the Panel indicated that it was also doubtful that Oisorio had satisfied the first prong of Strickland, the Panel did not, nor could it, set aside the trial court's well-grounded factual finding that Glass actively refused to allow Oisorio to testify. State v. Garcia, 431 So.2d 651 (Fla. 3d DCA 1983) ("[D]eterminations concerning questions of fact must be accepted by appellate courts if the record supports the findings.").

about his state of mind -- that he was unaware of his codefendants' plans to steal cocaine from the warehouse -- and about Detective Fernandez's lie, undermines confidence in the reliability of the jury's verdict. Moreover, by also depriving Oisorio of the ability to present the testimony of codefendant Diaz at a severed trial, trial counsel committed another unprofessional error that, viewed together, cumulatively rendered the verdict unjust. Kyles v. Whitley, _____ U.S. _____, 115 S.Ct. 1555 (1995).

ARGUMENT

THE THIRD DISTRICT ERRED IN CONCLUDING THAT DEFENDANT ROBERT OISORIO WAS NOT PREJUDICED BY HIS TRIAL COUNSEL'S ACTIVE REFUSAL TO ALLOW HIM TO TESTIFY

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 Amendment, the Due Process Clause of the Fifth Amendment, and as a necessary corollary to the Fifth Amendment's guarantee against compelled testimony.[9] 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

[9] 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. Oisorio respectfully submits that the Court appears to have simply 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). See also United States ex rel. Wilcox v. Johnson, 555 F.2d 115 (3rd Cir. 1977).

other grds., 928 F.2d 1470 (9th Cir.), cert. denied, 111 S.Ct. 2886 (1991). The right to testify is also guaranteed by the Florida Constitution, Article 1, section 16, which provides that in all criminal prosecutions, the accused "shall have the right ... to be heard in person, by counsel or both." The right to testify is personal to the accused. Teague, 953 F.2d at 1532.

The decision whether to testify often represents the single most important factor in a criminal case. Boyd v. United States, 586 A.2d 670, 673 (D.C.App. 1991); see Anthony Amsterdam, Trial Manual for the Defense of Criminal Cases, sec. 390 (3d ed. 1974); Edward Bennett Williams, The Trial of a Criminal Case, 29 N.Y.St.B.A.Bull. 36, 42 (1957). The waiver of this right must be based on a free and meaningful decision by the accused. United States v. DiSalvo, 726 F. Supp. 596, 602 (E.D.Pa. 1989). Defense counsel bears responsibility for advising the defendant of his right to testify and properly informing him of the state of the law and the legal implications of each choice. Teague, 953 F.2d at 1533. Most important, defense counsel bears responsibility for informing the defendant that the decision whether to testify "is ultimately for the defendant himself to decide." Id.

Because trial counsel's denial of a defendant's constitutional right to testify is evaluated as a claim of ineffective assistance of counsel, Torres-Arboledo, 524 So.2d at 411 n.2, the appropriate questions are whether "counsel's representation fell below an objective standard of reasonableness," and, if so, whether there is a reasonable probability that "the deficient performance prejudiced

the defense." Strickland v. Washington, 466 U.S. 668, 687-88 (1984). The first prong of Strickland is met "if defense counsel refused to accept defendant's decision to testify and would not call him to the stand." Teague, 953 F.2d at 1534; Torres-Arboledo, 524 So.2d at 411 n.2 (counsel is ineffective if counsel "actively refuses" to allow defendant to testify); Gill v. State, 632 So.2d at 661 (counsel is ineffective if he/she "refused to accept the defendant's decision to testify," or "never informed defendant of the right to testify") (quoting Teague, 953 F.2d at 1534); Kersey v. State, 636 So.2d 789 (Fla. 2d DCA 1994) (ordering an evidentiary hearing on 3.850 motion to determine if defendant's right to testify was waived by counsel without the defendant's concurrence and understanding); Merritt v. State, 642 So.2d 845 (Fla. 4th DCA 1994) (same); Williams v. State, 601 So.2d 596 (Fla. 1st DCA 1992) (same). Here, because the trial court found as fact that Glass actively refused to allow Oisorio to testify, the court's legal conclusion that counsel's performance was deficient under Strickland was correct (notwithstanding the unsubstantiated skepticism expressed by the Panel). See Teague, 953 F.2d at 1535 (finding of fact that defendant's will was overborne by counsel must be accepted unless clearly erroneous).

With respect to the prejudice prong under Strickland, at issue here, the court must determine whether

> there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694. Although this principle "should guide the process of decision, the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is challenged." Id. at 696. A defendant need not demonstrate that the presentation of exculpatory evidence would have resulted ultimately in the defendant's acquittal. Kyles v. Whitley, 115 S.Ct. at 1565-66 (reaffirming that a "prejudice" analysis under Strickland is akin to an analysis of the "materiality" of favorable evidence suppressed in violation of Brady v. Maryland, 373 U.S. 83 (1963)). Rather, the question is whether in the absence of the exculpatory evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 115 S.Ct. at 1566. Prejudice is demonstrated if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 1566.

Because "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," Chambers v. Mississippi, 410 U.S. 284, 302 (1973), courts are naturally more skeptical about the reliability of a jury's verdict in cases where exculpatory evidence has been improperly excluded than in cases where inculpatory evidence has been improperly admitted. See Kyles v. Whitley, 115 S.Ct. at 1569 (disclosure of exculpatory evidence would have made a different result reasonably probable); Green v. Georgia, 442 U.S. 95, 97 (1979) (vacating death sentence where trial court improperly excluded exculpatory testimony on hearsay

grounds); Chambers v. Mississippi, 410 U.S. at 302 (trial court's application of evidence rule to prevent defendant from calling witnesses to testify that someone else confessed to crime deemed harmful); United States v. Yizar, 956 F.2d 230, 233 (11th Cir. 1992) (counsel's failure to investigate and utilize the exculpatory testimony of a codefendant at severed trial prejudiced defendant); United States v. Alzate, 47 F.3d 1103 (11th Cir. 1995) (reversing conviction where prosecutor withheld exculpatory evidence material to defendant's duress defense); Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968) (reversing conviction where prosecutor failed to disclose exculpatory eyewitness identification evidence); Mattear v. State, 657 So.2d 46, 47 (Fla. 4th DCA 1995) (reversing conviction where trial court, based on discovery violation, excluded testimony from two witnesses implicating someone other than defendant); Alexander v. State, 627 So.2d 35, 43-44 (Fla. 1st DCA 1993) (reversing conviction where trial court improperly excluded testimony of witnesses regarding defendant's spontaneous statements after shooting); Johnson v. State, 388 So.2d 1088, 1089 (Fla. 3d DCA 1980) (exclusion of a witness' out-of-court utterance, which was relevant to defendant's state of mind, not harmless).

Moreover, when the excluded evidence is the defendant's own testimony, reviewing courts have historically been less confident in the reliability of the jury's verdict than when the excluded evidence is the testimony of another witness. See United States v. Walker, 772 F.2d 1172, 1179 (5th Cir. 1985) (reversing conviction where district court refused to reopen evidence to allow the

defendant to testify); Nichols v. Butler, 953 F.2d 1550, 1553 (11th Cir. 1992) (observing that the testimony of a criminal defendant at his own trial is "unique and inherently significant."); see also Wright v. Estelle, 572 F.2d 1071, 1081 (5th Cir. 1978) (Godbold, J., with whom Goldberg and Tjoflat, JJ., join, dissenting) (noting that "the right to testify resembles other rights recognized as requiring automatic reversal because it is impossible, and perhaps improper, to attempt to judge the effect that the defendant's appearance on the stand would have had on the jury.").

"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 (quoting United States v. Walker, 772 F.2d 1172, 1179 (5th Cir. 1985)). After all, 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). For "[t]he 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).

Courts across the country have adopted three different approaches for analyzing prejudice when trial counsel has deprived a defendant of his fundamental constitutional right to testify. Each of the approaches, however, recognizes the unique importance of a defendant's decision to testify at trial.

First, some courts, including the Second District Court of

Appeal in Gill v. State, supra, the only Florida appellate decision that has clearly addressed the issue, have held that prejudice is presumed 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).[10] Likewise, a federal district court in Maine has approved a per se rule of prejudice for analyzing the deprivation of a defendant's right to testify. United States v. Butts, 630 F. Supp. 1145 (D.Me. 1986) (finding that Strickland prejudice analysis is inapplicable in this context); see also United States v. Poe, 233 F. Supp. 173, 177 (holding that failure to inform defendant of the applicable law concerning his right to testify deprived him of a fair trial), aff'd, 352 F.2d 639 (D.C. Cir.1965); accord Wright v. Estelle, 572 F.2d. at 1081 (Godbold, J., dissenting) ("When personal rights are involved, the harmless error rule does not apply because we are not concerned with the 'ultimate consequences' of trial, but with preventing the individual from being overcome by the criminal

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[10] While the Second District misconstrued the holding in Teague, 953 F.2d at 1534, as adopting a per se rule of prejudice, that should not deter the Court from adopting its own per se rule, in light of the importance of the right to testify under the United States and Florida Constitutions.

process.") (citation omitted).

Other courts, though not applying a per se rule, have viewed the defendant's testimony to be of such inherent significance and the assessment of its impact so speculative that they have placed the burden on the prosecution to prove that the denial of the defendant's right to testify was harmless beyond a reasonable doubt. See Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991) (noting 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."); LaVigne v. State, 812 P.2d 217, 221-22 (Alaska 1991) (observing 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.").

Finally, in a third line of cases, courts have placed the burden of establishing prejudice on the defendant. See Nichols v. Butler, 953 F.2d at 1552-53; United States v. Moskovits, 815 F. Supp. 147, 154 (E.D.Pa. 1993). However, even these courts have recognized that the prejudice prong is nearly always satisfied because of the inherent significance of a defendant's testimony. Nichols v. Butler, 953 F.2d at 1552-53 (finding prejudice despite eyewitness identification because defendant's testimony would have enabled the jury to weigh his credibility against the perception of the eyewitness); United States v. Moskovits, 844 F.Supp. 202, 208 n.8 (E.D.Pa. 1993) ("However, it is certainly arguable that [the defendant's] burden of proof on this prong of the prejudice inquiry

should be softened somewhat to account for the fact that the deficient representation [the defendant] received interfered with his fundamental right to testify."); United States v. Moskovits, 815 F. Supp at 154 (reasoning 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.").

The Panel should have either presumed prejudice, or should have placed the burden on the State to demonstrate that the trial counsel's errors were not harmless beyond a reasonable doubt. Even applying the third standard, which the Panel purported to do, the Panel's decision should be reversed.

The Panel's assessment of the strength of the State's evidence conflicts with established precedent, including the decision in Kyles v. Whitley, issued by the United States Supreme Court only seven days prior to the Panel's decision. The Panel appears to have confused evidence that is "overwhelming" with evidence that is "sufficient" to convict. See Kyles v. Whitley, 115 S.Ct. at 1566 n.8 ("none of the Brady cases has ever suggested that sufficiency of the evidence (or insufficiency) is the touchstone."). Plainly, the evidence in this case cannot be considered "overwhelming," for it was no stronger than the eyewitness testimony from four people who were at the scene of the first-degree murder in Kyles v. Whitley, 115 S.Ct. at 1563. See also United States v. Moskovits, 844 F.Supp. at 208 (court finds prejudice even though the government's case, consisting of testimony from five co-

conspirators, was "strong" and "powerful").

This was a "mere presence" case. The evidence of Oisorio's knowledge of the cocaine, with the exception of the purported oral (unrecorded) inculpatory statement that Oisorio made to Detective Fernandez (with no other witnesses) at the crowded police station, was circumstantial. Oisorio did not speak with the confidential informant. He did not enter the warehouse. He did not load any packages into his car. He did not see the contents of the packages loaded into the car. He did not touch any of the packages. He did not drive the car in a manner consistent with a "getaway driver." There was no evidence that anyone told Oisorio what was going on.

Moreover, the Panel greatly exaggerated the nature and substance of the exculpatory evidence that a defendant must present to establish prejudice. The "now-asserted defensive materials" that the Panel viewed as "patently insubstantial," Oisorio, 657 So.2d at 5, consisted of Oisorio's testimony, under oath and subject to extensive cross-examination by the State, unequivocally declaring his innocence, explaining his presence at the warehouse, asserting his lack of knowledge about the cocaine, and stating that he did not confess to Detective Fernandez. Oisorio's testimony was material, exculpatory, and plausible.

These "defensive materials" also consisted of codefendant Diaz's testimony, under oath and subject to cross-examination, that he never discussed the break-in with Oisorio, nor was it discussed while he was in the car with Oisorio and the Quintana brothers. "The question is not whether the defendant would more likely than

not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. at 1566.[11]

The Panel ignored the teaching of Kyles by sitting as a seventh juror and evaluating whether it would have found the defendant guilty in view of the evidence and the exculpatory testimony. But the Panel did not have the benefit of observing Oisorio's testimony first-hand, and "[t]he facial expressions of a witness may convey much more to the trier of facts than do the spoken words." Walker, 772 F.2d at 1179 (quoting United States v. Irvin, 450 F.2d 968, 971 (9th Cir. 1971) (Kilkenny, J., dissenting)). After all, a reviewing court

> cannot weigh the possible impact upon the jury of factors such as the defendant's willingness to mount the stand rather than avail himself of the shelter of the Fifth Amendment, his candor and courtesy (or lack of them), his persuasiveness, his respect for court processes.

Wright v. Estelle, 572 F.2d at 1082 (Godbold, J., dissenting). By contrast, the trial court observed Oisorio first-hand, found his testimony to be plausible, and wrote:

> As far as prejudice is concerned, that's governed by the reliability of a result. Is there adequate assurance that the verdict in this case was reliable? I find that it was not ... he [Oisorio] should have an opportunity to present a defense to a jury to either believe or not

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[11] In reviewing the Panel's decision, this Court should consider the cumulative effect of all of Glass' unprofessional errors, see Kyles v. Whitley, 115 S.Ct. at 1569 (court must look at cumulative effect of excluded evidence), including his failure to move for a severance based on the Diaz affidavit and present Diaz's exculpatory testimony at a severed trial. United States v. Yizar, 956 F.2d 230, 233 (11th Cir. 1992) (counsel's failure to investigate and utilize exculpatory testimony of a codefendant at a severed trial prejudiced defendant).

> believe him on that defense. I don't know how we can assure the reliability of a defense, when the jury has never even heard the defense.

(T:501) (emphasis added). By taking the stand, Oisorio would have given the jury the opportunity to evaluate his credibility, his truthfulness, his ability to respond to cross-examination, his demeanor and body language, and his willingness to meet the charges head on. He is entitled to have a jury make a determination of his guilt or innocence after a fair trial. Because of his counsel's deficient performance, he has not yet had one.

CONCLUSION

For the foregoing reasons, this Court should reverse the Panel's decision and reinstate the trial court's Order vacating Oisorio's judgment of conviction and sentence. This Court should grant such other and further relief that to the Court seems just and proper under the circumstances.

Respectfully submitted,

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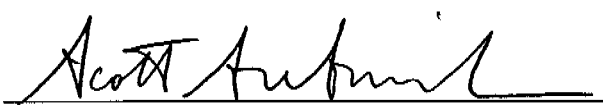
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits 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 6th day of November, 1995.

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