

U.S. Case No. 17A1235
Appeal No.: 17-14196-K
District Court No.: 17-cv-60799-WPD

IN THE
SUPREME COURT OF THE UNITED STATES

ANGEL L. ZENQUIS,
Petitioner,

v.

JULIE L. JONES,
SECRETARY, DEPARTMENT OF CORRECTIONS
STATE OF FLORIDA

Respondent.

ON *PETITION FOR WRIT OF CERTIORARI* TO
THE ELEVENTH CIRCUIT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

Angel l. Zenquis #L80123
Avon Park Correctional Institution
8100 Highway 64 East
Avon Park, FL 33825-6801

QUESTION(S) PRESENTED

Question One: Whether trial counsel can be deemed constitutionally ineffective for failing to present an independent act theory defense if Petitioner did not agree or did not commit the common crime at all. Conversely, whether an independent act theory defense be asserted as an alternative defense to actual innocence.

Question Two: Whether trial counsel rendered constitutionally ineffective of counsel when he interfered with Petitioner's right to testify in violation of the Fifth, Sixth and Fourteenth Amendment of the United States Constitution.

LIST OF PARTIES

All parties **do not** appear in the caption of this case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Baron, Evan (Defense Counsel)

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Comras, Cyhthia (Assistant Attorney General)

Conner, The Honorable Burton C. (State District Court Judge)

Cotrone, John (Appellate Defense Counsel)

Damoorigian, The Honorable Dorian K. (State District Court Judge)

Dijols, The Honorable Pedro (Circuit Court Judge)

Dimitrouleas, The Honorable William P. (District Judge)

Farmer, The Honorable Gary M. (State District Court Judge)

Geesey, Allen Richard (Assistant Attorney General)

Gillespie, The Honorable Kenneth (State Circuit Court Judge)

Gross, The Honorable Robert M. (State District Court Judge)

Holmes, Honorable Iola (State Circuit Court Judge)

Jones, Julie (Sec'y Dep't of Corrections)

Klein, The Honorable Larry A. (State District Court Judge)

Lebow, Honorable Susan (State Circuit Court Judge)

Levine, The Honorable Spencer D. (State District Court Judge)

Merrigan, The Honorable Edward H., Jr. (State Circuit Court Judge)

Morales, Gilberto (deceased victim)

Polen, The Honorable Mark E. (State District Court Judge)

Rood, Morgan (Assistant State Attorney)

Rosenthal, The Honorable Lynn (State Circuit Court Judge)

Perlman, The Honorable Sandra (State Circuit Court Judge)

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White, The Honorable Patrick A. (Magistrate Judge)

Zenquis, Angel – Petitioner

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In the
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a *Writ of Certiorari* issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at **Appendix A** to the petition and is unpublished. The opinion of the United States District Court denying petitioner's 28 U.S.C. § 2254 petition appears at **Appendix B** and is unpublished. The order denying rehearing to the United States Court of Appeals appears at **Appendix C** to the petition and is unpublished.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals entered judgment on January 29, 2018. **Appendix A.** Rehearing was denied on March 29, 2018. **Appendix C.** An extension of time to file the petition for writ of certiorari was granted to and including August 26, 2018 on May 9, 2018 in Application No. 17A1235. **Appendix D.** For these reasons explained below, this Court has jurisdiction under 28 U.S.C. §§ 1254(1), 1651, and 2253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of 28 U.S.C. §§ 1254, 1257(a), 1651, 2244, 2253 and 2254 as well as the *Fifth*, *Sixth*, and *Fourteenth* Amendments of the United States Constitution are involved in this cause of action.

STATEMENT OF THE CASE

On July 20, 2005, Zenquis was arrested and charged with Felony Murder and Conspiracy to Traffic on over 400 grams of Cocaine, (DE 13-1, p. 9). On that date, he gave taped statements to police officers (DE 13-1, p. 15-221); those statements were later suppressed by the trial court on October 17, 2007 (DE 13-1, p. 232-233), and the suppression was later affirmed on the state's interlocutory appeal. State v. Zenquis, 992 So. 2d 269 (Fla. 4th DCA 2008).

On August 10, 2005, Zenquis was indicted and charged with Felony Murder in the First Degree, Trafficking in 400 grams or more of cocaine, and Conspiracy to Traffic in 400 grams or more of cocaine. (Counts 2, 3 and 4). (DE 13-1, p. 11-12). He was not charged in Count 1.

The jury was instructed as to an Independent Act defense as to Count 2, Felony Murder. (DE 13-1, p. 260)

On January 12, 2009, Zenquis was found not guilty of Felony Murder. (DE 13-1, p. 272). He was found guilty of the lesser included offense of Attempted Trafficking on over 400 grams of Cocaine (DE 13-1, p. 273), and Conspiracy to Traffic in over 400 grams of Cocaine. (DE 13-1, p. 274)

On February 24, 2009, Zenquis was sentenced to fifteen (15) years in prison on both counts to run concurrently. (DE 13-1, p. 279-284)

On June 16, 2010, the Fourth District Court of Appeal *affirmed*. (DE 13-1, p. 337) Zenquis v. State, 37 So. 3d 869 (Fla. 4th DCA 2008). Mandate issued on July 16, 2010. (DE 13-1, p. 339).

On November 19, 2010, Zenquis filed his first Motion for Post Conviction Relief. (DE 13-1, p. 341-342). An Amended Motion was filed on August 24, 2011. (DE 13-1, p. 441-477) **See Appendix E**. Another Amended Motion was filed on June 18, 2012 (DE 13-1, p. 525-549). Another Amended Motion was filed on August 16, 2013 (DE 13-1, p. 553-588). On January 21, 2014 the trial court granted an evidentiary hearing on trial counsel's failure to develop an independent act theory of defense as to the drug counts; the other seven (7) claims were denied. (DE 13-1, p. 590-595). **See Appendix F**. An evidentiary hearing was held on August 7, 2015 in which counsel also filed a Memorandum of Law In Support of Claim One **See Appendix G**. and September 4, 2015. Defense counsel, Evan Baron, testified. On December 1, 2015, the trial court denied relief (DE 13-1, p. 704-709). **See Appendix H**.

Thereafter, on May 26, 2016 Zenquis briefed the issues giving rise to this certiorari petition. **See Appendix I**. The state filed their Answer Brief on September 19, 2016 **See Appendix J**, and Zenquis then filed a Reply Brief. **See Appendix K**.

On December 1, 2016, the Fourth District Court of Appeal *affirmed* (DE 13-1, p. 525-549). **See Appendix L.** Zenquis v. State, 229 So.3d 354 (Fla. 4th DCA 2016), Mandate issued on December 30, 2016. (DE 13-1, p. 792) **See Appendix M.**

On May 25, 2017, Zenquis filed his Amended¹ Petition for Writ of habeas Corpus (DE. 8) pursuant to 28 U.S.C. section 2254. In it, Zenquis raised six constitutional challenge to his conviction and sentence. On July 13, 2017, the Respondent filed a Response (DE. 13) and Appendix (DE. 12). Zenquis filed a Reply to the Response. (DE. 14). On August 14, 2017, United States District Judge William P. Dimitrouleas summarily denied without conducting an evidentiary hearing Browns' claim. On September 18, 2017 Zenquis timely filed his notice of appeal from the Middle District Court's Order and Judgment. (DE. 17)

In the Eleventh Circuit Court of Appeal on October 3, 2017 Zenquis filed his initial COA which was denied on January 29, 2018. On February 15, 2018 Zenquis filed his Motion for Reconsideration which was denied on March 29, 2018. From this last date Zenquis has 90-days (June 27, 2017) to file a application for writ of certiorari in the United States Supreme Court, however an extension of time to file the petition for writ of certiorari was granted to and including August 26, 2018.

This timely certiorari follows:

¹ The amended petition supersedes the original petition filed on April 18, 2017 (DE. 1).

STATEMENT OF THE FACTS

As the trial and the appeal have already been completed, there are no longer any disputed facts. The evidence relevant to the matter before the court was that Pedro Ortiz lived in Connecticut. His sister, Edith Vasquez lived in Port St. Lucie, with her husband, Jesus Vega. Pedro contacted his brother-in-law about purchasing cocaine. Arrangements were made, and Ortiz came to Florida to stay with his sister and her husband. He brought with him a black backpack. Ortiz never let the backpack out of his sight, and Edith Vasquez never saw what was inside of it.

On the day of the arranged deal by those three, they met at a McDonald's restaurant in St. Lucie County, with Carlos Chaparro, who worked with the brother-in-law, and who made arrangement for the sale with his supplier. Edith Vasquez had never before met Chaparro. As the three were traveling south toward Broward County, in two cars, Chaparro's van broke down. He left it off the road in Palm Beach County, and got in the car with the other three. As they headed south, Edith Vasquez heard Chaparro on the phone. Chaparro directed Vega to drive to a Wal-Mart store, but the people Chaparro was apparently expecting did not arrive there. After more phone calls from Chaparro, the four of them drove to a second Wal-Mart.

At the second Wal-Mart, the four met up with Mr. Zenquis. With Mr. Zenquis was another man, Gilberto Morales. Chaparro got out of the car and went

into the other cars passenger window and he returned to the car in which Edith, her husband and brother are in, and spoke with the men. He went back and forth to the two cars twice. Carlos then got in the car with Morales and Mr. Zenquis, and Edith followed that car to an auto parts store. Chaparro left the other vehicle, purchased a part for his broke down van, and returned to the other car. While in Broward County, and stopped next to each other at a Wendy's restaurant, near Flamingo Road. Vasquez testified that notwithstanding her previous statement to police, at the Wendy's, Mr. Zenquis exited his vehicle along with Chaparro and Morales and spoke to Pedro Ortiz and her husband. She testified that she had never before seen Mr. Zenquis. She testified that "they" (T.678) got into an argument with Ortiz and that Mr. Zenquis was angry. Edith Vasquez claimed that Mr. Zenquis wanted Ortiz to trust him, and that he would take the money, get the drugs, and return them to him. Ortiz refused. Zenquis wanted Ortiz to hurry, because he said someone was waiting for them. Chaparro said that they were only doing it for Ortiz.

Vasquez testified that Ortiz would not give the others the money, and that they did not want Ortiz to travel with them. Eventually, it was agreed that Ortiz would go with Morales and Mr. Zenquis, but that Ortiz would stay in the car. According to Vasquez, Mr. Zenquis said that he did "this" for a living. (T.682). The argument in the parking lot went on for 20-minutes. Eventually, Morales,

Ortiz and Vega got into the car that Mr. Zenquis was driving and left the parking lot. Ortiz took the backpack with him.

Edith Vasquez never stated how much monies, quantities or kinds of drugs were discussed.

In a short time, Chaparro got a telephone call, and ran to another area nearby, where Vasquez saw the car which Mr. Zenquis had driven away from the Wendy's stop, with police cars behind it. She saw Mr. Zenquis get out of the car, and Morales dead in the front seat. No other persons were in the car. Mr. Zenquis led the police back to the Saint Andrews Apartments area where Morales was shot, and Pedro Ortiz was found and arrested. He had the black backpack with him, and in it the police found a kilo of cocaine.

REASONS FOR GRANTING THE PETITION

Question One

Whether Trial Counsel Can Be Deemed Constitutionally Ineffective For Failing To Present An Independent Act Theory Defense If Petitioner Did Not Agree Or Did Not Commit The Common Crime At All. Conversely, Whether An Independent Act Theory Defense Can Be Asserted As An Alternative Defense To Actual Innocence.

Defense counsel was ineffective for his failure to develop a coherent theory of independent act with regard to the crime of attempted trafficking and to the crime of conspiracy to traffic cocaine.²

The sole evidence regarding Mr. Zenquis's participation in the crime of conspiracy to traffic in cocaine came from the testimony of Edith Vasquez. Ms. Vasquez claimed that there were discussions in her presence, in which Mr. Zenquis participated, that addressed a drug sale of which Mr. Zenquis was aware. One of the participants in the drug deal was Pedro Ortiz. Ortiz was arrested after the killing of Gilberto Morales, when Mr. Zenquis led the police to him. Ortiz was in possession of a backpack, which then contained a kilogram of cocaine. That was also the sole evidence regarding any attempt to traffic in cocaine. Edith Vasquez

² An almost identical argument was made in Zenquis' August 7, 2015 memorandum of law in support of claim one.

was the only witness who testified to the conversation that she claimed took place in which Mr. Zenquis expressed his awareness that there was to be a drug sale. She never saw drugs, and never saw what Ortiz had in his backpack.³ Vasquez did not testify that she knew of the details of the drug sale, either the amount of drugs to be purchased, or the amount of money to be paid. Based upon that evidence, Mr. Zenquis was convicted of attempted trafficking in cocaine, and conspiracy to traffic in cocaine.

Defense counsel argued that Mr. Zenquis was unaware that a drug sale was taking place. The defense was that it was unknown what took place from the time the vehicle was driven by Mr. Zenquis left Wendy's, until the time it returned, other than that Mr. Zenquis made a hysterical phone call, informing that Gilberto Morales had been shot. (T.794) Defense argued that:

We don't know what was in the backpack before Pedro Ortiz got in that car. We have no idea because nobody ever looked in there. We don't know when that cocaine got into the backpack. When that cocaine got into that backpack. When that cocaine got into that backpack. We don't know. Why, because there's no evidence to suggest how that took place. (T.807)

³ Defense counsel argued this point in his closing argument, stating:

"...there's been no testimony as to what was in that backpack prior to them finding it on the side of the street when Pedro Ortiz was taken into custody. There's been no testimony whatsoever.

... nobody saw any money. There's been no testimony about money."(T.800)

Defense counsel further argued:

Now, you're going to hear some instructions from her Honor concerning the law. And you all indicated that you could follow the law in regards to this case. One of the things that you will hear is the issue of the law of independent act. I submit to you that that applies in this case, the actions of Pedro Ortiz is an independent act it was not something that was anticipated or foreseeable in regards to Angel Zenquis. And what the judge is going to tell you is if you find that the crime alleged was committed an issue in this case is whether the crime of first degree felony murder was an independent act of a person other than the defendant. An independent act occurs when a person other than the defendant commits or attempts to commit a crime.

One which the defendant did not intend to occur and two in which the defendant did not participate. And three which was outside of and not a reasonable foreseeable consequence of the common design or unlawful act contemplated by the defendant. And I'll read the rest, as well.

If you find the defendant was not the present when the crime of first degree felony murder occurred that does not in and of itself establish that first degree felony murder was an independent act. So, the fact that he may not have been there, but that's really not the issue in this case. If you find that the first degree murder was on independent act of another, then you should find Angel Zenquis not guilty of the crime of first degree murder. (T.807-809)

Defense Counsel went on the argue:

You're also going to hear about possession of these drugs. Was there actual proof that at any point those

drugs were even in the car that Angel Zenquis was driving. The answer is, no, there's been no testimony. We don't know when those drugs were placed in the backpack. We don't know if those drugs were ever brought into the car. We didn't know if Mr. Zenquis had any actual or constructive possession of is, is having knowledge and control over those drugs. There's been no testimony to indicate that he did.

We don't know if those drugs were placed in the backpack at the seafood restaurant or on the street before they got in the car, or even if Angel Zenquis had any knowledge of the drugs being in there. There's no testimony that implicates Angel Zenquis with those drugs whatsoever except Edith Vasquez's testimony. (T.809)

The argument relating to independent act was strictly limited to the felony murder charge. The jury instructions given in this case specifically limits the independent act defense to the felony murder charge.⁴ Defense counsel neither sought, nor was granted an instruction on the theory of independent act, as it related to the drug counts. However, the facts in this case demanded that such a defense be presented, both to the jury, and to the court during the motion for judgment of acquittal. The court never heard that argument. That defense was unavailable for consideration by the jury, because defense counsel failed to obtain the jury instruction needed to bring that defense to the jury's attention.

⁴ A true and correct copy of the jury instruction on independent act given in this case is attached hereto and incorporated herein as "Appx N."

In Calabrese v. State, 886 So. 2d 396 (Fla. 1st DCA 2004), the defendant was charged with and convicted of trafficking in cocaine, conspiracy to traffic in cocaine, and possession of cocaine with intent to sell. The First District Court of Appeal held “that the trial court fundamentally erred by failing to give the “independent act” special jury instruction in conjunction with the instruction on conspiracy to traffic in cocaine. See Reed v. State, 837 So. 2d 366-368-70 (Fla.2002). Id. There, unlike here, the Court instructed the jury on independent act, as it related to the trafficking in cocaine charge. There, a defense to the cocaine trafficking was that the defendant was not involved in the negotiations for the amount of cocaine purchased, which was done outside of his presence by the person with whom he was with at the time the actual sale took place. Here, the defense was that any drug offense which occurred did not involve Mr. Zenquis, but only others. The holding of the Calabrese Court was:

The jury was not clearly instructed that the “independent act” doctrine applies not only to trafficking in cocaine, but also to conspiracy to traffic, and it found Appellant guilty as charged on Count. Id.

Calabrese thus stands for the proposition that the Court was required to give the independent act instruction, both as to the trafficking charge, and as to the conspiracy to traffic charge, in this case. The First District reasoned that:

The offense of criminal conspiracy involves at least two person. See § 777.04(3), Florida Statutes (2001). Thus,

the conspiracy itself could not have been the independent act of Rauf alone. However, the jury heard conflicting evidence regarding how much cocaine Appellant agreed and expected to purchase from Edelin, and whether it was an amount sufficient to constitute trafficking under section 893.135(1)(b)1.a. If it had been fully, properly instructed, the jury could have found that although Appellant and Rauf conspired to purchase cocaine, Rauf acted independently in deciding to buy a greater weight of cocaine (thereby meeting the statutory requirements for trafficking) than the amount to which Appellant had agreed or conspired to buy. The failure to give a complete instruction concerning a disputed element of the offense confused the jury and denied it an opportunity to “acquit” Appellant. Such a deficiency in a jury instruction constitutes fundamental error according to Reed, 837 So. 2d at 369-70, which is not subject to “harmless error” review.

Here, the defense was that the evidence did not show that Mr. Zenquis was aware that there was an enterprise involving the sale of cocaine. It is conceded that the jury could have (and by its verdict apparently did) believed Edith Vasquez, and determined that he did. However, there was NO evidence in the record that Mr. Zenquis knew the *amount* of cocaine that was involved. The State claimed that the circumstances of having found the cocaine in the backpack of Pedro Ortiz provided sufficient proof of that necessary element of the crimes. Calabrese teaches that there was an independent act defense to the State’s theory. As quoted above, the First District opined:

However, the jury heard conflicting evidence regarding how much cocaine Appellant agreed and expected to

purchase from Edelin, and whether it was an amount sufficient to constitute trafficking under section 893.135(1)(b)1.a. If it had been fully, properly instructed, the jury could have found that although Appellant and Rauf conspired to purchase cocaine, Rauf acted independently in deciding to buy a greater weight of cocaine (thereby meeting the statutory requirements for trafficking) than the amount to which Appellant had agreed or conspired to buy. The failure to give a complete instruction concerning a disputed element of the offense confused the jury and denied it an opportunity to “acquit” Appellant. Id.

Surely if that is true in a situation where there is conflicting evidence, it is equally true where no evidence at all was adduced as to the amount of the cocaine that was part of the transaction. The failure to develop that defense, by seeking an instruction to authorize acquittal on the cocaine possession and trafficking charges, was deficient performance by defense counsel.

The prejudice of that deficient and ineffective assistance of counsel is underscored by two factors that existed in this case. First, the jury acquitted Mr. Zenquis of the felony murder charge. The defense presented as to that charge solely had to do with Mr. Zenquis having not been involved in the underlying felony scheme. The fact that Gilberto Morales was shot and killed while in Mr. Zenquis car after driving from the Wendy’s to the Saint Andrews Apartments was not contested. From that acquittal, it is clear that the jury had a reasonable doubt as to Mr. Zenquis’s involvement in the incident, after being properly instructed as to

“independent act.” Second, the jury was demonstrably concerned with and troubled by the evidence adduced as to the role of Mr. Zenquis in the trafficking and conspiracy charges. The jury asked a question of the Court during its deliberations that very specifically indicated that concern:

Does the law of Principle (sic) apply to all three counts?⁵

The “law of Principles (sic),” which was contained within the instructions given to the jury is as follows:

PRINCIPALS

If the defendant helped another person attempt to commit a crime or commit a crime, the defendant is a principal and must be treated as if he had done all the things the other person did if:

1. The defendant had a conscious intent that criminal act be done and
2. The defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist, or advise the other persons to actually commit or attempt to commit the crime.

To be a principal, the defendant does not have to be present when the crime was committed.⁶

⁵ A true and correct copy of the question posed by the jury during its deliberations is attached hereto and incorporated herein as “Appx. O.”

⁶ A true and correct copy of the principals jury instruction given in this case contained within the Record, and attached hereto as “Appx. P.”

That question, directed to that instruction, directly indicates that this jury was struggling with Zenquis' role and culpability for the trafficking and conspiracy to traffic in cocaine charges. However, the deficient performance by defense counsel in not requesting an instruction on independent act must be analyzed for prejudice by the words of the Calabrese Court:

"[T]he failure to give a complete instruction concerning a disputed element of the offense confused the jury and denied it an opportunity to 'acquit'" Mr. Zenquis.

Once a defendant makes the required showing under Strickland, an objective basis for trial counsel's actions must be found within the record to justify counsel's performance and thereby rebut the defendant's claim on the ground that counsel's conduct was strategic. See Duncan v. State, 894 So. 2d 817, 824 (Fla.2004). Here, the record does not provide any objective basis justifying trial counsel's conduct or indicating that his decision not to request the instruction was a strategic one. There can be no reason that seeking such an instruction would have had a negative impact on the defense presented. That defense was that the testimony of Edith Vasquez was the only testimony tying Mr. Zenquis to the trafficking and conspiracy charges, and that she was unworthy of belief. No part of the argument made by counsel to the jury would have had to be changed.⁷ No other witnesses

⁷ More effective representation would have raised the evidentiary deficiency during the argument on motion for judgment of acquittal, and pointed out the failure of the State to prove the amount

would have been required to testify. The only requirement needed to give the jury the opportunity to acquit Mr. Zenquis to which he was entitled would have been the effective assistance of defense counsel.

Beyond the position already rejected by this court that Mr. Zenquis' claim is affirmatively refuted by the record in this matter, the State has raised only the issue of harmless error. That issue is directly refuted and completely defeated by Calabrese. Supra. That court determined the failure to give the independent act instruction in circumstances virtually identical to those at bar constitutes fundamental error. The Supreme Court of Florida defines fundamental error in a criminal case thusly:

[A] defective instruction in a criminal case can only constitute fundamental error if the error pertains to material element that is disputed at trial. Accordingly, where the trial court fails to correctly instruct on an element of the crime over which there is dispute, and that element is both pertinent and material to what the jury must consider in order to decide if the defendant is guilty of the crime charged or any of its lesser included offenses, fundamental error occurs. State v. Daniels, 121 So. 3d 409 (Fla. 2013).

In Daniels, the Florida Supreme Court reiterated the very standard and the very authority for it that the First District applied in Calabrese. The Supreme Court

of cocaine about which Mr. Zenquis could have possibly been aware, even if Vasquez was to be believed.

stated, “[I]n Reed, we made it clear that ‘fundamental error is not subject to harmless error review.’” 837 So. 2d at 369-70.

Although not raised in its response to this motion, as stated above, it is an available argument to the State in ineffective assistance of counsel cases, that the actions or inactions of defense counsel constituted tactics and strategy, which exempt them from Strickland review. However, it is well established, in a number of contexts, that “a tactical or strategic decision is unreasonable if it is based on a failure to understand the law.” Butler v. State, 84 So. 3d 419 (Fla. 2012); Hardwick v. Crosby, 320 F.3d 1127, 1163 (11th Cir. 2003)(citing Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991)). Whether a strategic decision is reasonable is a question of law. Id. 84 So. 3d 419. Here, there is no reasonable tactical or strategic reason for counsel not seeking the independent act instruction and defense, and not raising it before the court at the judgment of acquittal.

What makes this case of significant national importance is because in a case as close as this where Zenquis was also tried for felony murder but acquitted yet due to the law in effect counsel is being deemed constitutionally effective for failing to raise an independent act theory defense on his attempted trafficking and conspiracy charge because Zenquis’ defense was that he did not agree or did not commit the common crime at all. Conversely, whether an independent act theory defense can be asserted as an alternative defense to actual innocence.

Question Two

Whether Mr. Zenquis was denied his right to testify, in violation of due process, the *Fifth, Sixth, and Fourteenth Amendments*, and *Rock v. Arkansas*, 483 12U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

If Zenquis testified that he was a certified mechanic then he would have contradicted the testimony of Edith Vasquez which would have been relevant to the material issue of why Zenquis was at the scene ***See Appendix E, pg. 17-18***. Also had Zenquis' clothes been tested for gunshot residue and blood which showed negative result of gunshot residue and blood he would testified to the fact he was not in the car and did not participate in a drug deal. ***See DE. 8, pg. 17***.

Albeit it is undisputed, "It is well understood that voluntary statements which are suppressed on the basis of Miranda violation are admissible to impeach the maker of the statement. See Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975). "Although a defendant's statement that is suppressed as a result of Miranda violations is unavailable to the state during its case-in-chief, the statement may be admissible as a prior inconsistent statement and used by the state for impeachment purposes. See Harris v. New York, 401 U.S. 222, 224-26, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).

The evidence at trial was that Zenquis called the police and told them his friend had been shot and killed inside his car by two Hispanic males. The victim's

body was found in Zenquis' car. Zenquis later identified co-defendant Ortiz as the shooter. A backpack containing 1006.9 grams of cocaine was located in close proximity to where Ortiz was detained.

Edith Vasquez testified they got into an argument about the money and the drugs. (T.678). Edith Vasquez testified Zenquis was mad because her brother (Ortiz) didn't want to let go of the money (T.679). Edith Vasquez testified Zenquis was saying to trust him that he was going to get the drugs and bring it back to him (T.679). Edith Vasquez testified Zenquis was saying he doesn't need her brother's money; that he does this for a living (T.682).

In a case as close as this, where Zenquis was acquitted of murder, if the jury found reasonable doubt to find him not guilty there, had Zenquis been able to explain his reason for being at the scene was because he was called to fix a van and that he was certified mechanic with a verifiable job then there is a reasonable probability Zenquis would have also been acquitted of trafficking and conspiracy

A criminal defendant has a fundamental constitutional right to testify in his or her own behalf at trial. Rock v. Arkansas, 483 U.S. 44, 49-52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). This right is personal to the defendant, and cannot be waived by either the trial court or by defense counsel. United States v. Teague, 953 F.2d 1525, 1532 (11th Cir. 1992). The burden of ensuring that a criminal defendant is informed of the nature and existence of the right to testify rests upon trial

counsel, and is therefore a component of effective assistance of counsel. Teague, 953 F.2d at 1533; Sexton v. French, 163 F.3d 874, 882 (4th Cir. 1998). Specifically, it is primarily the responsibility of defense counsel to ensure that the defendant's right to testify is protected by "advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide." Teague, 953 F.2d at 1533. A claim of ineffective assistance is thus the proper vehicle for an argument that a defendant's right to testify was violated. Gallego v. United States, 174 F.3d 1196 (11th Cir. 1999)(citations omitted); Sexton v. French, 163 F.3d 874, 882 (4th Cir. 1998); United States v. Tavares, 100 F.3d 995, 998, 321 U.S. App. D.C. 381 (D.C. Cir.1996). Proof that counsel refused to accept movant's decision to testify in his own behalf at trial would satisfy the first prong of the Strickland analysis. *Id.* In order to establish that he was prejudiced by the alleged denial of his right to testify, movant must show that there is a reasonable probability that his testimony would have changed the outcome of the trial. Franklin v. United States, 227 Fed.Appx. 856, 860 (11th Cir. 2007)(citing United States v. Tavares, 100 F.3d 995, 998, 321 U.S. App. D.C. 381 (D.C. Cir. 1996).

Here, as with the issue of what witnesses to call in his defense, the state trial court specifically colloquied Zenquis, and he stated that he understood the risks and rewards of testifying at trial and decided against that course of action. (T.734-

35). Zenquis further acquiesced that he understood that he possessed the absolute right to testify if he wanted to, that he was not coerced or threatened into making the decision not to testify, and that nobody promised him anything to keep him from testifying at trial. (Id.).

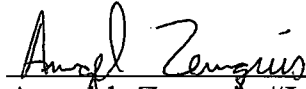
Moreover, the record reflects that there was not ample evidence of Zenquis' guilt, besides Edith Vasquez's testimony. Therefore, Zenquis' allegations that he presumably would have contradicted Edith Vasquez's version of the events, if proven, would establish a reasonable probability that the outcome of the proceeding would have been different in light of the evidence presented at trial. As such, Zenquis has established that counsel was ineffective in advising him not to testify.

What makes this case of significant national importance is because in a case as close as this where Zenquis was also tried for felony murder but acquitted yet counsel is being deemed constitutionally effective for interfering with Zenquis' right to testify where he had a reasonable explanation for being called to the scene to fix Carlos' van because he was a certified mechanic.

CONCLUSION

This Court should grant *certiorari* to review the judgment below.

Respectfully submitted,



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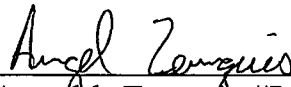
CERTIFICATE OF SERVICE

Under penalties of perjury, I hereby certify that a true and correct copy of the foregoing has been served by first-class mail on after being placed in the hands of a prison official for mailing at Avon Park Correctional Institution:

**SUPREME COURT OF THE
UNITED STATES**
One First St. N.E.,
Washington, DC 20543

Attorney General's Office
West Palm Beach Office (Fourth DCA)
1515 N. Flagler Dr., Ste. 900
West Palm Beach, Fl. 33401

On this 19 day of June 2018



Angel I. Zenquis #L80123
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