IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,034



ROBERT OISORIO,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

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# RESPONDENT'S BRIEF ON THE MERITS

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## INTRODUCTION

Respondent the **STATE OF FLORIDA**, was the prosecution in the trial court below, and the Appellant in the Third District Court of Appeal. The Petitioner **ROBERTO OISORIO**, was the defendant in the trial court below, and the Appellee in the Third District Court of Appeal. All parties will be referred to as they stood in the trial court. The symbol "R" will be used to designate the record on appeal. The symbol "T" will be used to designate the transcript of the trial court proceedings on the Rule 3.850 motion. All emphasis is supplied unless otherwise indicated.

## STATEMENT OF THE CASE

The State of Florida appealed from a lower court order granting Petitioner's Motions for Post Conviction Relief under Rule 3.850, Fla. R. Crim. 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. (R. 356-357). 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. State v. Oisorio, 657 So. 2d 4 (Fla. 3rd DCA 1995).

Petitioner then moved for certification to this Court based on a perceived direct conflict with Gill v. State, 632 So. 2d 660 (Fla. 2nd DCA 1994). The Third District, in a per curiam opinion, acknowledged said conflict, but denied the motion for certification. (R. 358-360). 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 post conviction relief for alleged ineffective assistance of counsel. 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. (R. 358-360). This Court then accepted jurisdiction of this cause, after review of both parties jurisdictional briefs.

## STATEMENT OF THE FACTS

On January 2, 1990, defendant and co-defendants Francisco and Luis Quintana, and Guillermo Diaz, were charged by information with trafficking in over 400 grams of cocaine. (R. 1-4). On July 13, 1990, a jury found all four defendants guilty as charged. (R. 30-31). Defendant was sentenced to a minimum mandatory 15 year prison sentence. (R. 6, 39). Defendant's Motion for New Trial was denied by the court, (R. 36-37A), whereupon he appealed his judgment and sentence to the Third District Court of Appeal, alleging that the evidence was legally insufficient to prove the defendant guilty of constructive possession of cocaine. (See Appendix A-D, attached hereto. [1]). On September 3, 1991, this Court affirmed defendant's judgment and sentence in a per curiam opinion. (Appendix C-D [2]).

On May 4, 1992, defendant filed a Motion for Post Conviction Relief pursuant to Rule 3.850, Fla.R.Cr.P. (R. 39-44), alleging that he was denied ineffective assistance of trial counsel because trial counsel refused to allow defendant to testify

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[1]Copies of the briefs of both Appellant and Appellee, as well as the Third District's opinion and mandate, filed in defendant's direct appeal from his judgment and sentence to this court, at appellate case number 90-1986, are attached to Respondent's brief to the Third District in case number 94-595 and are referred to as Appendicies A-D. These briefs should be included in the Record on Appeal in this cause, and Respondent will be glad to produce same upon the court's request. References to the evidence adduced at defendant's initial trial herein will be derived, to the extent possible, from these appellate briefs, and will direct the court to the appropriate page number of either Appendix A or B. References to the trial transcript itself will be designated by the symbol "ST", and Respondent filed one copy of the initial trial transcript in case number 90-1986, in the Third District below. (R. 326).

[2]Oisorio v. State, 585 So. 2d 942 (Fla. 3rd DCA 1991).

at his trial, and that trial counsel should not have allowed his co-defendants' confessions, allegedly implicating defendant, to be admitted into evidence without objection or limiting instruction at trial. (R. 42-43). On June 29, 1992, defendant filed an amended Motion for Post Conviction Relief, (R. 50-51), alleging defendant was denied his fundamental right to testify at his trial under both the Florida and United States Constitutions. On September 16, 1992, defendant filed a second amended Motion for Post Conviction Relief, (R. 57-58), alleging that trial counsel was ineffective for failing to move to sever defendant's trial from that of his co-defendants based on an allegedly exculpatory signed statement of one of his co-defendants, and further alleging ineffective assistance of appellate counsel.[3]

On December 3, 1992, a hearing on defendant's Motions for Post Conviction Relief was held before Judge Thomas Wilson, (T. 31-46), at which time counsel for defendant requested that an evidentiary hearing on defendant's allegations of ineffective assistance of counsel be held. (T. 31). After lengthy argument by both the defense and the State, the lower court took the matter under advisement, (T. 46), and on December 9, 1994, granting defendant's request for an evidentiary hearing based on defendant's allegations that he was denied his right to testify and that trial counsel should have utilized co-defendant Diaz's purportedly exculpatory affidavit under Taylor v. State, 472 So.2d 814 (Fla. 3rd DCA 1985). (T. 50-59).

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[3]Defendant's claim of ineffective assistance of appellate counsel was subsequently withdraw below pursuant to the State's Motion to Dismiss Defendant's Motion for Post Conviction Relief. (R. 59, T. 23-24, 57).

On February 12, 1993, the evidentiary hearing commenced, and the defendant testified as the sole witness on his own behalf. (T. 81-212). He testified that he had no prior criminal record, that he had used Glass as a divorce attorney, and that his parents paid him $15,000, in installments, to handle the trafficking case. (T. 83-85). Defendant stated that he told Glass that he was innocent of the charges, and pushed him to go to trial. (T. 87). Upon defendant's request, Glass allegedly prepared three affidavits, one for each co-defendant, gave them to the defendant, and told him to speak to each co-defendant and have them each sign an affidavit swearing to defendant's innocence, and return the signed affidavits to Glass. (T. 88). Glass allegedly didn't want any of the co-defendant's attorneys to know about these affidavits. (T. 88-89).

The defendant took one of the affidavits to co-defendant Diaz at the stockade, who signed the affidavit after having it explained/translated to him by one of the security personnel there. (T. 91-92, R. 204-206). It is undisputed that the affidavit signed by Diaz was neither dated nor notarized. (R. 204, T. 40-46). The defendant gave the affidavit to Glass, and his impression was that Glass was going to give it to the court. (T. 93). Neither the defendant nor Diaz ever told Glass that the affidavit was untrue. (T. 93).

The defendant also testified that he was offered a plea to conspiracy to traffick in cocaine, and a three year minimum mandatory sentence, in exchange for his testimony against his co-defendants, and that defendant rejected the offer because he was not guilty. (T. 94). He insisted that he never told Glass that he was guilty of the

charges, or that he knew that drugs were involved. (T. 95). Glass never talked to the defendant about pleading guilty, thought that the state had a very weak case on the defendant, and believed that he could obtain an acquittal for the defendant. (T. 97-98). The defendant's father also hired Glass to handle defendant's appeal to this Court. (T. 97).

During the joint trial of all four co-defendants, Detective Fernandez testified that the defendant had made an oral confession, admitting his knowing participation in what was thought by the defendants to be a drug "rip-off", to him. (T. 98-99[4]). During this testimony, defendant knew the detective to be lying, and told Glass that he wanted to testify to set the record straight. (T. 99). When the state rested, the court offered the defense a short recess to discuss whether any of the defendants were going to testify. (T. 33-36, 99). Defendant and his parents then accompanied Glass into the hallway, where, according to the defendant, he again told Glass he wanted to testify, and Glass adamantly refused to let him do so, stating that he could deal with Fernandez's testimony in closing arguments. (T. 100-107). Defendant stated that Glass refused to discuss the issue further and told defendant, while poking his finger into defendant's chest, that if he wanted to testify, Glass would immediately resign from the case. (T. 104-107). Defendant's parents, who spoke little or no English, allegedly witnessed this heated discussion, and after its conclusion, defendant translated it to them in Spanish. (T. 101-103). Upon returning to the courtroom, all

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[4]See Appendix A and B for an account of the facts on the case elicited at trial.

of the defendant's declined to testify, and rested. (T. 107). All four were subsequently found guilty by the jury, (T. 109), and Glass was retained by defendant's parents to handle his appeal, for an additional fee. (T. 110).

On cross-examination by the State, the defendant stated that Glass told him that he would handle Fernandez's testimony on cross-examination, and wouldn't let the defendant testify. (T. 115, 155, 159). Glass wouldn't give defendant a reason for not letting him testify other than that his "strategy" was to cross-examine Fernandez. (T. 116-117). Defendant stated that he assumed this was Glass' "trial tactic". (T. 118). He stated that he wasn't aware of whether he was or was not "allowed" to testify, that he wanted to testify, and that Glass told him that if he did so, he'd "walk away from the case." (T. 118, 123). He reiterated that he didn't know that a crime was going to take place when he drove to the warehouse. (T. 127).

The defendant was then questioned at length about the trial, his version of the events leading up to his arrest, and his relationship with his co-defendants. (T. 127-210)[5] He stated that he went to the warehouse because co-defendant Francisco Quintana asked him to give the co-defendants a ride to meet an unknown person there. (T. 141, 149-150). He had met co-defendants Diaz, and Luis and Francisco Quintana in a bar 9-10 months before the crime, and saw these men 4-5 times a month thereafter. (T. 143). He was not aware of the fact that Diaz was an escapee from a Georgia prison. (T. 142). A week before the arrest, he had rented a car

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[5]Compare the Statement of the Facts as set forth in Appendix A and B.

because his company car had not arrived.[6] (T. 144). When the car arrived two days later, Luis Quintana asked defendant to borrow the rental car, a Ford LTD, for the rest of the week, as it had already been paid for. (T. 144-145). He agreed to let Quintana use the car, and Quintana never told him about any drug deal. (T. 145). On the night of the arrest, defendant drove the Mitsubishi to Quintana's house to pick up the Ford, asking Quintana to meet him at the rental agency so he could return the Ford, whereupon Quintana's brother Francisco said he had to meet someone at the warehouse, and asked for a ride. (T. 146, 149-150). Luis Quintana drove the Mitsubishi to the warehouse, while defendant, driving the Ford, took Francisco and Diaz to the warehouse.[7] (T. 145-147). Defendant got out of the car, and "they" told him to get back into the car and wait. (T. 139-141, 148). He was out of the car only briefly, and never left the drivers side door, nor went to the trunk of the car. (T. 139-141). Defendant never asked the others why they went into the warehouse or why he was to wait in the car. (T. 148). The co-defendants went into the warehouse, then returned and asked defendant to open the trunk of the Ford, so he pushed the button in the glove box to do so. (T. 149). Again, he didn't know, nor ask why he needed to pop the trunk, (T. 150), and never looked into the trunk of the car. (T. 133-

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[6]The defendant testified that he was a representative for Mitsubishi Motors at the time he rented the Ford LTD in his own name at Miami International Airport. (T. 205-206).

[7]At some point, either at the warehouse or immediately before arriving there, Luis Quintana exited the Mitsubishi and got into the Ford with the others. (T. 146-147).

134, 139-141).

The Defendant was shown several photographs of the rental car that had been admitted into evidence at his trial,[8] and he testified that he did not see the weapons, which were shown to be both in the front seat and the trunk, before in his life, although he recalled seeing weapons at trial. (T. 127-141). He didn't recognize the photo of the car or the flashlight or handgun depicted to be in the middle of the front seat between the driver and passenger sides, (T. 130-132), and testified that neither the flashlight nor handgun were in the car the night of his arrest. (T. 128-133, 194, 198-199). Defendant likewise didn't recognize the photo of the trunk of the car or the clothing or weapons contained therein, reiterating that he never was at the trunk, nor looked in the trunk that night. (T. 133-141). He conceded that if the handgun was in the front seat as depicted in the photo, he would have seen it as the driver of the car. (T. 132).

When confronted with a quotation from the trial testimony of one of the surveillance detectives involved in defendant's arrest to the effect that all four of the defendants exited the car, went to the trunk, and the defendant opened the trunk, (T. 170-171)[9], the defendant again stated that he did not recall this testimony, nor went to the trunk of the car. (T. 172-173). The state then repeatedly played a surveillance videotape recorded by detectives involved in defendant's arrest and admitted into

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[8]The entire trial record and transcripts were provided to the trial court below.

[9]Quoting from the trial transcript at page 326.

evidence at trial, (T. 173-184), which showed defendant at the trunk of the car. The defendant continued to deny that he ever went to the trunk of the car. (T. 181). He further denied confessing to Detective Fernandez, stating that he told the police that he didn't know that was going on at the warehouse. (T. 191).

The defendant further testified that he was never involved in any cocaine deals with anyone, including his co-defendants, (T. 151), that he never told Glass that he was guilty, (T. 151), that Glass never told defendant that he wasn't going to use the Diaz affidavit, and that he never asked Glass about using the affidavit because it never crossed his mind to ask about it (T. 153-157). He stated that he was unhappy that he couldn't testify, unhappy with the verdict, but that he never-the-less hired Glass to handle his appeal because he didn't know anyone else to do it. (T. 160-162). He also stated that he approached both Luis and Francisco Quintana with the same affidavit signed by Diaz, but that they refused to sign them because Francisco felt they were all friends and should all do time together, and Luis' wife convinced him not to sign. (T. 166-170). At the conclusion of defendant's testimony, the defense entered attorney Lori Beloff's deposition into evidence [10] and rested its case. (T. 210-212).

Defense counsel then argued at length that Glass was ineffective for failing to let defendant testify at his trial, that defendant was coerced by Glass not to testify, that Glass failed to use the Diaz affidavit for no good reason, and that based on the

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[10] Beloff had represented Francisco Quintana at trial and her deposition was entered to rebut Glass's assertion that Beloff had covered the depositions taken pre-trial in this case on his behalf.

original Diaz affidavit coupled with two new affidavits procured from Diaz on November 3, 1992, (R. 204-211), Diaz would have testified at defendant's trial if it had been severed. (T. 211-234). The State responded throughout that the second prong of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), requiring a showing of prejudice to the defendant, hadn't been met by defendant's testimony, as there was no showing that the result of defendant's trial would have been different if he had been allowed to testify. The State further argued that the law in Florida does not require a personal waiver from the defendant of his right to testify, that a defendant's lawyer may waive the right, and that if a defendant disagrees with that decision, he is under an affirmative duty to so inform the court. The state argued that defendant's testimony was incredible, that his testimony supported a finding that the decision that defendant not testify was a tactical one made by Glass, and reiterated its motion to exclude the Diaz affidavits as hearsay, and that the original affidavit was also facially insufficiency because it was unsworn and undated.[11] (T. 212-234).

In an unusual posture on the exclusion of the affidavits, the Court refused to rule, and instead decided to call co-defendant Diaz as a court witness on the use of affidavits/exculpatory evidence issue, despite the fact that the defense had rested. (T. 226-234, 239-240). When Diaz was brought to court, both defense counsel and the

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[11] These arguments were essentially the same as were made by the parties at the December 3, 1992 hearing on the issue of whether to hold an evidentiary hearing in this matter. (T. 31-46).

State reiterated that neither party had called Diaz as a witness. (T. 239-240). The court acknowledged that Diaz was being called as a court witness, to rebut the State's objection to the admission of Diaz's affidavits. (T. 239-240). Co-defendant Diaz was then called to testify through the use of an interpreter, with defense counsel offering to question him first, as a courtesy to the court. (T. 240, 243-285).

At the outset of Diaz's questioning, the defense laid the predicate for the admission of the three affidavits by questioning Diaz as to these documents, (T. 244-249), and then moving them into evidence. Diaz stated that he signed the original affidavit and the subsequent, 1992 affidavits, based on "someone" telling him what was in the affidavits. (T. 245-248). The state requested permission to voir dire the witness prior to the admission of the affidavits, and pursuant thereto, Diaz testified that he read no English, that the documents were all the same, and read to him before he signed them. (T. 250). Diaz further stated that he couldn't say in English what the documents said. (T. 251-252). The state then proceeded to cross-examine Diaz. (T. 252-276).

Diaz testified that he and his co-defendants had gone to the warehouse in question to steal money, not drugs, and should have been convicted of theft instead, pursuant to the unified defense presented at trial. (T. 252-255). He said that the CI told him that a Colombian money laundering ring was operating out of the warehouse, and that he went to the warehouse to get the money, not drugs, and therefore was not guilty of drug trafficking. (T. 252-255). He told this to Detective Fernandez and his own attorney, and he stated that Fernandez didn't read him his rights or say

anything to the defendants after arrest. (T. 255). He further testified that he didn't confess to Fernandez, and that he never spoke to the defendant about what was going to happen at the warehouse. (T. 256-258). However, he conceded that he couldn't say whether the Quintana brothers had told defendant what was going on at the warehouse, or what defendant was told regarding driving his co-defendants to the warehouse. (T. 258-260). He didn't want to attend the evidentiary hearing because he couldn't smoke cigarettes, and didn't want to lose his gain time. (T. 261-262).

Diaz went on to express his dissatisfaction with his own lawyer, Ron Gainor, because he was found guilty and had told Gainor that the plan was to steal money, not drugs. (T. 264, 267-268). He admitted that when arrested for this crime he was an escapee from prison, where he was serving time on marijuana trafficking charges. (T. 264-265). Diaz stated that he didn't traffick in marijuana, but he never-the-less took a plea to three years in jail. (T. 265-266). He never told his attorney about the affidavit defendant brought him in jail, (T. 268), and he said that his attorney told him not to testify at trial, that it was better to say nothing, and that he followed that advice. (T. 269-270). He also stated that his attorney never spoke to him during trial about taking the stand, and that the judge never asked, after the State's case, whether the defendants were going to testify, nor took a break for this purpose. (T. 269-270).

As to the facts of the crime, Diaz said that it was the CI's idea to steal the money from the warehouse, that the CI had spoken to Francisco Quintana and himself about this, and that prior to going to the warehouse, Francisco and he were in one car and the defendant and Luis Quintana were in another car. (T. 271-272). Just before

arriving at the warehouse, he and Francisco met up with defendant and Luis, and they got into defendant's car. (T. 272). They used a crowbar to break into the warehouse, (T. 272-273), which they got from the trunk of the car, but he never saw the weapons in the trunk until police took them, because he didn't look in the trunk. (T. 273).

On redirect, Diaz stated that only he and Francisco Quintana had any contact with the CI, and that to his knowledge, defendant never spoke to the CI, nor was present when he and Francisco discussed doing this burglary, over the course of a two week period. (T. 276-279). On recross, Diaz stated that defendant had come to the warehouse with Luis Quintana, and was not there due to anything Diaz had said or done, that the first time Diaz learned that defendant was involved was when defendant drove up with Luis, but he wasn't surprised because he saw defendant every day, although it was only supposed to be himself and Francisco in the deal. (T. 279-281), that the CI tricked them, because it was only supposed to be money in the warehouse rather than drugs, that Luis Quintana probably knew of the deal because he was Francisco's brother, and that he didn't mind splitting the money four ways as opposed to two ways, because if all four participated, each should get a part of the money, that Diaz never saw any firearms, and that defendant never asked any questions during the course of this entire episode. (T. 278-285).

Diaz's trial attorney, Ron Gainor, was then called as a state witness. (T. 286-329). He testified that all of the lawyers in the case agreed to present a unified front at trial early on, so as not to point fingers at each other, and they had several very brief meetings about the case. (T. 286-287). Diaz never told Gainor about the

affidavit given him by defendant, mentioned testifying for defendant, nor told Gainor he or Diaz was not guilty of the charges. (T. 287-288). If Diaz had brought up testifying for defendant, he would have discussed it further with his client, and would have advised him against it, although it never came up. (T. 288). If Diaz had wanted to testify and lie, he would have had to do so via free-flowing narrative, and Gainor would definitely have not encouraged him to do so. (T. 289).

Gainor believed that Lori Beloff sat in for Glass during depositions, and could have sworn Beloff told him she was doing so. (T. 289, 301). He, attorney Gottlieb, and Glass were all in accord on a unified defense, and he thought that Glass actively participated at trial, held up his end, and did a good job under the circumstances. (T. 290). He spoke to Diaz about testifying during the recess after the state had rested at trial, (T. 291), and while in the hallway observed at least some of the conversation between Glass and defendant, which seemed like a normal, regular conversation, and he didn't see arms waiving, hear loud voices, or observe an interpreter with Glass's group. (T. 291-297). He said that he thinks he'd remember if the conversation seemed adversarial, and that it did not appear adversarial. (T. 295-297). He stated that weapons were found in the Ford LTD, and displayed to the jury during trial, (T. 300), that none of the lawyers filed motions to suppress evidence, (T. 303, 318), that the trial testimony held few surprises as compared to the deposition testimony, (T. 306), that Glass never told him nor showed him any "Byrd" affidavit from Diaz, nor did anyone else, (T. 309-311), and that he would have told Diaz not to sign the affidavit if he thought it was perjury. (T. 319).

The court then commenced questioning the witness, asking him what Glass's defense was in this case. (T. 319). After responding that it was a unified defense that the defendants were at the warehouse to rip off money, not drugs, the court inquired if Glass ever told Gainor about a "mere presence" defense. (T. 319-320). Gainor didn't recall any discussion of this with Glass, whereupon the court asked if an attorney should make a motion to sever a case if he has a "Byrd" affidavit in his file. (T. 320). Gainor replied, "I believe so." (T. 320). The court then inquired if Gainor wouldn't have asked for a severance if he had a client who told him he was "merely present", whether or not he would have used that defense instead, and whether or not that was a safer defense than arguing that they were there to burglarize a warehouse for money. (T. 320-321). Gainor replied affirmatively to all three questions, and the court then asked him what the standard is for allowing a client to testify, and what he does if the client wants to do so against counsel's advice. (T. 321). Gainor said he would make a court record to that effect. (T. 321).

On redirect, Gainor stated that he would try to talk a client out of taking the stand and lying, that if Glass thought the affidavit was perjury, it was not unsound not to use it, and that the choice of a trial defense is a strategy decision not subject to a Rule 3.850 motion. (T. 326-328). He concluded by stating that a defendant is entitled to a threshold level of competency of counsel, that he presumably got that in this case, and that Glass did a good job in this case. (T. 328-329).

Finally, attorney Stephen Glass testified on his own behalf. He stated that he had represented Oisorio and his sister before with no complaint, and that he referred

Lori Beloff one of defendant's co-defendants before trial. (T. 330-331, 359, 372). His understanding was that Beloff was to cover depositions for him in this case, and that she was compensated for that. (T. 331-332). Several checks from Glass to Beloff were shown to Glass, and on voir dire by the defense, it was established that none of these could conclusively be said to relate to this case. (T. 332-350). Glass insisted that he had a financial relationship with Beloff as to other cases, and that she got paid for covering depos in this case. (T. 350-356). He had a disagreement with Beloff over moving office space, and their relationship ended on unfriendly terms. (T. 357-360).

The defendant told Glass that he had known the other defendants in this case for awhile, and had done at least one other narcotics transaction with them. (T. 360). One of the co-defendants had told defendant about a warehouse full of cocaine which they decided to rip off, and defendant was to be the getaway driver. (T. 360). To this end, defendant rented a car, but Glass didn't recall if defendant was to be paid with money or cocaine. (T. 360). He and the defendant discussed a plea, and defendant was concerned that other defendants would "flip" against him, so he brought Glass an affidavit from one of them which was exculpatory. (T. 362). Glass insisted that he didn't prepare the affidavit, that it was prepared on a typewriter and he only has a computer, and the state displayed Glass's normal pleadings, which are always captioned differently. (T. 363-364, 390-391). He stated that defendant brought him the affidavit solely to prevent his co-defendant's from testifying against him, that defendant wanted to get similar affidavits from the other defendants but didn't bring him any other affidavits, and that if he had intended to use the affidavit as a "Byrd"

affidavit, he would have been ethically obliged to discuss that with the other defendant's lawyers, and before approaching any defendant for that purpose. (T. 364-365, 391-392). He didn't use the affidavit because he knew it to be perjury based on defendant's confession to him, wouldn't encourage either defendant or Diaz to testify and thus perjure themselves in court, and if a defendant wants to do so must do so via narrative. (T. 366-367, 383, 392-393, 396).

Glass testified that Detective Fernandez stated at trial that defendant confessed and was to get paid with cocaine, but the defendant denied that he confessed to Fernandez. (T. 361). Glass felt he cross-examined Fernandez, and tried the case, to the best of his ability. (T. 368). He maintained that during the recess after the state rested its case, the defendant reiterated their previous discussions that he didn't want to testify. (T. 368, 384). Glass felt that he had a colorable defense which he could support with his cross-examination to obtain an acquittal, and he felt he could successfully argue that this was nothing more than a burglary, not drug trafficking. (T. 368). He tried to get the state attorney to reduce the charges to burglary, to no avail. (T. 368-369). The defendant told Glass that he didn't want to testify, and if defendant hadn't confessed his participation to Glass, Glass would have encouraged defendant to testify, as he was well-educated and would make a good witness. (T. 369). He told defendant not to testify, and defendant agreed with Glass. (T. 369-370, 384). Glass stated that he informed defendant that he would have to testify in narrative form if he took the stand, and that on cross-examination might get caught in his lies. (T. 370). In sum, Glass denied that defendant ever told him he wanted to

testify, and denied that any altercation, or "finger-poking" occurred in the hallway. Glass stated that defendant was not mad at him, and in fact retained Glass to handle his appeal. (T. 370-371).

Glass considered advancing a "mere presence" defense at trial, but made a "tactical decision" to reject the defense based on the amount of evidence against defendant, including his confession to Fernandez, and the videotape of defendant's participation in the deal. (T. 373). In Glass's experience, a court would give more credit to such a defense than a jury, and the defendant's confession, coupled with the videotape showing "nasty looking" guns in the car, caused Glass to conclude that a jury wouldn't buy a mere presence defense. (T. 373-375). He believed that he could better convince a jury that the defendants intended to steal money rather than drugs, to avoid the minimum mandatory sentence under the trafficking guidelines, and as defendant had no prior convictions, would only be subject to nonstate prison if convicted of burglary. (T. 375-376). He felt that since the cocaine in the case was concealed in a duffel bag, rather than wrapped in clear packaging as it usually was, the burglary defense had added credibility. (T. 375-376). He also considered filing a motion to suppress in this case, but felt it to be merit less, and declined to do so as not to lose credibility with the court. (T. 377-378).

Glass reiterated much of this testimony on cross-examination, (T. 383-396), adding that in his experience, a client doesn't confess to a crime when he is innocent, (T. 396). Defense counsel then launched into very lengthily cross-examination of defendant about prior Florida bar complaints lodged against Glass by his prior clients,

over repeated and continued relevancy objections by the state. (T. 396-417, 425-451). Glass remembered and discussed each complaint, despite the trial court's ruling finding to the contrary. (T. 396-451, 499). At the conclusion of this testimony, it was established that nine out of eleven of the bar complaints discussed had been dismissed, and two were still pending. (T. 451).

Glass reiterated on cross that defendant's parents were not there when he discussed the defendant testifying in the hall, as he had walked them down to the smoking section, and that there was no disagreement, heated altercation, or finger poking over the issue, nor did he threaten to walk away from the case. (T. 454-456). On redirect, he stated that less than 2% o the 500-700 clients he's represented over the last 13 years had filed bar complaints against him, that he never had a bar complaint stand, nor was convicted of a crime, and that it was not unusual for criminal defendants to file bar complaints against defense attorneys as well as prosecutors. (T. 457-461). He again stated that it was not in defendant's best interest to testify, that he didn't want to do so, that it would have to have been done as a narrative, and that the defendant lied about this because he was a desperate man in a desperate situation, facing a 15 year minimum mandatory, and attacking Glass was defendant's last hope for release. (T. 462-464).

On recross, the court took over questioning Glass, (T. 467-475), finding Glass's statements that he had no notes pertaining to either the "Byrd" affidavit or defendant's confession in his file for security reasons, and reiterated that the Diaz affidavit was secured by defendant as an insurance policy, rather than a "Byrd" affidavit, that

defendant agreed not to use the affidavit, and that he would have been suborning perjury by using the affidavit. (T. 471-473). He further reiterated that his defense in the case was that defendant intended to commit a burglary rather than trafficking, and the court then inquired why he had argued that the defendant was merely present on appeal, and how that would be consistent with his trial defense. (T. 473-474). Glass replied that a legal argument on sufficiency of the evidence was appropriate for the appellate court, (T. 474), whereupon the court asked if Glass wasn't under an obligation to file an "Anders" brief rather than some "frivolous defense that doesn't apply". (T. 474). Glass again stated that a mere presence defense was a good legal issue for a court, but not effective before a jury. (T. 475).

On January 7, 1994, the lower court granted defendant's motion for post conviction relief in a lengthy oral ruling finding ineffective assistance of trial counsel. (T. 496-501, R. 157-159). In so finding, however, the court specifically stated that "This is not to indicate in any way, shape or form that Mr. Oisorio on a new trial will be acquitted. Frankly, he's going to have a rough road to hoe." (T. 501).

On January 12, 1994, after stating that the fact defendant prevailed on his post conviction motion "is by no means an indication Mr. Oisorio will prevail in the upcoming trial." (T. 489), the court granted defendant a $10,000.00 bond. (T. 487-492). This bond was revoked during the oral argument before the Third District Court of Appeal, who reversed the lower court order at the conclusion of oral argument, and ordered Petitioner to be taken into immediate custody at that time, where he remains pending the outcome of this appeal.

## QUESTION PRESENTED

WHETHER THIS COURT SHOULD ADOPT BOTH THE PERFORMANCE AND PREJUDICE PRONGS OF STRICKLAND v. WASHINGTON, 466 U.S. 668 (1984) AS THE LAW IN FLORIDA GOVERNING EVALUATION OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS BASED ON A DEFENDANT'S ALLEGATION THAT HE WAS DENIED THE RIGHT TO TESTIFY IN HIS OWN BEHALF AT TRIAL. (RESTATED).

## SUMMARY OF THE ARGUMENT

The sole issue before this Court is whether to explicitly overrule Gill v. State, 632 So. 2d 660 (Fla. 2nd 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) or whether to adopt the holding in Gill, and deviate from the two prong Strickland test followed by virtually every jurisdiction in this country.

Respondent submits that this Court should unequivocally quash Gill and follow Strickland, as there is simply no legal, equitable, or public policy reason to support the position enunciated in Gill or advocated by Petitioner.

The Third District Court of Appeals correctly interpreted and set forth the law in Florida with regard to the standard for obtaining post conviction relief based on a claim of ineffective assistance of counsel in denying Petitioner's motion for certification (R. 358-360) and Respondent submits that this Court should explicitly adopt the well reasoned opinion of the Third District in this cause.

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. Both Teague and companion case Nichols v. Butler, 953 F. 2d 1550 (11th Cir. 1992)(en banc), cert. denied, __U.S.__, 113 S.Ct. 127, 121 L. Ed. 2d 82 (1992), upon which Gill's interpretation of these cases to the contrary.

Respondent submits that the Third District's interpretation of Teague is clearly correct, as is their conclusion that "the court in Gill misapprehend" this holding, which Petitioner concedes in his brief. As Strickland makes clear, deficient performance by counsel alone is not grounds for reversal of a validility obtained conviction based on overwhelming, competent evidence, such as was presented at defendant's trial below. There is simply no logical legal, equitable, or public policy reason for this Court to deviate from this standard and adopt a per se rule that elevates the right to testify, whether truthfully or perjuriously, above all other constitutional rights. In Torres - Arboledo v. State, 524 So. 2d 403 (Fla. 1988), this Court adopted the position that the right to testify is not so fundamental as to merit the adoption of a per se rule in Florida which would do away with the eminently logical and almost universally adopted "prejudice prong" requirement of Strickland. Petitioner's position would open the door to literally every defendant to claim ineffective assistance of counsel based on allegations, whether truthful or false, that their counsel denied them the right to testify at trial where the trial record was silent in this regard, with the outrageous result that they could prevail on these claims despite no showing whatever that their testimony would have produced an acquittal. This Court must unequivocally reject Petitioner's position, quash Gill, supra, and clearly adopt the two-pronged Strickland standard as the law in Florida.

## ARGUMENT

Appellant's issue and argument as framed, that the Third District erred in finding no prejudice to defendant resulting from trial counsel's alleged failure to allow defendant to testify in his own behalf, has nothing to do with the conflict question to be resolved by this Court. The sole issue before this Court is whether to explicitly overrule Gill v. State, 632 So. 2d 660 (Fla. 2nd 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) or whether to adopt the holding in Gill, and deviate from the two prong Strickland test followed by virtually every jurisdiction in this country.

Respondent submits that this Court should unequivocally quash Gill and follow Strickland, as there is simply no legal, equitable, or public policy reason to support the position enunciated in Gill.

Respondent submits that in Oisorio v. State, supra, the Third District Court of Appeals correctly interpreted and set forth the law in Florida with regard to the standard for obtaining post conviction relief based on a claim of ineffective assistance of counsel in denying Petitioner's motion for certification (R. 358-360) and submits that this Court should explicitly adopt the well reasoned opinion of the Third District in this cause.

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 who 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 post conviction 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 misapprehend" this holding.

Oisorio v. State, supra. Indeed, Petitioner, in its brief, concedes that "the Second District misconstrued the holding in Teague ... as adopting a per se rule of prejudice ... (p. 19 fn. 10), but argues that this Court should never-the-less promulgate its own per se rule despite the clear "prejudice" requirement repeatedly set forth by the United States Supreme Court in Strickland, Teague, and its progeny. There is no reason on earth to do so.

In Strickland, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court announced the definitive standard under which claims of ineffective assistance must be evaluated. As previously quoted from Teague, supra, a defendant must demonstrate both that counsel's performance was deficient, and that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendant of a trial who result is reliable. Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and a fair assessment of performance of a criminal defense attorney "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time ... [A] court must indulge a strong presumption that criminal defense counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial stragedy." Strickland, id.

Further, strategic choices made by a criminal defense counsel after thorough investigation of law and facts relevant to plausible options are "virtually unchallengeable", and when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And even if a criminal defendant shows that particular errors of defense counsel were unreasonable, the defendant must show that the actually had an adverse effect on the defense in order to establish ineffective assistance of counsel. The test for prejudice requires the defendant to show that, but for counsel's unprofessional errors, the result of the proceeding would have been different, or, alternatively stated, whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. A claim of ineffective assistance of counsel is a mixed question of law and fact, to be resolved by an examination of the totality of the circumstances and a review of the entire record.

It has additionally been held that the test for determining whether counsel's performance was deficient has nothing to do with what "best" lawyers would have done or what most good lawyers would have done. White v. Singletary, 972 F. 2d 1218 (11th Cir. 1992), Strickland, supra. The standard is not a high standard, and the court does not determine what an ideal attorney would have done in a perfect world or even what the average attorney might have done on an average day; instead, the "case by case inquiry focuses on whether a particular counsel's conduct was reasonable effective in context." Atkins v. Singletary, 965 F. 2d 952 (11th Cir.

1992). Effective assistance of counsel does not mean "error less" counsel. Adams v. Wainwright, 709 F. 2d 1443 (1983).

Within the context of these preliminary standards, in conjunction with the evidence adduced at both the trial and evidentiary hearing, and the law pertaining to the specific allegations of trial counsel's alleged error, it is clear that the defendant herein did not establish either that trial counsel's performance was deficient, or that he was prejudiced such that the result of his trial would have been different, so as to satisfy the dictates of Strickland and its progeny.

The lower court in this cause ruled that he believed the defendant's claim that defendant wanted to testify in his own behalf at trial, finding Glass's statement to the contrary to be incredible. (T. 497-499). However, the court did not go so far as to disbelieve Glass's testimony that the defendant had confessed to him, and in that respect, ruled as follows:

> The defendant in any criminal case has an absolute right to testify; whether he testify to the truth or whether he testify to perjury. He also has a right to have a jury trial or a non-jury trial. And he has the right to plead guilty or not guilty. After that the lawyer handles the case. Mr. Glass did not honor that right to testify. Perjury can be handled in many different ways. Primarily, you can tell the court that your client is going to -- you believe your client is going to perjure himself and let the court make some decision. You could ask the court to withdraw. You might have to return a portion of the fee. I don't think that is a reasonable alternative as far as Mr. Glass. I don't think that he would ever consider returning any portion of a fee. You could direct the client to testify or not testify or not direct the client to testify. If he wants to testify, you ask him his name, what he wants to tell the jury and then ask him if there's anything else that he wants t say. And when he finished his statement, you can then ask the state to cross-examine. I believe that to force someone not to testify is wrong. Mr. Oisorio wanted to testify. Mr. Glass did not want him to testify. The family corroborates Mr.

> Oisorio's description of what took place in the hall. And I believe Mr. Oisorio acquiesced to the authority of his attorney, who was in charge of helping him. And consequently did not testify at that trial.

(T. 497-499).[12]

Respondent maintains that the lower court's ruling was an incorrect statement of the law, and its credibility findings were refuted by the record. Even assuming, however, that the credibility issue is resolved in favor of defendant on this point, [13] the law is clear that "Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely." Nix v. Whiteside, supra. The court in Nix went on the say that "there is no right--constitutional or otherwise--for a defendant to use false evidence", and that "the right to counsel includes no right to have a lawyer who will cooperate with planned perjury." The

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[12] Defendant's parents executed affidavits in this case stating that defendant told Glass during the recess that he wanted to testify, and that Glass pointed his finger in defendant's chest and told him he would not let him testify. The affidavits further aver that although they are written in English, they were translated to Spanish for the affiants prior to their execution. These affidavits were provided to the Third District in Appellant's Motion to Supplement the Record on Appeal. (R. 314-324).

[13]Respondent respectfully submits that a review of the evidentiary hearing transcript reveals that the trial court assumed a decidedly defense-oriented slant below, negating the requirement of impartiality. Peek v. State, 488 So. 2d 52 (Fla. 1986). The court, on its own, called co-defendant Diaz after the defense had rested below to assist the defense in its attempts to admit the Diaz affidavits into evidence, (T. 226-231, 239-240), questioned the witnesses extensively, often on matters already covered by the parties, Rahme v. State, 474 So. 2d 1236 (Fla. 5th DCA 1985), injected an issue, specifically the "mere presence" defense issue, into the case which was not presented by the defense, (R. 39-44, 50-51, 57-58), and based his ruling of ineffective assistance upon this issue in large part, (T. 497), and on occasion argued the defense case for defense counsel, (T. 44, 227, 229, 470), even referring to the defense as "we". (T. 229). This posture places the trial court's credibility rulings in significant doubt, and Respondent submits that these findings were not supported by the record below, and are clearly erroneous.

court concluded that "For defense counsel to take steps to persuade a criminal defendant to testify truthfully, or to withdraw, deprives the defendant neither of his right to counsel nor the right to testify truthfully", and further held that the prejudice prong of Strickland cannot be established as a matter of law based on defense counsel's failure to permit a criminal defendant to testify falsely.

The specific holding in Nix, which is directly on point, and which was presented to the trial court below, (T. 59), conclusively contradicts the trial court's conclusions of law with respect to trial counsel's duties and options at trial. The defendant here in did not have absolute right to testify to perjury as held by the lower court, and absent an express finding that the defendant did not confess to Glass, or was going to testify truthfully at trial, which is clearly belied by the trial court's discussion in its ruling, its ruling herein could not be upheld as a matter of law under Nix. [14] See also, Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987).

Additionally, the defendant himself repeatedly stated that Glass's decision not to allow him to testify was based on Glass's "strategy" to cross-examine Fernandez instead, (T. 116-118), which he assumed was Glass's "trial tactic". Under Strickland, informed trial strategy is "virtually unchallengeable" on a claim of ineffective assistance, and when coupled with the assertion that defendant would perjure himself if he testified, cannot possibly be deemed deficient under either Strickland or Nix.

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[14] It is undisputed that a defendant's trial, the court did not obtain a personal waiver from the defendants of their right to testify, and that all four defense attorneys announced that each would rest after the recess provided to discuss if any defendant would testify. (ST. 400-411).

Respondent further submits that the court's credibility finding as defendant's desire to testify is refuted by the record below. To the extent that the court relied upon defendant's parents to corroborate defendant's testimony in this respect, defendant himself testified that his parents spoke little or no English, (T. 100-101), and that defendant himself translated the conversation to his parents in Spanish after it was over. (T. 103). Defendant's parents' affidavits state that they "remember Mr. Glass pointing his finger in my son's chest and telling him that he would not let my son testify", when it is unrebutted that they heard Glass himself say no such thing. Defendant's parents were the ones that paid Glass, both for trial and his appeal, and can not be said under any circumstances to be disinterested witnesses. The court's statements that on a new trial, defendant "is going to have a rough road to hoe", and repeated implications that he most likely would not be acquitted on retrial, (T. 489, 501), coupled with its discourse on the use of perjured testimony, compel the conclusion that the court did not find the defendant generally believable. The defendant's own testimony concerning the events of the drug rip-off, disclaiming that he confessed to Fernandez or to Glass, that he ever looked into or was at the trunk of the car to observe the guns therein, despite the videotape, that he failed to recognize the photos of the car he himself rented, or that he ever saw the gun of flashlight in the front seat of the car in which he was the driver, and which were depicted in the photos which were introduced into evidence against him at trial, (T. 127-159, 170-189, 194-199), provides further substantial reason to disbelieve his testimony. The defendant's testimony was even in conflict with that of Diaz regarding which

defendants were in which cars prior to arriving at the warehouse. On the other hand, Glass's testimony, aside from its conflicts with defendant's testimony and the single conflict created by Beloff's deposition, was unrebutted by any testimony at the hearing, and in fact was to some extent corroborated by that of Ron Gainor.

Additionally, as review of the trial transcript reflects, this was not a complicated case from any point of view. The defendants were the targets of a reverse sting operation by police, who videotaped much of the events at issue, and there was no dispute that defendant was present, as the driver of the Ford LTD, at the warehouse, nor that he rented the car in his own name. The sole questions which conceivably could have been subject of debate at trial were the extent of defendant's knowledge of his codefendant's plans to rip-off the warehouse, and whether or not he knew that the duffel bag the codefendants' stole contained cocaine. Based on Fernandez's rendition of defendant's oral confession, admitted only after Glass conducted an extensive voir dire on the voluntariness of the statement during trial, (T. 156-183), the defendant admitted both knowing and active participation in the rip-off, and that he knew the subject of the rip-off was cocaine. (ST. 156-191). This was consistent with Glass's rendition of defendant's confession to him. (T. 360-361).

As this discussion clearly reveals, defendant's trial counsel's performance below was neither deficient under Strickland or Nix, nor could the prejudice prong be met, and were it not for the erroneous interpretation of the Gill court, no issues would be cognizant on review herein. Thus, no factual basis exists to over turn the Third District's conclusions below, and Respondent submits that there is no legal, equitable,

or public policy basis to do so.

The rationale believed Strickland's "prejudice" prong requirement is both logical and painfully obvious. The interests of justice dictate that even where counsel's performance is deemed "deficient", which Respondent adamantly disputes in this case, if the evidence against a defendant is such that even "errorless" counsel could not have secured an acquittal (or hung jury), a defendant should simply not be entitled to a new trial due to said "deficient" performance alone. Stated more simply, deficient performance by counsel alone is not, according to the United States Supreme Court, grounds for reversal of a validly obtained conviction based on overwhelming, competent evidence, such as was presented at defendant's trial below. There is simply no logical, legal, equitable, or public policy reason for this Court to deviate from this standard and adopt a per se rule that elevates the right to testify, whether truthfully or perjuriously, above all other constitutional rights. Indeed, Nix clearly holds to the contrary, as has this Court, in Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988), when it stated:

> Although we agree that there is a constitutional right to testify under the due process clause of the United States Constitution, we agree with the Wisconsin Court that this right does not fall within the category of fundamental rights which must be waived on the record by the defendant himself. We view this right to be more like an accused's right to represent himself. Although such a right has been expressly recognized by the United States Supreme Court in Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), this right has not been considered so fundamental as to require the same procedural safeguards employed to ensure that a waiver of the right to counsel is knowingly and intelligently made."

Based on this holding, this Court declined to promulgate a per se rule requiring a trial court to make a record inquiry concerning a defendant's waiver of the right to testify, although this case is a classic illustration of the ramifications of a silent record in this regard (see Torres-Arboledo, supra, fn. 2). However, Torres-Arboledo makes clear this Court's position that the right to testify is not so fundamental as to merit the adoption of a per se rule in Florida which would do away with the eminently logical and almost universally adopted "prejudice prong" requirement of Strickland. It is abundantly clear that if Petitioner's position was adopted it would open the door to literally every defendant to claim ineffective assistance of counsel based on allegations, whether truthful or false, that their counsel denied them the right to testify at trial where the trial record was silent in this regard, with the outrageous result that they could prevail on these claims despite no showing whatever that their testimony would have produced an acquittal. In short, every defendant would have a key to the jail house door despite overwhelming evidence of guilt, a result which would turn justice on its ear, and undermine the entire judicial system. This Court must unequivocally reject Petitioner's position, quash Gill, supra, and clearly adopt the two-pronged Strickland standard as the law in Florida so as to alleviate any doubt in this regard.

## CONCLUSION

Based on the foregoing arguments and citations of authority, opinion of the Third District Court of Appeal in this cause quashing the lower court order and upholding defendant's conviction should be upheld.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing **RESPONDENT'S BRIEF ON THE MERITS** was furnished by mail to **WILLIAM P. CAGNEY III, Esq.**, 3400 First Union Financial Center, 200 South Biscayne Blvd., Miami, Florida 33131-2393 on this 21 day of December, 1995.

Michael T Mello
**JONI BRAUNSTEIN**
Assistant Attorney General

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