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**SUPREME COURT**

**SUPREME COURT**

**STATE OF WISCONSIN**

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**STATE OF WISCONSIN,**  
Plaintiff-Respondent-Respondent,

v.

**JESUS GONZALEZ,**  
Defendant-Appellant-Petitioner

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**PETITION FOR REVIEW**  
**OF A DECISION OF THE COURT OF APPEALS IN**  
**CASE NUMBER 2021AP001496**

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Petitioner, Jesus Gonzalez, petitions the Court pursuant to Wis.Stat. § 809.62 for review of a decision of the Court of Appeals. This is a criminal case in which Gonzalez was convicted of first-degree reckless homicide and second-degree recklessly endangering safety.

### Statement of the Issues

1. Whether trial counsel is ineffective and unconstitutionally deprives her client of the right to present a defense when she 1) advises her client not to testify in a self-defense case when there are no other eye-witnesses that will present self-defense facts; 2) does not call corroborating witnesses who heard Gonzalez's excited utterances immediately after the incident; and 3) tells potential self-defense expert witnesses that Gonzalez shot the victims when Gonzalez was not under attack but when she has information that Gonzalez was under attack.

### Criteria for Review

A decision by this Court will help develop, clarify or harmonize the law, and the question presented is a novel one, the resolution of which will have statewide impact. A decision in this case will guide the bench, the bar, and criminal defendants who have potential self-defense defenses.

## Statement of the Case

The evidence at trial showed that Gonzalez discharged a handgun seven times, resulting in permanent injuries to J.C. and the death of D.J. Gonzalez did not testify, and there were no eye witnesses other than J.C. The only evidence of self-defense presented at trial was Gonzalez's own call to 911, in which he said he had been attacked.

At his sentencing hearing, Gonzalez testified that J.C. charged at Gonzalez, made oral threats and intimidating gestures. Gonzalez also told the sentencing court that D.J., who was driving, revved his engine and drove straight at Gonzalez. Trial counsel likewise told the sentencing court similar things.

Gonzalez did not testify at trial. In his 974.06 motion, Gonzalez averred that several friends and relatives heard Gonzalez's excited utterances immediately after the incident, which would have corroborated Gonzalez's version of events. Trial counsel did not call those witnesses, either.

Finally, Gonzalez averred in his 974.06 motion that experts would have been able to use the forensic evidence discovered by the State to show that the events happened the way Gonzalez described, and not as told by J.C. Trial counsel did not call any such experts, either.

Trial counsel testified at a *Machner* hearing that she did not believe there was evidence that Gonzalez acted in self defense, but in the sentencing hearing, she told the trial court that there was.

Gonzalez was tried and convicted of 1<sup>st</sup> degree reckless homicide, as a lesser included offense of 1<sup>st</sup> degree intentional homicide, on November 21, 2011. He also was convicted of 2<sup>nd</sup> degree reckless endangering safety by a plea of no contest. He moved for a new trial on November 13, 2014, and that motion was denied on March 31, 2015.

Gonzalez filed a notice of appeal on April 20, 2015 and the Court of Appeals affirmed his convictions on March 8, 2016. Gonzalez filed a petition for review that this Court denied on June 15, 2016.

Gonzalez filed a motion for postconviction relief pursuant to Wis.Stats. § 974.06 on September 8, 2017. Doc. 15. On January 1, 2018, the trial court denied the motion. Gonzalez filed a notice of appeal on February 6, 2018. On August 8, 2019, the Court of Appeals reversed, holding that the trial court should have held a *Machner* hearing on the motion.

On remand, the trial court held a *Machner* hearing over several months, it being difficult to schedule and produce Gonzalez from prison on account of the COVID pandemic. On July 2, 2021, the trial court entered an order denying the motion again, but the order contained language that the case should be returned to the Court of Appeals. On August 11, 2021, the trial court entered a substitute order denying the motion.

Gonzalez filed a notice of appeal on August 30, 2021 and the Court of Appeals affirmed on August 30, 2022. Gonzalez filed a motion for reconsideration that the Court of Appeals denied on September 21, 2022. Gonzalez now requests that this Court take jurisdiction to review the Court of Appeals' decision and to determine the issues raised in this Petition.

## Argument

Gonzalez maintains that his trial counsel was ineffective. She testified at the *Machner* hearing that her theory of defense was self defense. Doc. 275, p. 45. The only surviving eye witnesses to the events were one of the victims, who testifies against Gonzalez, and Gonzalez himself. Nevertheless, trial counsel

steadfastly and emphatically advised Gonzalez not to testify in his own defense. *Id.*, p. 47. She therefore constructed a defense with no evidence to support it. Gonzalez testified at the his sentencing hearing and at his *Machner* hearing that, if he had testified at trial, his testimony would have been that one of the victims threatened him and the other one revved his car engine and drove straight for Gonzalez. If not for Gonzalez's firing a gun at the car and diving out of the way, he would have been run over. But the jury was not afforded an opportunity to hear this evidence because Gonzalez heeded his trial counsel's advice and did not testify.

Immediately after the incident, Gonzalez recounted parts of the incident to his family members in excited utterances. Doc. 15. Thus, there were potential witnesses that could have testified to these utterances. Trial counsel did not even attempt to call such witnesses.

Finally, trial counsel interviewed potential self-defense expert witnesses, but she told them that Gonzalez chased the victim who had threatened him and ultimately shot him, even though the evidence at trial was that that victim was hit by a ricochet off the car driven by the attacker. Trial counsel did not tell these potential experts about the car attack on Gonzalez. Doc. 275, p. 63.

Unsurprisingly, the experts told her that Gonzalez did not have a valid argument for self-defense.

Clearly, had the jury been able to hear Gonzalez's testimony, it could very well have believed that Gonzalez validly used self-defense and was not guilty of

any crime. Moreover, the testimony of corroborating witnesses would have leant credibility to Gonzalez's testimony. Finally, had they been told the facts of the case as testified to by Gonzalez, the potential experts could have been able to testify that Gonzalez's shooting was reasonable under the circumstances. It was ineffective of trial counsel to advise Gonzalez not to testify, to fail to call corroborating witnesses, and to fail to properly interview and call expert witnesses and he was prejudiced thereby.

The failure to advise Gonzalez to testify was raised in the trial court and the Court of Appeals and rejected by both in the *Machner* context. Likewise for the failure to properly interview and call expert witnesses.

Gonzalez also raised the issue of the failure to vet and call defense fact witnesses in his 974.06 motion, but that issue was rejected by the trial court and the Court of Appeals (Appeal # 2018AP257).

## Conclusion

For the foregoing reasons, this Court should exercise its jurisdiction and review the decision of the Court of Appeals.

Electronically signed by:

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## CERTIFICATE OF COMPLIANCE

I certify that this document complies with the requirements of Wis.Stat. § 809.62(4)(a). This document was prepared using a proportional font and it contains 1,337 words.

Electronically signed by:

/s/ John R. Monroe

John R. Monroe



## **Electronic Filing Certification**

I certify that I have filed this document electronically In accordance with Appendix A(6)(6) of the Interim Rule 19-02B and 20-07B, and that such electronic copy is identical to the paper copy.

Electronically signed by:

John R. Monroe