No. 18-7698

IN THE
SUPREME COURT OF THE UNITED STATES

LAWRENCE ANDREW INGRAM- PETITIONER, PRO SE

VS.

JULIE L. JONES as SEC'Y DEP'T. OF CORRECTIONS, and PAM BONDI, as ATTORNEY GENERAL of FLORIDA-RESPONDENT'S

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

I

DOES TRIAL COUNSEL WAIVE A DEFENDANT'S RIGHT TO APPELLATE REVIEW OF AN ERRONEOUS RULING ON EVIDENCE IF COUNSEL CHOOSES NOT TO OBJECT TO THE RULING WHEN THE LAW IN EFFECT AT THE TIME DOES NOT REQUIRE A PARTY TO RENEW AN OBJECTION IF THE COURT HAS MADE A DEFINITIVE RULING ON THE RECORD ADMITTING OR EXCLUDING EVIDENCE, EITHER AT OR BEFORE TRIAL?

II

DID THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERR WHEN IT DENIED INGRAM'S CLAIM THAT TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO FILE A MOTION FOR NEW TRIAL BY FINDING THAT BECAUSE COUNSEL STRATEGICALLY CHOSE NOT TO RENEW HIS OBJECTION TO THE TRIAL COURTS ERRONEOUS RICHARDSON RULING INGRAM WAIVED ANY REVIEW OF THE ERROR IN A MOTION FOR NEW TRIAL PROCEEDING, THUS NOT ELIGIBLE FOR HABEAS CORPUS RELIEF?

III

DOES THE CONTEMPORANEOUS OBJECTION RULE APPLY IN ORDER TO PRESERVE FOR REVIEW RULINGS ON EVIDENCE WHEN A DEFINITIVE RULING WAS MADE AT OR BEFORE TRIAL AND DID THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT MISAPPLY THE LAW WHEN IT APPLIED THE CONTEMPORANEOUS OBJECTION RULE TO DETERMINE INGRAM WAS NOT ENTITLED TO A NEW TRIAL?

IV

DID THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT COA MOTION COURT ERR WHEN IT FAILED TO ADDRESS INGRAM'S CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE TRIAL COURT'S FUNDAMENTAL ERROR OF IMPERMISSIBLY INFRINGING UPON INGRAM'S CONSTITUTIONAL RIGHT TO TESTIFY?

V

DID THE COURT OF APPEALS COA MOTION COURT ERR WHEN ITS DENIAL OF INGRAM'S GROUND FIVE WAS BASED ON AN ERRONEOUS FACTUAL FINDING THAT WAS PERTINENT TO INGRAM'S CONSTITUTIONAL CLAIM THAT HE WAS DEPRIVED HIS CONSTITUTIONAL RIGHT TO TRIAL BEFORE A FAIR AND IMPARTIAL TRIBUNAL WHEN THE COURT GAVE BENEFICIAL STRATEGIC ADVICE TO THE PROSECUTION?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX TO APPENDICES

APPENDIX E: Order, date, from the United States Court of Appeals, for the Eleventh Circuit, denying Mr. Ingram's timely Motion for Reconsideration of the denial of his Application for Certificate of Appealability.

APPENDIX F: Application for Certificate of Appealability to the Eleventh Circuit Appeals Court.

APPENDIX G: Motion for Reconsideration to Expand Certificate of Appealability.

APPENDIX H: Ingram's Initial Brief filed to the Eleventh Circuit Court of Appeals.

APPENDIX I: Respondent's Answer Brief filed to the Eleventh Circuit Court of Appeal.

APPENDIX J: Ingram's Reply Brief filed to the Eleventh Circuit Court of Appeals.

TABLE OF AUTHORITIES CITED

Cases

Statutes

STATUTES AND RULES

CONSTITUTIONAL AUTHORITIES

OPINIONS BELOW

For Cases from Federal Courts:

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A and C to this petition and is unpublished as of yet.

The opinion of the United States District Court, Middle District of Florida, Orlando Division, appears in Appendix B, and is; **2016 U.S. Dist. LEXIS 72619**

For cases from the State Court:

The opinion of the highest state court to review the merits appears at Appendix D, to the petition and is reported at ***Ingram v. State,***

JURISDICTION

For cases from Federal Courts:

The date on which the United States Court of Appeals decided Mr. Ingram's case was on June 27, 2018. A timely Motion for Reconsideration was denied by the United States Court of Appeals Eleventh Circuit on July 11, 2018.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1). Further, Mr. Ingram avers, pursuant to 28 U.S.C. § 2101 (c) and Sup.Ct.R. 13.3 (2018). Accordingly, as Mr. Ingram is a prison inmate, this instant certiorari, submitted on October 8, 2018 is transpiring within the statutorily required 90-days pursuant to Sup.Ct.R. 29.2 (2018)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statutory provision: Title 28 U.S.C. § 2253 (c) (2), is involved, circumscribed by the 6th Amendment (*effective assistance of counsel*) and 14th Amendment (*due process*) of the United States.

STATEMENT OF THE CASE

Initially, jurisdiction of the United States District Court was invoked under Title 28 U.S.C. Section 2254. Mr. Ingram is in custody pursuant to a State Court judgment in violation of the laws and constitution of the United States.

FEDERAL APPELLATE COURT PROCEEDINGS:

Mr. Ingram sought review of the Middle District Federal Court's denial of his 2254 federal petition for writ of habeas corpus with the Eleventh Circuit Court of Appeal. The Honorable Beverly B. Martin granted COA on the following issue:

> "Whether counsel was ineffective for failing to file a motion for new trial on the basis that the trial court's ruling regarding the evidence of incest-related materials on Mr. Ingram's computer violated Richardson v. State, 246 So.2d 777 (Fla. 1971)"

Judge Martin concluded in her COA opinion that Ingram has demonstrated counsel's performance was deficient and also that the deficient performance prejudiced him. Judge Martin found the erroneous *Richardson* ruling operated to prevent Mr. Ingram from testifying in his own defense, specifically, as counsel explained at the evidentiary hearing, Mr. Ingram ultimately chose not to testify because of the concern that his testimony would open the door to the computer evidence. (Appx. D)

Mr. Ingram moved the Court of Appeals for reconsideration to expand the COA on the basis that the COA motion judge failed to address Ingram's ground nine of his habeas petition where he claimed appellate counsel was ineffective for

failing to raise the trial courts fundamental error when it infringed upon Ingram's constitutional right to testify, and that Judge Martin committed a manifest error of fact on Ingram's claim that appellate counsel was ineffective for failing to raise that Ingram was deprived his federal constitutional right to trial before a fair and impartial tribunal. The motion for reconsideration was summary denied.

Mr. Ingram proceeded as a pro se litigant on appeal and filed his initial brief arguing that the district federal court denial should be reversed because the Court abused its discretion when it found the state courts adjudication of the claim was not contrary to or an unreasonable application of the clearly established law set forth by this Court in *Strickland v. Washington*, 104 S.Ct. 2052 (1984) in spite of the state courts factual finding being contrary to the record.

The State of Florida responded in their brief arguing for the first time ever that Ingram waived any and all review of the constitutional claim because trial counsel strategically chose not to contemporaneously object to the trail court's erroneous *Richardson* ruling, thus, had counsel filed the motion for new trial Ingram would not have been entitled under the law to a new trial.

Ingram replied arguing that the State's position was based on decisional law that applied prior to the amendment of Florida Statute 90.104 (1) (b) (2003). That Mr. Ingram's trial took place after the amendment therefore counsel did not have to contemporaneously object to the *Richardson* ruling because counsel had already

objected to the admission of the discovery violation evidence and a definative ruling was made prior to trial on the record. Thus, had counsel filed the motion for new trial based on the erroneous *Richardson* ruling that operated to prevent Ingram from taking the stand he would have been entitled to a new trial under the law.

The merits panel for the Eleventh Circuit concluded that:

> Ingram's counsel acknowledged his mistake in not filing a motion for new trial, in which he would have included the erroneous Richardson ruling as a basis for relief. The state habeas court determined the erroneous Richardson ruling to have been tested on appeal, so there was no prejudice from the failure to file a motion for new trial for this reason. However, the district court found Ingram did not challenge the Richardson ruling on appeal and the state did not dispute this finding. Thus, the state habeas court's decision that Ingram couldn't show prejudice under Strickland was based on an "unreasonable determination of the facts." See 28 U.S.C. § 2254 (d) (2), (e) (1). We must therefore resolve Ingram's ineffective assistance claim "without the deference AEDPA otherwise requires." Panetti v. Quarterman, 551 U.S. 930, 953, 127 S.Ct. 2842, 2858 (2007)

After de novo review the Circuit Court concluded, after applying the *Strickland* test, that Ingram cannot show he would have been entitled to a new trial if his counsel had filed a motion based on the trial court's erroneous *Richardson* ruling because counsel made a reasonable tactical choice to agree with the trial court's erroneous ruling therefore he "knowingly waived" his objection and could not "benefit form that decision" on a motion for new trial, citing to *Blandon v. State*, 657 So.2d 1198, 1199 (Fla 5th DCA 1995). (Appx. A)

Ingram argued on rehearing that the Appellate Court's decision was based on decisional law that was superceded by the amendment to section 90.104 (1) (b) which governed the preservation of evidence rulings at the time of trial. Rehearing was denied.

The Relevant Facts of the Case:

Mr. Ingram's unconstitutional detention began when allegations were made by his biological daughter A.I. . The allegations were made on June 6, 2004, after Sheriff's deputies encountered her while responding to a noise complaint at a home on O'Brian Rd., near Howey in the Hills, many miles from the Ingram home. The deputies found teenagers having a pool party which involved underage drinking. Deputy Kleinfelt was approached by seventeen year old A.I., who after being informed her parents had been called, told him she could not go home. She said her father had raped her.

Upon returning home that night from their eighteenth wedding anniversary dinner celebration Mr. Ingram and his wife received a phone call from deputies to come to the scene of the party to pick up their daughter. Mr. Ingram and his wife drove to 'Howey in the Hills' about 20 miles from their home to get their daughter. On the ride there Mr. Ingram received a call from his daughter saying "Dad, I'm not coming home tonight, and you can't make me. And when you get here they might arrest you". Once upon the scene Mrs. Ingram was informed of A.I.'s

allegations. She briefly confronted her husband about the allegations. According to Mrs. Ingram, he responded, "This is it." and then "Whatever she said". The Ingram's were instructed to follow a deputy to the station. Mr. Ingram drove the 92' Saturn he'd given A.I. that afternoon as a gift. Mrs. Ingram drove their van. Later that morning, Mr. Ingram chose not to speak to the detective without an attorney present and was subsequently booked on probable case for capital sexual battery.

Some seven months after Mr. Ingram's arrest and his ongoing detention his fourteen year old son was twice arrested for battery and assault charges against his mother and A.I. Subsequent to his arrest after a ten day stay in juvenile detention facility, the son made allegations during family therapy that his father had sexually abused him also. These allegations became counts four, five and six, of a third amended Information; counts to which Mr. Ingram was ultimately found not guilty in the consolidated trial.

After Mr. Ingram discharged his private attorney the court eventually appointed private attorney John Spivey as conflict–free counsel since Mr. Ingram's son was represented by the Public Defender's office.

After failed plea discussions, depositions were performed and trial set for March 18, 2005. A continuance was obtained.

One week prior to trial a hearing was held on the states motion in limine. During the hearing the issue of Mr. Ingram's son's arrest and anger management classes came up. The judge inquired of whether the state had witnesses to the young mans anger issues. The state responded they had the sister and mom. The Court then interjected:

> **The Court**: "And the therapist. Okay, actually, ***just from an argument standpoint, it might be beneficial for the State to have you bring out how outraged the kid became when he was in therapy for this man's alleged abuse."*** (A. 299-300) Emphasis added

The prosecutor then responded that she'd had extensive discussions with her colleagues and she'd rather keep the, [the therapist] out. (R. 300)

However, as the record reflects, later that day, on June 1, the State added the Haven counselors Ms. Kelly Smallridge and Naomie Currie to their witness list. (R. at 146-147).

Immediately after jury selection on June 6, 2005, Mr. Spivey moved the Court for a *Richardson*[1] hearing, due to the prosecutions late disclosure of an expert witness. Approximately four days earlier the prosecution had informed Mr. Spivey that the Sheriff's office had found internet searches on a computer retrieved from the Ingram family home nine months after Ingram's arrest depicting incestuous relationships. Mr. Spivey moved to prohibit the introduction of the evidence under *Richardson v. State*, 246 So.2d 771 (Fla. 1971).

[1] Richardson v. State, 246 So.2d 777 (Fla. 1971)

This evidence involved expert testimony. Mr. Spivey argued this evidence was extremely prejudicial, although he did not believe that the late disclosure was a product of prosecutorial misconduct, he argued there was not enough time to prepare to effectively rebut this evidence at trial, especially because the defense would need to hire an expert witness to do so. (T.T. 134-37).

The prosecutor explained the delay was caused by the difficulty in retrieving the information from the computer as it appeared someone had attempted to "scrub" the website from the internet history folder. The prosecutor was hoping to find pornography on the computer but instead only found salacious internet searches, some containing the word "incest". The prosecutor intended to offer the evidence at trial in order to show of "consciousness of guilt" that Mr. Ingram apparently attempted to scrub the websites from the computer. (T.T. 137-38). The prosecutor acknowledged that he State had known about the computer for at least four months and that there might have been pornography images on the computer but failed to alert the defense. (T.T. 139-142).

The trial court ruled the State could not use the evidence in its case–in–chief, for it determined the evidence was relevant but "materially injurious" to Mr. Ingram, who had no opportunity to review the evidence; and would need an expert to examine the evidence and there was "no opportunity now." (T.T. 143).

But the court then stated:

> I'll put [Mr. Ingram] [on] warning though. For [Mr. Ingram] to get on the witness stand and say I don't do pornography and I don't watch those and that it's against my religion, because he's famous about how religious he is. If he gets on the stand and starts talking about how religious he is and he's never looked at pornography, and how he'd never do this, them I believe he's opened – the door. So I'm not going to let him get away with possibly lying or prevaricating while he's on the witness stand. And so he needs to be aware of that. (T.T. 143)

Mr. Spivey immediately agreed. He did not renew his objection. (T.T. 143-144)

After the state rested its case, Mr. Spivey told the court he had a lengthy conversation with Mr. Ingram the night before about whether he would testify or not. That prior to Mr. Ingram making his decision they'd discuss with the court the issue of the computer evidence because he felt the evidence was potentially devastating, and to open the door on the credibility issue to the evidence would be in his opinion a very good reason and a predominant reason why he'd say not to testify. Mr. Spivey told the court he felt if the defendant took the stand and denied the sexual allegations against him the door would not be opened, but that he felt the court may not be in line with his line of thinking. (T.T. 520-523).

The court then commented that if Mr. Ingram took the stand he'd be subject to cross-examination like any other witness, and said:

> [I]n cross-examination [the prosecutor] may have a line of questions they want to ask him. If he denies – like for instance, I can

> picture the question, you deny having sex with your children, but you like to watch web sites, don't you or you like to watch movies about that, don't you? If he says no, well then, [the computer evidence] is in. And that's open cross-examination. I mean its up to him. (T.T. 523)

Mr. Spivey explained that's the kind of hypothetical question he's concerned with. Counsel then asked Mr. Ingram what his answer to that hypothetical question was; "It would be no" Ingram answered. (T.T. 523- 524:4)

Mr. Ingram then expressed his concern to the court about his fear of this evidence because there were no dates or times to prove it wasn't him on the computer; that he'd been locked up for a year and how it was the family's computer, but taken from his son's room. That he could not defend himself against this evidence. The court said, "It's not my problem. I'm not going to say you ought to try your case or whatever you do. You do whatever you want to ". (T.T. 524:24-524:1)

Upon inquiry from the court Mr. Ingram proffered that he would not testify out of his concern for the computer evidence coming in because he could not defend himself against that evidence. (T.T. 565)

The Court then placed on record its logic that the law clearly allowed previously excluded discovery violation evidence to be used to impeach a defendant if he testifies. The Court cited to *Harris v. New York*, 401 U.S. 222 (1971) in support of his position. (T.T. 567-570).

➢ THE STATE HABEAS HEARING:

Mr. Spivey testified that he knew the *Richardson* ruling was wrong, but he chose not to challenge it out of a "gross paranoia" the judge would order a recess for him to depose the expert, change the ruling and allow the evidence to come into the states case-in-chief. (T.T. 130-34) Mr. Spivey felt the evidence was "potentially devastating" so he kept it out at all cost. *Id.* at 131-33. Mr. Spivey acknowledged he could have and should have raised the ruling in a motion for new trial since it wasn't preserved for appeal. He took "full responsibility" for the failure to file a motion for new trial. *Id.* at 135-36

Mr. Spivey said he talked to Mr. Ingram a number of times about testifying at trial and he believed that a defendant's testimony was particularly important in a sexual abuse case. *Id.* at 118-19

Mr. Ingram testified at the hearing that he and counsel discussed some defense strategies. *Id* at 20-21. That they discussed how important it was that he testifies; that it was his full intention to do so. *Id* at 21. Mr. Ingram said the first time he became aware of the computer evidence was the day before trial began while going over the defense with Mr. Spivey. *Id.* at 22 Mr. Spivey told Mr. Ingram they were still on board for him to testify; that he would try to get the evidence excluded. *Id.* at 23

Ingram said he talked to Mr. Spivey about the *Richardson* ruling to allow it to be used if he testified and how it could affect the trial. *Id.* at 24-27. Mr. Spivey explained about opening-the-door and how he could "tailor" his testimony so as not to open-the-door. *Id.* at 26-27. Ingram said Mr. Spivey told him it would be devastating to open-the-door to the evidence because he was not prepared to go up against this expert witness. *Id.* at 28. Mr. Ingram said, up until the day of trial when the judge made his *Richardson* ruling he felt solid about testifying, but, that after the ruling he had a lot of concerns. *Id.* at 30. He recalled the many discussions between Mr. Spivey and the judge concerning the opening-the-door problem. *Id.* at 30-31.

After those discussions and the trial court giving his hypothetical question for the state to ask, Mr. Ingram understood that if he took the stand and a question like that was asked and he answered no, the previously excluded evidence would come in. *Id.* at 45-48

At the hearing Mr. Ingram adamantly denied sexually abusing his children, but he did admit that he was guilty of domestic violence against his wife and of child neglect because he was abusive towards his wife in front of the kids, charges the state never sought against him. (*id.* at)

➢ THE STATE CASE AT TRIAL:

At trial, Mr. Ingram's daughter A.I., testified that her father sexually abused her for many years. She testified the first time he molested her was on Christmas Eve in 1997. She was ten years old. (T.T. 221).

A.I. said the abuse occurred between two to four times per week for years. She explained that she did not tell anyone about the abuse out of fear that if she did, her father would hurt her, her mother, or her siblings. (T.T. 224-25)

A.I. admitted that she had falsely accused her father of physical abuse in May, 2003. (App. B at 226) A.I. said that she had wanted to disclose the sexual abuse at that time, but she was scared and just wanted her father to get into a little bit of trouble so she told the school resource officer that her dad had been hitting on her and bruised her arm, but in fact the bruise was caused from the family dog had jumped on her. (App. B at 226)

A.I. testified concerning count one of the information that on the night of Christmas Eve 1997 that the family had gone to her uncle's house in College Park for dinner. That after the family arrived home together in one car; that the lights then flickered and the power went out and her father placed candles around the house. That she went to bed between 1:30-2:00 and her father came in and placed a candle so if she got up to go use the bathroom she could see. She said her father then sat on her bed for about twenty minutes and put his hands down her pants, put

his fingers inside her vagina, fondled her breast and penetrated her vagina with his tongue. (App. B at 223-224)

A.I. testified about two other incidents in 2004 where her father had sexual intercourse with her and performed oral sex on her when she was seventeen. (App. B at 230) The State presented evidence of a letter Mr. Ingram wrote to A. I. after he was arrested. (App. B at 232) Mr. Ingram wrote that he hoped A.I. and her mother could forgive him for the things he had done to hurt them all. (App. B at 235)

Kenny Rodriguez, an employee of Sumter Electric Cooperative testified that business records from the company showed that a power outage occurred in Clermont Florida on December 25, 1997 at 12:28 A.M. and lasted until 3:12 A.M. (App. B at 317-318)

Mrs. Ingram testified about the night of her husband's arrest and the statement he'd made to her about A.I.'s allegations. (App. B at 457-60; 462-65)

Mr. Ingram's step-daughter, Shannon testified as a *Williams*[2] rule witness. She testified that she had told school official's when she was in middle school that her step-dad had sexually abused her. She testified that when DCF came to investigate at the home she told them that she made up the allegations because her step-dad had put her on restriction from seeing her best friend Sarah because they

[2] Williams v. State, 110 So.2d 654 (Fla. 1959)

had skipped school. But then after A.I. had made her allegations she came forward and said the abuse actually happened, that she said it was a lie to keep the family happy. (App. B at 471-475)

➢ The Defense Case at Trial:

Trial counsel Spivey presented the case as one of troubled teens and how it wasn't until they each came into contact with law enforcement did any allegations of sexual abuse ever come up; that such allegations were fabricated to keep from the consequences of their actions. (App. B at 167-174)

After much discussion with Mr. Spivey, Mr. Ingram chose to put his wife on the stand for the defense. Mrs. Ingram testified that she and her husband had been married for 19 years. (App. B at 527) She gave testimony about her children and family, and their family activities; about how her husband was with the kids. *Id.* at 528-537. She testified that on the night of Christmas Eve 1997 she drove a separate car but could not remember what time her husband got home. She recalled being up late with her husband getting things ready for Christmas after the power came back on. *Id.* at 538-543 Mrs. Ingram testified about Shannon's allegations of abuse in high school. That she admitted they were false. *Id. at* 544-47. She was a stay at home mom for most of the marriage. *Id. at* 548-49. That A.I. was rebellious, skipping school, running away at night with her friend Ashley and other teen issues. And the false allegations made by A.I. . *Id. at* 550-54

➢ MR. INGRAM'S PROFFERED TRIAL TESTIMONY:

At the state habeas hearing, Mr. Ingram placed on the record what the substance of his proposed testimony would have been had he testified. (E.T. 30-51). He testified about his alibi for the night of December 25, 1997 Christmas Eve. His family had a dinner party at his grandmother's condo in College Park near Orlando. Mrs. Ingram, A.I. and their son departed for the party early that afternoon on the 24th of December in the Astro van. That Mr. Ingram followed later the evening after work in his El Camino. After the party Mrs. Ingram and A.I. left around 11:00 P.M. while her husband and their son stayed behind to clean up and follow his mother home to unload her car for her. He and his son departed College Park for Clermont around 12:30 A.M. *Id.* at 53-54

Upon arriving in Clermont around 1:30 A.M. Mr. Ingram came upon a car accident scene on Lakeshore Dr.. Emergency vehicles were present and traffic was stopped due to a downed power pole and wires. (E..T. 53-54) While waiting for traffic to clear he spoke to a deputy sheriff who was working the traffic backup. The deputy stayed with Mr. Ingram's son while Ingram walked to the crash scene to make sure it was not his wife and daughter involved. It was not. After returning Ingram spoke to the deputy for a while longer about his custom El Camino. *Id.* at 54-55. The road was reopened and Mr. Ingram proceeded home, arriving at 2:45-2:50 A.M.. He put his son to bed, spoke to his wife and daughter about the car

crash and they then put A. I. to bed. He proceeded to unload the vehicles and get up into the attic to retrieve presents that were hidden for Christmas morning. The power then came back on, and he then spent several hours assisting his wife in preparations for Christmas and went to bed. *Id.* at 57-60. Mr. Ingram said he was not home when A.I. said he was home sexually abusing her; that he did not sexually abuse A.I.. *Id.* at 49-50. Mr. Ingram rebutted his wife's hearsay statements where she said he answered "this is it" and "what ever she said" when asked if he did what she said. Mr. Ingram testified that he actually responded to his wife saying, "This is it?" and "Whatever. Whatever she said!" in a sarcastic manner when she asked him if he'd done what she said, because he was tired of the allegations in light of the prior false allegations of physical abuse. *Id.* at 62-63

Mr. Ingram also testified about what had transpired at home between him and A.I. on the afternoon of his arrest when he gave her the 92' Saturn as a gift. About laying down the ground rules for her and the consequences if she broke the rules; she'd lose the car. *Id.* at 65-69 Ingram also explained that the real reason behind his apologies in the letters he'd written to his family from jail was that he was apologizing for being an abusive husband and a stern father; not for having sexually abused A.I., because he didn't. *Id* at 70-74

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REASONS FOR GRANTING THE PETITION

This Honorable Court should grant the petition in order to cure Mr. Ingram's unconstitutional detention which resulted from the violation of his federal constitutional right to effective assistance of counsel, right to testify in his own behalf, right to trial before an impartial tribunal, due process of law and a fair trial under the Fifth, Sixth and Fourteenth Amendments.

In affirming the district court, the panel made fundamental errors of law and fact that, if not corrected, would lead to a miscarriage of justice. The consequence of this Court's failure to act would be the continued incarceration of a person as to whom a grave question exists whether he is innocent of the offense, the alleged sexual battery's, and whose conviction on the charge may be fundamentally flawed. This is a person who has never before been convicted of a crime before and as is evidenced by the not guilty verdict on the three charges brought on by Mr. Ingram's son, there was clearly fabrication going on.

The questions before this Court are of grave importance to citizens of the United States who are accused of crimes because the "[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. ... The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice

will not 'still be done.' " *Johnson v Zerbst*, 304 US 458, 462, 82 L ed 1461, 1465, 58 S Ct 1019, 146 ALR 357 (1938).

Sixth Amendment's provision guaranteeing accused's right to assistance of counsel for his defense is made obligatory upon states by Fourteenth Amendment. *Gideon v Wainwright* (1963) 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 and the right to counsel guarantees a defendant the right to effective counsel representation. See *Strickland v. Washington*, 104 S.Ct. 2052 (1984)

A fair trial in a fair tribunal is also a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio*, 273 US 510, 532, 71 L ed 749, 758, 47 S Ct 437, 50 ALR 1243

The bulk of Mr. Ingram's constitutional violations all stem from the trial court's erroneous *Richardson* ruling and the threat against him to use the otherwise excluded discovery violation computer expert and evidence to impeach him if he

testified in his own behalf; which threat then operated to prevent him from taking the stand infringing upon Mr. Ingram's fundamental constitutional rights and trial counsel's actions and inactions surrounding the trial court's erroneous ruling.

This Honorable Court stands as the guardian of the citizens rights set forth in our great Constitution and Mr. Ingram humbly prays the Court would grant the petition to decide the following questions.

▶ As to questions one, two and three the answers to these three questions stem from does trial counsel waive a defendant's right to appellate review of an erroneous ruling on evidence if counsel chooses not to object to the ruling when the law in effect at the time does not require a party to renew an objection if the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial?

Mr. Ingram respectfully moves this Court to grant the petition and answer this all important question in order to ensure that a miscarriage of justice does not occur and for the public's perception of the fairness of the Circuit Courts review of state prisoner's constitutional violations and convictions remain intact.

When viewed through any lens under the law and the rights given Mr. Ingram by the Constitution and Bill of Rights, Mr. Ingram is entitled to a new trial where he can take the stand in his own behalf without his constitutional right to testify being infringed upon by the trail court's erroneous *Richardson* ruling.

However, because the Eleventh Circuit panel applied the incorrect law to his constitutional claim when determining whether he was prejudiced by counsel's failure to file a motion for new trial, Mr. Ingram remains in prison in violation of the Constitution of this great country.

As to this question to the Court, Mr. Ingram contends that the Eleventh Circuit panel committed a fundamental error of law and fact during its de novo review of Ingram's constitutional claim that trial counsel was ineffective when he admittedly failed to file a motion for new trial on the basis the trial court erred in a decision of law [discovery violation ruling] during the course of trial which prejudiced his substantial rights.

Mr. Ingram overcame the high bar for relitigation set forth by congress when it enacted the Antiterrorism Effective Death Penalty Act of 1996 which left the Eleventh Circuit Court to review the constitutional claim de novo.

The fundamental error of law occurred when the appellate panel adopted the State of Florida's eleventh hour assertion that the contemporaneous objection rule applied when determining whether Ingram would have been entitled to a new trial and thus Ingram waived review of the trial court's erroneous *Richardson* ruling because trial counsel strategically chose not to renew his objection to the use of the discovery violation evidence if Ingram testified in his own behalf.

The Federal Circuit Court departed from the accepted and usual course of judicial proceedings when it based its ruling on an erroneous view of the law by applying the law pertaining to the preservation of evidence rulings that were in effect prior to the change in Federal rules of Evidence 103 and Florida Statute 90.104 in effect at the time of Ingram's trial. A court ``would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990).

All of the cases cited to in the Circuit Court's opinion were written prior to the law change that affected the preservation of evidence rulings. The law supporting the Court's decision required a party to contemporaneously object when an error occurred at or before trial in order to raise it in a motion for new trial. See *State v. Goldwire*, 762 So.2d 996, 998 (Fla. 5th DCA 2000) (Generally, Florida courts cannot "entertain a motion for new trial . . . absent an objection."); accord *State v. Brockman*, 827 So. 2d 299, 303 (Fla. 1st DCA 2002)

The Circuit Court explained that the purpose of this "contemporaneous objection rule" is "to give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors." See *State v. Rhoden*, 448 So.2d 1013, 1016 (Fla. 1984) That "the rule prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to

provide a defendant with a second trial if the first trial decision is adverse to the defendant." *Id.*

This conclusion of law made by the Eleventh Circuit is clearly wrong and a misapplication of the law that governs Mr. Ingram's trial which was held in June 2005. It is a miscarriage of justice and a violation of Mr. Ingram's constitutional right to due process of law to apply the wrong law when denying his claims.

In 2003 an amendment to Fla. Stat. 90.104(1)(b) dispensed with the necessity of a contemporaneous objection at trial where a prior definitive ruling on the record has been made on an objection. *Castaneda v. Redlands Christian Migrant Ass'n,* 884 So.2d 1087 (Fla. 4th DCA 2004).

Section 90.104 (1)(b) Florida Statutes (2003) in pertinent part states that "[i]f the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial , a party ***need not renew an objection*** or offer proof to preserve a claim of error for appeal." Emphasis mine

Florida's amendment mirrored that of the Federal evidence rules which were amended in 2000 to eliminate the need for contemporaneous objections to evidence if there is a definitive ruling on the record admitting evidence before or at trial. Fed. R. Evid. 103(b) provides,

> "[i]f the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal".

Thus, under both Federal and Florida evidence rules, if an issue [objection] is "raised in a motion in limine [Richardson hearing] at or before trial admitting or excluding evidence and ruled on definitively, it is not necessary for the party to raise an objection when the evidence is offered at trial." *United States v. Davis*, 779 F.3d 1305, 1308 (11th Cir. 2015); See also *McWatters v. State*, 36 So.3d 613 (Fla. 2010) (McWatters did not waive review, "McWatters preserved his objection for review by obtaining a pretrial ruling on the admissibility of the evidence")

The panel's decision that Ingram had to contemporaneously object to the *Richardson* ruling conflicts with the decision in *Davis*. A panel of the Eleventh Circuit Court which included the Honorable Judge Martin agreed with Mr. Ingram's position. In *Davis* the government argued Mr. Davis had waived his objection, but this Court concluded:

> "[t]he government says Mr. Davis waived the "chaplain" objection by failing to assert the objection contemporaneously during the trial. That is plainly wrong. Since 2000, Federal Rule of Evidence 103(b) has provided: "Once the court rules definitively on the record-either before or at trial-a party need not renew an objection or offer of proof to preserve a claim of error for appeal." The government's reliance on older cases-cases of the kind that prompted the 2000 amendment-is misplaced.) *id.* 1308

The amended rules on evidence clearly show that the "contemporaneous objection" rule is not applicable to errors made in the course of evidentiary rulings if there is a definitive ruling made on the record excluding or admitting evidence.

The Federal "Rule 51 Preserving Claimed Error" even states, "[a] ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103."

With respect, Ingram asserts the "contemporaneous objection" rule is not applicable to this issue because prior to trial, counsel Spivey made his initial objection to the admission of the computer evidence and a definitive ruling on the discovery violation evidence was made, therefore, section 90.104 (1) (b) governs whether the issue was preserved for review in a motion for new trial.

Ingram submits, how could counsel waive an objection that he was not required to make under the amended statute 90.104 (1)(b)?

The government misled the panel court with its reliance on older cases which are distinguishable, not applicable, and were superceded by the amendment to section 90.104 to conclude that trial counsel had a duty to object contemporaneously to the trial courts erroneous ruling in order to preserve the issue for appeal. This misleading has caused the Court to overlook the clearly established law and rule set forth in section 90.104 (1)(b). The decisional law on which the panel courts decision rest is based on the rules of evidence in effect prior to the change in 2003. The preservation of the discovery violation ruling is not controlled by the "contemporaneous objection" rule as this Court so decided, but is

instead governed by section 90.104 (1)(b) Florida Statute (2003) as was argued in Ingram's reply.

The question then is, did the state court make a definitive ruling on the admission or exclusion of the discovery violation evidence at or before trial as would be required by section 90.104 (1)(b) in order to eliminate the need for counsel to then object contemporaneously to the ruling.

If one finds a definitive ruling was made on the record, as it should for the record reflects there was, then one must then find that, under the law governing rulings on evidence - at the time of trial in 2005 - the discovery violation evidence ruling was preserved in spite of trial counsel choosing not to object after the ruling was made. See *In re Amendments to the Florida Evidence Code*, 891 So.2d 1037, 1038 (Fla. 2004) (Chapter 2003-259, section 1, Laws of Florida, amended section 90.104 (1)(b) to eliminate the need for a trial objection in order to preserve an evidentiary issue for appeal when the trail judge has made a definitive ruling on the admissibility of the evidence.);; *Rogers v. State*, 948 So.2d 655 (Fla. 2006) ("Rogers preserved the argument based solely on his pre trial motion" quoting 90.104 (1)(b)); *Kyne v. State*, 370 So.3d 759 (Fla. 2d DCA 2014) (the State initially argued that this issue was not properly preserved for review because Kyne did not object when the State offered the evidence during trial, citing *Correll v. State*, 523 So.2d 562, 566 (Fla. 1988). However, the State's argument ignores the

plain language of section 90.104(1)(b), Florida Statutes (2012), added in 2003, which provides that when the court has made a definitive pretrial ruling on the record either admitting or excluding evidence, "a party need not renew an objection or offer of proof to preserve a claim of error for appeal."); *Williams v. Lowe's Home Center's, Inc.*, 973 So.2d 1180 (Fla. 5th DCA 2008) (Based on 90.104 (1), we held that since the trial court did not either at trail or prior to trial make a definitive ruling on the record admitting or excluding the evidence, the defendant was required to make a contemporaneous objection to the evidence in order to preserve the claim of error for appeal.)

Other Federal Circuits have also agreed on this issue. See also; *United States v. McElmurry*, 776 F.3d 1061, 1067 (9th Cir. 2015); *United States v. Whittemore*, 776 F.3d 1074, 1082 (9th Cir. 2015); *United States v. Big Eagle*, 702 F.3d 1125, 1130 (8th Cir. 2013); *United States v. Nixon*, 694 F.3d 623, 628 (6th Cir. 2012).

Mr. Ingram has been denied his right to effective counsel representation as was evidenced by Judge Martin's opinion. If trail counsel waived review in a motion for new trial then Mr. Ingram asserts that trial counsel was unaware that he forfeited Ingram's right to review. Mr. Ingram should not have to bear the burden of his unconstitutional detention because the state appointed attorney failed to inform himself on the law of preservation. But that should not be the case because Mr. Ingram has demonstrated that the law is clear at the time of his trial that

counsel did not need to object to the erroneous Richardson ruling because a definative ruling was made before trial therefore under the law set forth in section 90.104 (1) (b) (2005) the error was preserved. The writ of certiorari should be granted to cure Ingram's constitutional detention.

► As to the question four presented to the Court, the record plainly demonstrates that the District Federal Court did not address Mr. Ingram's constitutional claim that the state court impermissibly interfered with his right to testify when it threatened to use the otherwise excluded computer evidence against him if he took the stand; a ruling that was contrary to Florida Law.

The Eleventh Circuit Appeals Court when ruling on Ingram's application for COA failed to rule on this ground nine of the habeas petition and thus, Ingram's federal constitutional claim was never addressed.

The defect occurred when the Court made a substantive mistake of fact in the final judgment of Ingram's "Ground Nine" of the habeas petition when it misconstrued the actual claim raised in Ground Nine of Ingram's habeas petition. This mistake caused Ingram's constitutional claim not to be heard.

Ingram argued in Ground Nine that ***appellate counsel was ineffective*** for failing to raise the claim that the ***trial court interfered*** with his constitutional right to testify. (Doc. 1)

However, the Court recharacterized the claim to be [that appellate counsel was ineffective for failing to argue that ***trial counsel was ineffective*** in failing to object to the trial courts interference with Ingram's right to testify]. This is a substantive mistake of fact.

This Court's written order denying relief proves a defect occurred in the habeas proceeding. The record states the following:

> "Petitioner claims appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to challenge the violation of his right to testify." (Doc. 15 at 22). Emphasis mine.

Mr. Ingram did not claim appellate counsel should have argued that "trial counsel was ineffective for failing to challenge the violation of his right to testify". By recharacterizing Ingram's constitutional claim, the Court adjudicated a different constitutional claim than the one actually raised.

This defect has caused an injustice to Mr. Ingram because his true constitutional claim was never evaluated by this District Court in order to remedy Ingram's unconstitutional detention. See *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992) (*en banc*) ("District Court must address the merits of habeas petitioner's claims"). Such a defect in the federal proceeding has caused Mr. Ingram an extreme hardship and injustice for he continues to be detained in violation of his federal constitutional rights. This defect can undermine the public's confidence in the judicial process.

The district court's recharacterization of the constitutional claim fatally undermines all of its subsequent conclusions of fact and law. The defect caused the District Court to conclude appellate counsel was not deficient because "claims of trial counsel ineffective assistance cannot be raised on direct appeal". citing *Latson v. State*, 193 So.3d 1070 (Fla. 2016). (Doc. 15 at 22)

The constitutional claim was properly put before the Court for resolution in order for Ingram to obtain relief from the extreme malfunction that occurred during his direct appeal in order to correct the trial courts impermissible violation of his fundamental constitutional right to testify in his own behalf.

► As to the last question did the Court of Appeals COA motion Court err when its denial of Ingram's ground five was based on an erroneous factual finding that was pertinent to Ingram's constitutional claim that he was deprived his constitutional right to trial before a fair and impartial tribunal when the court gave beneficial strategic advice to the prosecution?

Ingram alleged in ground five that appellate counsel was prejudicially ineffective for failing to raise on direct appeal the claim that the trial judge departed his role as a neutral and detached arbiter when he gave the state strategic advice during the proceedings against Ingram. The defect occurred when the Court denied Ingram's [ground eight] finding that Ingram ". . . has not demonstrated that the trial court's actions rose to the level of fundamental error or that he was

deprived of a fair trial. As noted *supra,* Petitioner was acquitted of the charges with regard to his son." (Doc. 15, at 22)

The Court overlooked the fact that, although Ingram was acquitted on his son's charges, the witness [Haven counselor] which the trial court advised the prosecutor to call in the son's case, also testified against Ingram as to the charges stemming from his daughter which he was found guilty; thus Ingram was prejudiced by the trial judges departure from neutrality.

Had this Court not had such an oversight there is reason to believe the Court would have granted Ingram habeas corpus relief to cure his unconstitutional detention. However, due to this defect in the habeas proceeding there is a risk of an injustice to Ingram and that, "absent such relief, an extreme and unexpected hardship will result." *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984)

►Factual Basis for the Constitutional Claim:

Mr. Ingram communicated with appellate counsel Robert Wildridge on several occasions prior to the filing of the initial brief on direct appeal. Mr. Ingram brought to counsel's attention the trial judges actions giving the state strategic advice and requested counsel to raise it on appeal. Counsel advise because trail counsel did not preserve the issue for appeal he could not.

Ingram alleged on his state habeas against appellate counsel that the trial court committed fundamental error when he departed his neutrality by giving the state beneficial strategic advice on which witnesses to present to benefit the states case.

On June 1, 2005, just 5 days before trial an in limine hearing was held before Judge Make J. Hill. As the judge heard both sides arguments a discussion about Mr. Ingram's son's anger counseling as the result of his arrest for battery charges against his sister and mom. The Judge said:

> **The Court**: "And you've got witnesses to prove that, the conduct in therapy?
> **Mr. Greenberg**: "Yes, your Honor, I have him, his mother, his sister.
> **The Court**: "And the therapist. Okay, actually, just from an argument standpoint, it might be beneficial for the State to have you bring out how outraged the kid became when he was in therapy for this man's alleged abuse." (A. 299-300)

The prosecutor then responded that she'd had extensive discussions with her colleagues and she'd rather keep the, [the therapist] out. (A. 300)

It is clear that at that point the judge's advice seemed to not persuade the State to add the Haven counselors. However, as the record reflects, later that day, on June 1, the State added the Haven counselors Ms. Kelly Smallridge and Naomie Curry to their witness list. (T.T. 146-147).

Both of these witnesses ultimately testified in the trial about Mr. Ingram's son's anger issues, and yes Mr. Ingram was acquitted on all of the son's charges,

but this strategic advice from Judge Hill became very beneficial to the prosecution upon the admission of Kelly Smallridge's testimony about A.I.'s angst and depression caused by her father's alleged abuse.

Ms. Smallridge testified when asked by the prosecutor in her experience what was the demeanor of alleged victim A.I.. The following took place:

> Q: And what was the demeanor of Aimee with your training and experience?
>
> A: Aimee was very upset. She felt guilty. She produced all of these feelings to me. She stated that she was having depression, that she was having anxiety, that you know, she wasn't sleeping at night. She was restless. She was lashing out at her mother. So a myriad of other symptoms. (B at 407-408)

The prejudice from this highly inflammatory testimony was compounded when the prosecutor used the therapy sessions to bolster its case in closing arguments. (B at 616). Such testimony was highly prejudicial towards Mr. Ingram on charges he was convicted of.

The law in Florida and other states clearly shows that testimony of a prosecutrix emotional state can be highly prejudicial to a defendant when presented to a jury. See *Aho v. State*, 393 So. 2d 30 (Fla. 2d DCA 1981) (Evidence that the prosecutrix later told Officer Horner that she was considering suicide as a result of the occurrence was highly inflammatory and may well have tipped the scales.) *SeeAlso; People v. Egan,* 331 Ill. 489, 163 N.E. 357 (1928); *Bailey v. State,* 30 S.W. 669 (Tex.Crim.App.1885). *Cf. Bynum v. State,* 76 Fla. 618, 80 So.

572 (1919), in which the court held that it was reversible error to admit testimony concerning the sufferings or impairment of health of the prosecuting witness in a rape case.

The defect that occurred in this Court's assessment of Ingram's habeas claims is a critical defect because whether or not Ingram was prejudiced by the inclusion of such testimony from the Haven witness affects this Court's determination whether fundamental error occurred at trial which would allow appellate counsel to raise the unobjected to error on appeal.

"The Due Process Clause clearly requires a 'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904-905, 117 S.Ct. 1793, 138 L.Ed.2d 712 (1997). Even in the absence of actual bias, a judge's interest or prejudice may "pose such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow v. Larkin*, 421 U.S. 35, 36, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975).

The trial judge has a duty to conduct the trial carefully, patiently and impartially. He must be above even the appearance of being partial to the prosecution." *Hunter v. United States*, 62 F.3d 217, 220 (5th Cir. 1932).

Mr. Ingram's claim that the judge departed its neutrality is plain on the face of the record. Mr. Ingram requested his appellate counsel to raise this issue on appeal. Counsel responded that he could not because trial counsel did not object to the judges actions.

Appellate counsel was incorrect in this advice for "impartiality of the trial judge constitutes fundamental error which can be raised for the first time on appeal." *Sparks v. State*, 740 So.2d 33 (Fla. 1st DCA 1999). Fundamental error has been described as error that goes to the essence of a fair trial , error so fundamentally unfair as to amount to a denial of due process." *Kilgore v. State*, 688 So.2d 895, 898 (Fla. 1996). The law is well established that a fundamental tenant of due process is a fair and impartial tribunal." *Porter v. Singletary*, 49 F.3d 1483, 1487-88 (11th Cir. 1995)

In *Sparks* the trial judge called both trial counsel to the bench and brought to the states attention that the defendant had made a statement on his affidavit of insolvency that was contrary to the testimony he had just given. The prosecutor then resumed questioning Sparks and impeached him with the sworn statement concerning his employment. Trial counsel objected to the improper impeachment but never brought up the issue of the trial court having just departed its neutrality.

The First District Court addressed whether the conduct of the trial court, in pointing out evidence that the prosecutor could use for impeachment, actually

crossed the line from neutral arbiter to advocate resulting in a denial of Sparks' right to due process of law and trial by a neutral and detached magistrate. The fourth district was faced with somewhat similar circumstances in the case of *J.F. v. State*, 718 So. 2d 251 (Fla. 4th DCA1998). In that case, the judge directed a witness for the state to obtain additional evidence, and Judge Warner properly noted, While is it permissible for a trial judge to ask questions deemed necessary to clear up uncertainties as to issues in cases that appear to require it, the trial court departs from a position of neutrality, which is necessary to the proper functioning of the judicial system, when it sua sponte orders the production of evidence that the state itself never sought to offer into evidence. {740 So. 2d 37} Id. at 252 (internal citation omitted). In *Chastine v. Broome*, 629 So. 2d 293 (Fla. 4th DCA1993), the fourth district also held that a trial court judge had demonstrated a lack of impartiality by cautioning the prosecutor against further cross-examination of a defense witness. There, the trial judge that passed a note to the prosecutor giving the attorney the strategic tip about cross-examination. See id. at 294. The fourth district concluded that "when a judge becomes a participant, a shadow is cast upon judicial neutrality. . .." Id. at 295. A judge's neutrality is that much more impaired when he or she actively seeks out the presentation of additional evidence in a case." A trial judge should never assume the role of prosecuting attorney and lend

the weight of his great influence to the side of the government." J.F., supra (quoting *Hunter v. United States*, 62 F.2d 217, 220 (5th Cir. 1932)).

The First District determined that the issue raised by *Sparks* constitutes fundamental error which may be raised for the first time on appeal.

In our system of administering justice the functions of the trial judge and the prosecuting attorney are separate and distinct; they must not be confused. The trial judge has a duty to conduct the trial carefully, patiently and impartially. He must be above even the appearance of being partial to the prosecution. *Hunter* at 220

Florida law expressly prohibits a judge from stepping away from the appearance of impartiality to become an advocate for either party by giving "tips" or "strategy" to present additional witnesses or evidence which might be beneficial to their case over the other party. See *Chastine v. Broome*, 629 So.2d 293 (Fla. 4th DCA 1998); *Lyles v. State*, 742 So.2d 842 (Fla. 2nd DCA 1999); *Sparks v. State*, 740 So.2d 3 (Fla. 1st DCA 1998); *Gerali v. State*, 50 So.3d 727 (Fla. 5th DCA 2010)

Therefore, counsel's misunderstanding of the law for not raising the fundamental error cannot excuse the deficient performance. The U.S. Supreme Court has explained that decisions based on mistaken beliefs certainly are neither strategic nor tactical. See *Kimmelman v. Morrison*, 477 U.S. 325, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986): *Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir. 2003)

Therefore the issue appellate counsel could have and should have presented on direct appeal is not hypothetical but an actual invasion of Ingram's federal right to be tried before an impartial tribunal and counsel prejudiced Mr. Ingram by not raising the above issue on direct appeal.

The Appellate Courts judgment should be vacated due to the defect that occurred during COA and federal habeas proceeding when the Court inadvertently overlooked this critical factual component of the constitutional claim. The writ of certiorari should issue after a correct review of the merits and finding appellate counsel was prejudicially ineffective in failing to argue the trial courts unconstitutional departure from neutrality.

]

CONCLUSION

The petition for writ of certiorari should be granted in order to cure Mr. Ingram's unconstitutional detention.

Respectfully Submitted

U23642

Lawrence Andrew Ingram # U23642
Petitioner, *Pro Se*

JURAT

I, Antonio Ingram, DO HEREBY DECLARE, under the penalties of perjury, pursuant to 28 U.S.C. 1746, that I am the Petitioner in the above styled cause of action; that I have read the foregoing *Petition for Writ of Certiorari* and the statements and facts contained therein are true.

Executed on this 8th day of October, 2018, by:

U23642

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