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 REPLY BRIEF

WILLIAM P. CAGNEY, III
William P. Cagney, III, P. A.
Fla. Bar No. 146030
3400 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2393
(305) 371-1411

SCOTT A. SREBNICK
Fla. Bar No. 872910
1899 South Bayshore Drive
Miami, Florida 33133
(305) 285-9019

Attorneys for Petitioner

TABLE OF CONTENTS

SUMMARY OF THE CASE

The trial court, after conducting an evidentiary hearing on petitioner Robert Oisorio's motion pursuant to Fla.R.Crim.P. 3.850, found that petitioner's now-disbarred trial lawyer, Stephen A. Glass, rendered constitutionally ineffective assistance at trial. The trial court found that Glass refused to let Oisorio testify, and failed to move for a severance so that Oisorio could present the credible and exculpatory testimony of a codefendant at a severed trial. The trial court concluded that the reliability of the verdict was suspect. A Panel of the Third District Court of Appeal reversed, concluding as a matter of law that Oisorio did not establish prejudice under Strickland v. Washington, 466 U.S. 668 (1984). State v. Oisorio, 657 So.2d 4, 5 (Fla. 3d DCA 1995). The Panel, however, acknowledged that its decision was in conflict with Gill v. State, 632 So.2d 660 (Fla. 2d DCA 1994), which holds that prejudice is presumed whenever trial counsel deprives a defendant of his/her constitutional right to testify. Oisorio sought discretionary review of the Panel's decision. This Court accepted jurisdiction to resolve the conflict between the districts and determine the proper standard for lower courts to assess prejudice when trial counsel actively refuses to let his client testify.

Oisorio contends that the Panel applied the wrong standard for assessing Strickland prejudice because it failed to attach added significance to the fact that counsel's deficient performance resulted in the exclusion of the defendant's own testimony. When the defendant is deprived of his right to testify, the fundamental

fairness of that proceeding is virtually always rendered suspect. Thus, prejudice should either be presumed or be viewed as so substantial that only in the rarest or most extraordinary of trials would the Strickland prejudice prong not be satisfied. Any formulation of the Strickland standard adopted by this Court must account for the importance of a defendant's testimony in a criminal case. Petitioner's Brief, at 18-21.

Finally, Oisorio contends that even if this Court chooses to attach no added importance to the testimony of a criminal defendant in determining prejudice, the Panel Opinion must still be reversed. The Panel misconstrued Strickland by applying a standard that asked whether the jury *would have acquitted* Oisorio had it heard his testimony. This is the wrong inquiry. 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 v. Whitley, 115 S.Ct. 1555, 1566 (1995).

SUMMARY OF THE RESPONDENT'S ARGUMENT

The State of Florida contends that this Court accepted jurisdiction for the sole purpose of deciding the general question whether to overrule the *per se* standard of prejudice adopted in Gill v. State, 632 So.2d 660 (Fla. 2d DCA 1994). The State urges this Court to overrule Gill on the ground that the *per se* rule conflicts with the holding of Strickland. The State reasons that a *per se* rule of prejudice would "turn justice on its ear, and undermine the entire judicial system." Respondent's Brief, at 36. The State further argues that the Panel decision should be affirmed

because trial counsel's performance was not deficient. The State asks this Court to reject the trial court's factual findings, and make its own credibility determinations about the witnesses who testified at the evidentiary hearing.

PETITIONER'S REPLY

1. The Question Presented

As a threshold matter, the State takes issue with Oisorio's statement of the issue. Respondent's Brief, at 26. The State attempts to cast the issue presented as simply a choice between the *per se* rule adopted in Gill and the Strickland prejudice standard. The State presents the question as whether the Court should adopt the prejudice prong of Strickland for evaluating "right to testify" claims, and devotes the bulk of its brief to arguing why Strickland should be upheld. Respondent's Brief, at 23, 26-28, 35-37.

The question, however, is not *whether* the Strickland standard should be applied. Plainly, Strickland is the law of the land. Rather, the question for which jurisdiction was accepted by this Court concerns *how* the Strickland prejudice standard should *be applied* to cases in which defense counsel interferes with a defendant's constitutional right to testify -- i.e., does the fact that the excluded evidence is the *defendant's own testimony* provide added, or even *per se*, force to a defendant's claim of prejudice?[1]

---

[1] The argument heading in Petitioner's Brief on Jurisdiction was as follows: "This Court Should Resolve The Conflict Between The Districts Regarding The Standard For Assessing The 'Prejudice' Prong Of Strickland V. Washington, 466 U.S. 668 (1984), When An Attorney Deprives A Defendant Of His Constitutional Right To Testify At Trial."

This is the critical question because, as the Supreme Court observed in Strickland, the prejudice standard is not a rule, but merely a guide to analyzing ineffective assistance claims:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, *a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles 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.* In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland, 466 U.S. at 696 (emphasis added).

In Gill, the Second District acknowledged that a defendant's claim that he was deprived of his right to testify must be analyzed as a claim of ineffective assistance of counsel under Strickland. Gill, 632 So.2d at 661 (citing Strickland and United States v. Teague, 953 F.2d 1525 (11th Cir.), cert. denied, 113 S.Ct. 127 (1992)). The Second District held that, in evaluating the effect on a criminal defendant of the deprivation of his right to testify, the Strickland prejudice standard is always satisfied. According to the Second District, prejudice should be presumed because, unlike the testimony of other witnesses, the testimony of a criminal defendant is of unique and constitutional significance. Gill, 632 So.2d at 661-62. When a defendant is prevented from addressing the jury, the result of the particular proceeding is unreliable because the adversarial process has necessarily broken down. Thus, the holding in Gill was itself an application of the

Strickland standard to one species of ineffective assistance claims -- when a lawyer's ineffectiveness deprives a defendant of his constitutional right to testify.[2]

Because Strickland is merely a guide, not a "mechanical rule," a decision holding simply that Strickland is the proper standard would be tautological and would not answer the question facing the Court. This Court should decide whether application of the Strickland standard to such claims requires a *per se* rule, as adopted in Gill, or some other principle, as adopted by most other courts, which recognizes the inherent and constitutional significance of a defendant's testimony in a criminal trial. Petitioner's Brief, at 17-21. Thus, even if this Court rejects a *per se* rule, the Court should still decide whether the Panel properly applied Strickland when it failed to attach any significance to the fact that counsel's deficient performance resulted in the exclusion of *the defendant's* testimony,

Furthermore, it is well-settled that once this Court accepts jurisdiction to resolve a legal issue in conflict, it is proper and within the Court's jurisdiction to consider other issues properly raised and argued before the Court, which are dispositive of the

---

[2] The fact that the Second District applied a per se rule to such claims does not, by itself, render Gill in conflict with Strickland. In Strickland, the Supreme Court acknowledged that "[i]n certain Sixth Amendment contexts, prejudice is presumed," such as when assistance of counsel has been denied altogether, or when an actual conflict of interest adversely affected the lawyer's performance. Strickland, 466 U.S. at 692. The Court noted that "[p]rejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost." Id. The Second District implicitly equated the severity of a deprivation of the right to testify with the denial of counsel.

case. Savoie v. State, 422 So.2d 308, 310 (Fla. 1982) (resolving legal issue in conflict but reaching other issues to avoid piecemeal determination of case); Jacobson v. State, 476 So.2d 1282, 1285 (Fla. 1985) (accepting jurisdiction to resolve conflict but disposing of case on ground other than conflict); Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977) ("If conflict appears and this Court acquires jurisdiction, we then proceed to consider the entire cause on the merits."); D'Agostino v. State, 310 So.2d 12, 13 (Fla. 1975) (accepting jurisdiction based on conflict and considering cause on merits). Plainly, the merits of Oisorio's claim has been fully briefed by both sides. By reviewing the Panel's decision on the merits, the Court could bring finality to Oisorio's 3.850 claim and preempt the expenditure of resources in federal litigation of a petition pursuant to 28 U.S.C. §2254.

2. The Jurisdictional Conflict

The State does not dispute that the Panel Opinion conflicts with Gill. The State argues that Gill should be overruled because there is "no logical, legal, equitable, or public policy reason for this Court to ... adopt a per se rule that elevates the right to testify, whether truthfully or perjuriously, above all other constitutional rights." Respondent's Brief, at 35. The State further argues that a *per se* rule "would open the door" and that "every defendant would have a key to the jail house door" despite overwhelming evidence of guilt. Id. at 36.

This argument grossly exaggerates the potential effect of a *per se* rule of prejudice. First, because the *per se* rule does not

apply to the performance prong of Strickland, a defendant must still persuade a trial judge, through the presentation of competent evidence at an adversarial evidentiary hearing, that his counsel deprived him of the right to testify. Second, logic dictates that the adoption of a *per se* rule of prejudice would actually *decrease* the number of claims of ineffective assistance of counsel. With a *per se* rule of prejudice, trial courts would undoubtedly heed this Court's advice in State v. Torres-Arboledo, 524 So.2d 403 (Fla. 1988), and conduct a record inquiry of each defendant prior to the close of the defense's case to determine whether the defendant understands that he has a right to testify, and that it is his personal decision. Torres-Arboledo, 524 So.2d at 411 n.2. Thus, a *per se* rule would help ensure that defendants understand their rights, much in the same way that the *per se* rule applicable to the outright denial of counsel has ensured that criminal defendants nationwide are provided with counsel.

In arguing that Gill be overruled, the State urges this Court to adopt the Panel Opinion as the correct interpretation of Strickland in this context. Respondent's Brief, at 24. The holding in Gill and the Panel Opinion occupy two extreme positions on the Strickland landscape. While Gill holds that a defendant's testimony in a criminal trial is inherently more significant than other exculpatory evidence such that its denial is presumptively prejudicial, the Panel Opinion does not treat a defendant's testimony differently than any other exculpatory testimony.

Most courts have adopted an approach that falls somewhere in

the middle between these polar opposites. The courts that have not applied a *per se* rule have indicated that the Strickland prejudice standard must be "softened somewhat" in the context of the deprivation of a defendant's right to testify, and that it is only the "rare case" or "the most extraordinary of trials" that prejudice would not be established. See Cases cited in Petitioner's Brief, at 20-21. These courts are naturally reluctant to have confidence in a verdict where a defendant has been deprived of the right to tell his side of the story to the jury.

The State fails to address any of these alternatives. Nor does the State address any of the cited cases that discuss the significance of a defendant's testimony and his willingness to take the stand in a criminal trial. Oisorio respectfully submits that, in the event that the Court is not inclined to adopt the *per se* rule announced in Gill, the Court should require application of a standard of prejudice that treats a defendant's testimony with the constitutional consideration to which such testimony is entitled.

3. The Merits Of The Panel Opinion

Even if the Court chooses to attach no inherent significance to a defendant's testimony in a criminal case, the Third District Panel Opinion must be reversed because the Panel misapplied the Strickland standard. The Panel implicitly required Oisorio to prove that he would be acquitted at a new trial to establish prejudice. The Panel wrote:

> That order is reversed because the record demonstrates, as a matter of law, that Oisorio did not satisfy the second, or "prejudice," prong of Strickland v. Washington, 466 U.S. 668, 669, 104 S.Ct. 2052, 2055-56,

> 80 L.#d.2d 674, 682 (1984), that, but for "counsel's [alleged] unprofessional errors, the result of the proceeding would have been different." The evidence against Oisorio was so overwhelming, and the now-asserted defensive materials so patently insubstantial that no rational jury could do anything but convict him.

Oisorio, 657 So.2d 4, 5 (Fla. 3d DCA 1995).

The starting point for analyzing the proper application of the Strickland standard is the holding in Strickland. There, the Supreme Court held that to demonstrate prejudice from counsel's constitutionally deficient performance, a defendant must show that there is "a reasonable probability" that the result of the proceeding would have been different but for counsel's errors. Strickland, 466 U.S. at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id. As explained in Kyles v. Whitley, this standard asks not whether the presentation of exculpatory evidence would have resulted ultimately in the defendant's acquittal. Kyles, 115 S.Ct. at 1565-66 (reaffirming that "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)). 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.

The Panel's ritualistic invocation of the Strickland standard does not save its decision because the standard applied by the

Panel below was not faithful to Strickland. In requiring that Oisorio demonstrate that "the result of the proceeding would have been different," Oisorio, 657 So.2d at 5, the Panel quotes Strickland out of its proper context, failing to require only a "reasonable probability" of such a result.

The holding in Strickland does not require that the defendant demonstrate that he *would have been acquitted* but for counsel's errors. Yet the State makes the same mistake as the Panel when it repeatedly cites this as the standard. Respondent's Brief, at 25 ("Petitioner's position would open the door to literally every defendant to claim ineffective assistance of counsel ... despite no showing whatever that their testimony *would have produced an acquittal.*") (emphasis added); Respondent's Brief, at 30 ("the defendant did not establish ... that the result of his trial *would have been different*, so as to satisfy the dictates of Strickland and its progeny.") (emphasis added); Respondent's Brief, at 36 ("... despite no showing whatever that their testimony *would have produced an acquittal.*") (emphasis added).

By contrast, the trial court measured the reliability of the verdict and the fundamental fairness of the proceeding:

> 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. 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. However, he should have an opportunity to present a defense to a jury to either believe or not 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).

The State also argues that Oisorio failed to satisfy the performance prong of Strickland, and attacks the credibility choices and factual findings of the trial court. Respondent's Brief, at 30-34. The State cannot point to one factual finding by the trial court that does not have clear support in the record.

Glass' testimony was unbelievable, and his excuses and explanations for his actions were transparent and disingenuous. For example, Glass testified that Oisorio had confessed his guilt at their first attorney-client meeting. Glass was then confronted with more than ten (10) Florida Bar complaints that had been filed against him in less than a two year period. (T:397-408). In at least three of his responses to those complaints, Glass' defense to the charges 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 dollars worth of securities, (T:402), or to having purchased property with drug money. (T:403).

Glass testified that he asked Laurie Beloff, counsel for co-defendant Francisco Quintana, to cover the depositions for him. (T:331). Yet, Ms. Beloff contradicted Glass, stating that she had no agreement with Glass to cover the depositions for him, (R:218), and as the State concedes, none of the check stubs that Glass brought to the hearing to substantiate his false testimony indicated any payment to Beloff for taking the depositions. Respondent's Brief, at 18; (T:332-50). 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. Glass admitted that he never reported this to the Florida Bar. (T:439-41). Glass also admitted that he had besmirched the names of two judges. (T:438).

Glass stated that he always takes notes when he interviews his clients. (T:467). When asked by the trial court to look through his notes, Glass could not find any notes that remotely indicated that Oisorio had confessed. (T:469). Glass further admitted that he did not mention the alleged confession to Oisorio's post-conviction counsel when they visited him in his office. (T:424-26).

Finally, the trial court considered that Glass was the target of an ongoing state criminal investigation when he testified *for the State* at the hearing, (R:146, 148), and that the State had failed to disclose this fact to Oisorio at the evidentiary hearing. Glass obviously had an incentive to curry favor with the State. Moreover, with so many Florida Bar complaints pending against him, Glass could not have been excited about the prospect that the court would find his representation of Oisorio to be inadequate.

The trial court considered all the evidence presented at the hearing, and made factual findings and credibility determinations based on that evidence. The record overwhelmingly supports those findings. 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.").[3]

The State argues that since Oisorio has no constitutional right to commit perjury, see Nix v. Whiteside, 475 U.S. 157 (1986), Glass properly refused to allow Oisorio to testify. Respondent's Brief, at 30-32. The success of this argument depends entirely on the assumption that Oisorio confessed his guilt to Glass. The only support for this assumption that the State can muster is its suggestion that the trial court "did not go so far as to disbelieve Glass' testimony that the defendant had confessed to him." Respondent's Brief, at 30. The trial court's findings can hardly be viewed as an endorsement of the State's argument:

> It should also be noted that Mr. Glass, in judging his credibility, on cross-examination was informed about, reminded that he had forgotten about certain Bar complaints that were filed against him by former clients. Once reminded of their names, he all of a sudden was able to remember that, yes, in fact, he did represent them; and, in fact, they had made complaints against him. But, his defense in each and every one of those cases was that his client had confessed to him and he had to get the client the best deal possible. Sort of like crying wolf, he has used that defense far to [sic] often. I don't believe the defense is viable.

---

[3] Unhappy with Judge Wilson's credibility determinations, the State attacks his impartiality. Respondent's Brief, at 31 n.13. The State's personal attack on Judge Wilson's integrity is unfair and unsupported by the record. It is disturbing that the State, in an effort to save this conviction, would embrace the obviously perjured testimony of a disbarred lawyer who was engaged in criminal conduct during the period in question. Glass' testimony -- that Oisorio, Oisorio's parents, codefendant Diaz, co-counsel Laurie Beloff, and the Florida Bar complainants were all lying about him -- was inherently incredible and directly refuted by the record. The best illustration of this is Glass' testimony that Oisorio expressed his desire not to testify "from day one." (T:368-70, 456). Glass could not explain why, if Oisorio was resolute against testifying, Glass stated to the trial judge on the first day of trial: "While we're on that subject, though, I am contemplating my client taking the stand." (ST:9; T:383).

(T:499-500). The court also wrote in no uncertain terms: "I do not find Mr. Glasses' testimony credible." (T:498). The fact that the court's findings recount the many ways a lawyer can handle perjury, (T:498), does not, as the State would hope, constitute an implicit finding that Oisorio confessed to Glass. Rather, the court's discussion underscores the fact that Glass did not handle Oisorio's alleged perjury in any of the acceptable ways, thereby undermining the credibility of Glass' "my client confessed" excuse.

The State also argues that Oisorio's failure to testify was a "strategy decision" or "trial tactic" which is "virtually unchallengeable" under Strickland. Respondent's Brief, at 32. The State relies on an excerpt of the cross-examination of Oisorio by Assistant State Attorney Thomas McCormick, during which McCormick attempted to put the words "strategy" and "trial tactic" into Oisorio's mouth. (T:116-17). In reality, Oisorio repeatedly said in his own words that Mr. Glass "wouldn't let me testify," (T:115), "told me I could not testify," (T:116), and that "I was not allowed to testify." (T:117). Moreover, Glass threatened to "walk away from the case" if Oisorio persisted in wanting to testify. (T:106, 118). Glass did not let Oisorio testify because it was too late in the day; Glass hoped to finish the closing arguments by the end of that day. (T:104). The trial court heard the testimony and found that Glass' decision was not a "strategy" decision made by Oisorio with Glass' advice. Rather, the decision was made by Glass, who actively refused to allow Oisorio to make that decision for himself. The trial court's factual findings compel the legal

conclusion that Glass rendered ineffective assistance. Teague, 953 F.2d at 1534 (defense counsel ineffective if he "refused to accept defendant's decision to testify and would not call him to the stand."); Torres-Arboledo, 524 So.2d at 411 n.2 (counsel ineffective if he actively refuses to allow defendant to testify).

CONCLUSION

This Court should reverse the Panel's decision and reinstate the trial court's Order vacating Oisorio's judgment of conviction.

Respectfully submitted,

WILLIAM P. CAGNEY, III, ESQ.
William P. Cagney, III, P.A.
FL BAR NO. 146030
200 South Biscayne Boulevard, #3400
Miami, FL 33131-2393
(305) 371-1411

SCOTT A. SREBNICK, ESQ.
FL BAR NO. 872910
1899 South Bayshore Drive
Miami, FL 33133
(305) 285-9019

By: 
WILLIAM P. CAGNEY, III, ESQ.
SCOTT A. SREBNICK, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Reply Brief was furnished by mail to Joni Braunstein, Asst. Atty. Gen., Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Post Office Box 013241, Miami, FL 33101, this 11th day of January, 1996.

By: _____
SCOTT A. SREBNICK, ESQ.