No: 18-9380 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

MIGUEL DANIEL LEAL – PETITIONER

vs.

CHARLES L. RYAN, et. al. – RESPONDENT(S)

****

ON PETITION FOR A WRIT OF CERTIORARI TO

THE NINTH CIRCUIT COURT OF APPEALS

****

PETITION FOR WRIT OF CERTIORARI

MIGUEL DANIEL LEAL

PETITIONER PRO SE

ADC # 241025

ARIZONA STATE PRISON COMPLEX

KINGMAN UNIT: HUACHUCA, M63, 1-F-1

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PHONE NUMBER: NONE

QUESTION(S) PRESENTED

1. Is United States Supreme Court dicta which interprets the U.S. Constitution authoritative and controlling on Federal and State Courts, or may Federal Circuit Courts choose to adopt State Courts opinions and not follow this Court's opinions set forth in dicta?

2. If United States Supreme Court dicta is authoritative and controlling, did the 9th Circuit violate Article VI, Clause 2 ("the Supreme Law of the Land") of the U.S. Constitution in failing to follow this Courts language in *Mickens v. Taylor,* 535 U.S. 162, 171, 152 L. Ed. 2d 291 (2002)?

3. Did the State of Arizona violate the Sixth Amendment of the Constitution when it removed "Retained Counsel of Choice" representing Mr. Leal in a criminal prosecution, due to a mere theoretical division of loyalties construed as an actual conflict?

4. Did the Ninth Circuit err in the denial of Mr. Leal's 28 USC 2254 petition claiming that the petition did not state a valid claim of the denial of a constitutional right, when the trial and appellate record is supported by United States Supreme Court dicta and facts?

5. Did the State of Arizona violate the "common law marital communications privilege" recognized by the United States Supreme Court, when the trial court admitted and played in open court (as evidence) for the Trial Jury to hear Mr. Leal and his wife's telephone communication? (United States Supreme Court dicta in: [*Trammel v. United States*, 4460 U.S. 51, 100 S. Ct. at 912; *Blau v. United States*,

340 U.S. 332, 333, 71 S. Ct. 301, 302, 95 L. Ed. 306 (1951) *Wolfe v. United States,* 291, U.S. 7, 13, 54 S.Ct. 279, 280, 78 L.Ed. 617 (1934); also *Katz v. United States*, 389 U. S. 347, 353, 88 S.Ct. 507, 512, 19 L. Ed. 2d 576 (1976)]

6. Should this Court exercise its supervisory power to decide the conflicting decisions of the Ninth Circuit – U. S. District Court of Arizona: *Miguel Daniel Leal v. Charles L. Ryan*, Warden and Attorney General for the State of Arizona, and the Tenth Circuit – U. S. District Court of Colorado: *United States v. Neal*, 532 F. Supp. 942 (D.C. Colo. 1982); regarding the marital communications privilege and whether the husbands privilege to communicate in confidence with his wife entitles him to suppress his statements to her in the phone conversation? Apparently, this is a question of first impression in the Federal Courts.

7. Did the Ninth Circuit err in deferring to the State Court's finding that Mr. Leal had objected at trial to the denial of his request to present one of his sisters as a rebuttal witness with respect to the State's theory that flight demonstrated guilt, but the objection failed to state a constitutional ground, therefore, Mr. Leal's claim that his constitutional rights (due process, compulsory process, and to present a defense - per the Sixth and Fourteenth amendments of the U.S. Constitution) were waived?

8. Did the Ninth Circuit err in adopting the States summary background facts, (which omitted over two years of trial delays) without reviewing the entire timeline record; and accepting the District Courts justification of a speedy trial violation (which had already occurred). As follows: Mr. Leal's "counsel objected to continuing the trial from January to March 2008, based on a violation of Leal's speedy trial rights. The

subsequent request to delay trial were based on Counsel's schedule, - - -." If the delays were not caused by the Defendant and he had previously invoked his Constitutional rights to a Speedy Trial, in writing and filed in court, were his constitutional rights violated?

9. Did the Ninth Circuit err in deferring to the State Court's decisions denying ineffectiveness of trial and appellate counsel claims, stating the denials were not objectively unreasonable; when the Ninth Circuit's decisions were based on flagrant misreading or not reading of the trial record?

10. Did the Ninth Circuit abuse its discretion by not considering other circuit courts authoritative decisions which addressed the same issue in deciding if Mr. Leal had a valid constitutional claim in which jurists of reason would find it debatable? [i]

LIST OF PARTIES

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

Attorney Gen. for the State of Arizona.

TABLE OF CONTENTS

INDEX TO APPENDICES

APPENDIX G - to the Ninth Circuit, Petitioners Motion to Proceed in Forma Pauperis, 10/05/2017 (9th Cir., Doc. 09).

APPENDIX H - To the 9th Circuit, Petitioners Request for Appointment of Attorney, 10/05/2017 (9th Cir., Doc. 06).

APPENDIX I - ORDER of Supreme Court State of Arizona, No. CR-16-0225-PR (Including Declaration of Innocence-Fundamental Miscarriage of Justice, 10/07/2016); February 7, 2017.

APPENDIX J - Arizona Supreme Court, Evidentiary Hearing-Certified on June 21, 2016.

APPENDIX K - MEMORANDUM DECISION, Arizona Court of Appeals, No. 2 CA-CR 2015-0318-PR, May 20, 2016.

APPENDIX L – MANDATE, Arizona Court Appeals, 2 CA-CR 2009-0114, Cause No. CR 2005 3517, August 1, 2011.

APPENDIX M- ORDER of Supreme Court of Arizona, No. CR-11-0052-PR, Court of Appeals Division Two No. 2 CA-CR-09-0114, Pima County Superior Court No. CR 2005 3517; (Petition for Review-DENIED), July 20, 2011.

APPENDIX N - MEMORANDUM DECISION, Arizona Court of Appeals Division Two, 2 CA-CR 2009 0114, (AFFIRMED), December 21, 2010.

APPENDIX O - To the Court of Appeals State of Arizona, Appellants' Reply Brief, 2 CA-CR 2009 0114, 08/06/2010.

APPENDIX P - To the Arizona Supreme Court, Appellants' Petition for Review, 03/03/2011.

APPENDIX Q - To Arizona Superior Court, Pima County Defendants (Mr. Leal's) "Request for Remedy Notice Regarding Defendants Counsel; Filed Pro Se, 10/30/2006.

APPENDIX R - ORDER/UNDER ADVISEMENT RULING, Arizona Superior Court, Pima County, Judge Hon. Kenneth Lee; Case No. CR 2005 3517, 04/28/2006.

APPENDIX S - Detail Ineffective of Counsel Issues of Facts, in this Petition for Writ of Certiorari.

APPENDIX T - In the US District Court for the District of Arizona, Factual and Legal Material in Support of Pending Writ of Habeas Corpus Petition, 10/01/2015.

APPENDIX U - Affidavits, Transcripts, District Court of Lubbock County Texas Writ of Habeas Corpus, Superior Court of Arizona for Pima County, Motions and other relevant Exhibits. (Index Included).

APPENDIX V - Constitutional and Statutory Provisions included in this case.

STATUTORY PROVISIONS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Citations herein: Verbatim pertinent texts are found in Appendix V - Pages

1.) Article VI, Clause 2 of the United States Constitution

2.) Fourth Amendment of the United States Constitution

3.) Fifth Amendment of the United States Constitution

4.) Sixth Amendment of the United States Constitution

5.) Fourteenth Amendment of the United States Constitution

6.) 18 USC 3161-Chapter 208-Speedy Trial

7.) 28 USC 1254 (1)-Federal Jurisdiction

8.) 28 USC 2254-State Custody; remedies in Federal Courts

9.) 28 USC 2403 (b)-Constitutionality of Statute of a State is drawn into question

INDEX OF EXHIBITS

(For Appendix U)

A.) Affidavit of Irene Leal, August 31, 2007 (Lubbock Texas attorney Larry Elms)

B.) Affidavit of Irene Leal, October 6, 2005 (Lubbock Texas attorney Larry Elms)

C.) Arizona Superior Court, Pima County, 4/17/2006 Hearing Transcript-Detective W. Thomason's and Irene Leal's testimony.

D.) In the 364th District Court of Lubbock County Texas, June 3, 2008-Writ of Habeas Corpus/ORDER

E.) Miguel D. Leal's, hospital admission form, 7/22/2005

F.) Arizona Superior Court, Pima County-Motion to Dismiss (on Grounds of Officers Egregious Conduct), 9/28/2006.

G.) Arizona Superior Court, Pima County-Motion to Dismissed (Based on Doctrine of Collateral Estoppel), 9/27/2006; Attached H.

H.) Writ of Habeas Corpus Transcript, 9/27/2006

I.) Arizona Superior Court, Pima County-Motion to Suppress Testimony, 1/09/2007

J.) Arizona Superior Court, Pima County-Request for Remedy Notice Regarding Defendants Counsel, 10/34/2006

K.) Arizona Superior Court, Pima County-Rule 15.2 Disclosure Statement, 8/08/2006

L.) Arizona Superior Court, Pima County-Joint Pretrial Statement, 7/18/2006

M.) Arizona Superior Court, Pima County-Minute Entry, 7/20/2006

N.) Arizona Superior Court, Pima County-Minute Entry and Transcript, 12/14/2007

O.) Arizona Superior Court, Pima County-Notice of Invocation of Defendant's Constitutional Right, 7/12/2006

P.) Arizona Superior Court, Pima County-Motion to Dismiss Due to Speedy Trial Violation, 8/29/2008

Q.) Arizona Superior Court, Pima County- Motion to Suppress Statements, 9/12/2006, Filed by Attorney Bertram Polis

R.) Affidavit of Perlita Rodriguez, 7/17/2008

S.) Affidavit of Robert Rodriguez, 7/17/2008

T.) Affidavit of Carlos Leal, 7/15/2008

TABLE OF AUTHORITIES CITED

RULES and STATUTES

OTHER

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

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is

[X] is unpublished.

The opinion of the United States District Court appears at appendix B, C to the petition and is

[X] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided by case was November 30, 2018.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: March 1, 2019, and a copy of the order denying rehearing appears at appendix D.

The jurisdiction of this court is invoked under 28 USC § 1254(1).

STATEMENT OF THE CASE

On July 17, 2005 the Leal family gathered for a family meal at Petitioner Miguel Daniel Leal's home. The family included Petitioner (Mr. Leal), his wife Irene Leal, son Michael and ex-wife Destiny along with their four children, Mr. Leal's second son Joseph and his wife Deanna along with their four children, Mr. Leal's third son Aaron, and Mr. Leal's daughter Michelle (RT 12/10/08, 56, 57, 62, 67, 69; RT 12/11/08, 22; RT 12/12/08, 7, 78, 138, 150).

At some point, Mr. Leal and his wife went upstairs to take a nap (RT 12/11/08, 69, 70). Irene Leal heard a knock at their door but by the time she opened it, no one was there. (Id.) Aaron testified that he went upstairs and knocked on his parent's door to say goodbye; no one answered right away, and he went into the bedroom (RT 12/11/08, 154, 155, 166). Aaron testified that while he was in the bathroom for five minutes, he heard his parent's door open and he heard his sister Michelle's voice talking to someone (Id. at 157-158, 159-160). When Aaron came out of the bathroom, Aaron saw his dad (Mr. Leal) alone sleeping in his bedroom. (Id. 157, 159). Irene testified that after the knock on the door she could not sleep anymore, so Irene went downstairs because the babies were crying (RT 12/11/08, 71-75). Irene testified that she recalled Deanna saying, "look for the bottle," telling L. L. (Alleged victim), "look for the bottle," or "get the baby's bottle". "RT 12/11/08, 74). Irene was trying to calm the babies; Michelle said, "Where is L. L.?" Irene said "she was here"..., so Michelle went upstairs looking for L. L. (RT 12/11/08, at 74).

Michelle testified that L. L. opened her parent's bedroom door and the first thing Michelle asked L.L. was what was she doing; L. L. said she was "watching cartoons". Michelle verified that there were cartoons on the TV. Then Michelle asked L. L., "What's grandpa doing?". L. L. said, "he's sleeping" Michelle verified that grandpa (Mr. Leal) was asleep on his bed. (RT 12/10/08, 125, 127).

L. L. testified that she went to Mr. Leal's bedroom looking for her sister's bottle (RT 12/12/08, at 80-81). L. L. testified that she remembered Aunt Michelle asking her what she was doing in Grandpa's room and telling her "watching cartoons" (RT 12/12/08, at 115). L. L. testified in response to a final question asked by the jury: "Did you look on top of grandpa's bed when you went into Grandpa's room looking for a baby bottle?" L. L. Answers: "No." (Id. at 137).

After getting out of Grandpa's room Michelle took L. L. out for ice cream, and asked L. L. a series of leading/suggestive questions that led Michelle to believe Mr. Leal may have inappropriately touched L. L. [1] (RT 12/10/08, 83-92; RT 12/11/08, 76-91, 144-48). Michelle relayed this to Irene and Joseph (L. L.'s Father), and they decided to take L. L. to a hospital to be examined. (RT 12/10/08, 100-102; RT 12/11/08, 27-35, 82-83). At some point, Deanna (L. L.'s Mother) arrived and called police. There were no swabs or DNA samples taken or requested by police. (12/16/08, 43). The hospital report found no evidence of abuse of any kind. (See ROA).

Three days later, L.L. and other family members were interviewed at a "child advocacy center"; afterward, Detective Thomason convinced Joseph and Deanna to

participate in a monitored and recorded "confrontational call" with Mr. Leal, aimed at getting his confession (RT 12/10/08, 22-26, 104-106).

Deanna made the confrontational call. Although Mr. Leal thought it was a private phone call, he repeatedly denied the allegations (RT 12/16/08, 57; Ex. 29; ROA 82 Ex. 3, 1-22). Mr. Leal then asked to speak to his wife Irene (with full expectation of privacy, ROA 26 see OB 61), who was directed to participate on the police end of the line (she was not informed of what was going on) (RT 12/16/08, 26-27, 55; also see Appendix R," Under Advisement Ruling"). Irene told the Detective that she did not want to talk to her husband, but the Detective did not give her a choice (he used his authority to direct her to participate) (Appendix U, Exhibit C Page 10 at 8-24). Irene was not asked for consent and she did not give consent for her communication with her husband (Mr. Leal) to be recorded (wiretapped). See Appendix U "Irene's Affidavit" Ex. A; also see Appendix U, Ex. A. Detective Thomason testified on April 17, 2006 hearing ((See Appendix U Exhibit D (ROA 37)) that he did not have any written authorization, and that he did not give Irene an option to do what he asked of her or not. Thomason had prepared questions to be asked during the call and was writing questions to ask during the call (Id.). In response to Irene's leading questions, Mr. Leal made some arguably inculpatory statements. ROA 82 Ex. 3, 30-31.

Officers went to the Leal home. Mr. Leal was not there. In fact, Mr. Leal was in the hospital. It was erroneously concluded that Mr. Leal had gone to Texas to attend to his ill mother [2]. Mr. Leal had often driven to Lubbock, Texas to attend to his ill mother (RT 12/11/08, 42-43). After getting out of the hospital, Mr. Leal was

made aware that his mother's health had turned worse. Mr. Leal called Irene and told her that he was going to Lubbock, TX to tend to his ill mother. Irene gave the Detective Mr. Leal contact information in Lubbock, but the detectives did not follow through. Mr. Leal was arrested in Lubbock Texas several weeks later. (RT 12/12/08, 42-43; RT 12/16/08, 46-50)

Procedural history:

Petitioner (Mr. Leal) was arrested on August 8, 2005 in Lubbock Texas. Mr. Leal hired attorney Larry Elms to challenge the legality of the arrest and probable cause by filing a Writ of Habeas Corpus in the Lubbock County District Court. Mr. Elms requested the District Court in Lubbock, Texas to summon Barbara Rauritzon, Pima County extradition department (see Appendix U, Exhibit D). Irene met with Mr. Leal's attorney, Larry Elms, privately, and wrote an affidavit in October 2005. See Appendix U, Ex. B.

Meanwhile, the Pima County Prosecutor's office held a Special Grant Jury and obtained and indictment against Mr. Leal on August 29, 2005. The indictment included three counts involving L. L.; Count One Continuous Sexual Abuse; Count Two Sexual Abuse of a Minor Under 15; and Count Three Sexual Conduct with a Minor Under 15. Subsequent to a trial by jury, Mr. Leal was acquitted on Count One due to lack of evidence. The jury returned guilty verdicts on Counts Two and Three. Mr. Leal was sentenced to thirteen years on Count Two and two and a half years on Count Three, to be served consecutively.

A timely Notice of Appeal was filed, followed with Appellants' Opening Brief (OB) on March 17, 2010. The Arizona Court of Appeals affirmed the Trial Courts decision on December 21, 2010. A Petition for Review to the Arizona Supreme Court was filed on March 31, 2011 and denied on July 20, 2011 (Appendix J).

The appeal raised three issues: 1.) Did the trial court deny Mr. Leal's Sixth Amendment right to counsel of choice by ordering Bertram Polis, a privately retained attorney, off Mr. Leal's criminal case; 2.) Did the trial court err in admitting Defendant's statements to his wife during the "confrontational call"; and 3.) Did the trial court violate Defendant's constitutional rights to due process, confrontation and rebuttal, in not allowing his sister to testify in reference to the "flight" theory of guilt and jury instruction.

Due to Petitioners court appointed appellate counsel's ineffectiveness, Mr. Leal filed a Notice of Post-Conviction Relief (PCR). (ROA. Ex. S). After several counsels withdrew (ROA, Ex. U, W, CC), Mr. Leal files a Pro Se PCR petition listing 25 claims (Id. Ex. DD). Subsequently, another court appointed counsel filed a Supplemental PCR petition raising seven claims of Ineffective Assistance of Counsel (IAC) (ROA Ex. QQ). The PCR court reviewed the two petitions and concluded the Pro Se petition did not raise any colorable claims that were not also included in Counsel's Supplemental Petition, because Mr. Leal had not included affidavits or other evidence [3]; therefore, the Court directed the State to respond only to Counsel's Supplemental PCR. (ROA Ex. RR).

Appendix T.

An evidentiary hearing was held, and Mr. Leal's counsel filed a Supplemental Brief as directed by the court, raising an additional IAC claim (Id. Appendix J).

On March 19, 2015, the PCR Court denied on the merits all claims raised in the two Supplemental PCR petitions. (Appendix K.). Mr. Leal filed a Pro Se Petition for Review listing all 25 claims. (See Appendix K). The Court of Appeals granted review but denied relief. (See: *State v. Leal*, No. 2 CA-CR2015-0318-PR. 2016 WL 2945197) (Ariz. Ct. App. May 20, 2016) See Appendix K. The Arizona Supreme Court denied review. See Appendix I.

Mr. Leal filed a Petition under 28 USC 2254 for a Writ of Habeas Corpus on August 8, 2014, because the PCR court was delaying his PCR – Rule 32 petition process [4]. On August 31, 2017, the US District Court of Arizona denied Petitioners petition (Appendix C). On September 26, 2017, Mr. Leal filed two motions with the District Court; Motion to Alter or Amend Judgment and Motion for Reconsideration of Petitioners Objections to R&R (Doc. 42, 43), pursuant to FRCP 59 (e). On October 3, 2018, the Court ordered both motions DENIED. (App. B).

On September 19, 2017, Mr. Leal had previously filed a Motion of Appeal for the August 31, 2017 Ninth Circuit review of the District Court Judgment. On October 4, 2017, Mr. Leal filed a Motion for Certificate of Appealability (App. K), and on October 13, 2017, filed a Supplemental to Certificate of Appealability (Trial Evidence), (App. L.)

On January 29, 2018, the Ninth Circuit Court issued an order staying appellate proceeding pending disposition of Motion for Reconsideration in the US

District Court. On October 2, 2018, the US District Court denied the Motion for Reconsideration.

On November 30, 2018, the stay is lifted by the Ninth Circuit Court, and denied appealability; stating "appellant has not shown that 'jurists of reason' would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that 'jurists of reason' would find it debatable whether the District Court was correct in its procedural ruling"...." "any pending motions denied as moot" (App. A, Doc.14).

On December 26, 2018, Mr. Leal filed a combined Motion for Reconsideration and Motion for Reconsideration *en banc* (App. E, Doc 17) to the Ninth Circuit Court.

On March 1, 2019 the Ninth Circuit Court "GRANTED" Appellants' Motion for Extension of Time and DENIED both motions (App. D).

REASONS FOR GRANTING THE PETITION

REASON ONE

This Court should decide an issue of first impression: whether a trial court commits structural error when it orders a criminal defendant's retained counsel of choice to withdraw due to potential conflicts of interest, when any such potential conflicts post-date the criminal representation, do not implicate the Sixth Amendment right to counsel, as the other parties are family members of the defendant, and are rectifiable by less drastic remedies.

The Ninth Circuit, and the District Court, and the Arizona Court of Appeals decisions are in conflict with decisions of the United States Supreme Court – *Mickens v. Taylor*, 535 US 162, 171, 152 L.Ed.2d 291 (2002): (and "actual conflict" is a "conflict that affected counsel's performance – as opposed to a mere theoretical division of

loyalties), and, authoritative decisions of other United States Courts of Appeal that address the same issue: *United States v. Turner*, 594 F. 3d 946, 952 (7th Cir. 2010); *Rodriguez v. Chandler*, 382 F.3d 670, 671-73 (7th Cir.2004), *Gonzalez-Lopez*, 548 US 140 [5].

Argument

The trial court denied Mr. Leal's Sixth Amendment right to counsel of his choice when it granted the State's motion to remove defense counsel Bertram Polis for conflict of interest reasons, when any conflict was (a) either nonexistent or a de minimus family representation in a minor civil law matter; (b) post-dated the criminal representation; (c) was easily rectifiable by means short of ordering Mr. Polis off the criminal case; and (d) should have been subservient to Mr. Polis's constitutionally protected criminal representation of Mr. Leal.

Issue-specific procedural history.

Mr. Leal hired private attorney Bertram Polis to represent him. See ROA 7 (Notice of Appearance filed by Mr. Polis October 12, 2005). Mr. Polis zealously represented Mr. Leal through the ensuing nine months of this prosecution, including appearing at the case management and pretrial conferences, advising Mr. Leal on the State's plea offer, and filing and litigating pretrial motions, including the motion to suppress Mr. Leal's statements in the confrontation call. See ROA 7, 14, 22, 25, 26, 35, 37.

On July 7, 2006, the State filed a "Notice of Potential Conflict of Interest," noting that Mr. Polis had assumed representation of Joseph Leal, L.L's father, in a divorce case that might involve custody of L. L. ROA 47. On July 20, 2006, the trial court (Judge Acuna) found that no actual conflict existed and denied the State's motion without prejudice. (ROA 59) See Appendix U, Exhibit M.

Undeterred, on August 23, 2006, the State filed a second "Notice of Potential Conflict of Interest," outlining the timeline and details of Mr. Polis's representation in the instant prosecution, the Joseph Leal divorce, and his representation of Mrs. Irene Leal in a family law visitation matter involving her granddaughter L.L., ROA 83. The State claimed that Mr. Polis had a conflict of interest and "request[ed] that the Court remove Mr. Polis as counsel of record and appoint new counsel for the Defendant." Id., 13.

On August 28, 2006, Mr. Polis submitted his Response, stating that there was no conflict because both Mr. Leal, Mrs. Leal, and their son Joseph had all been consulted and consented to his representation and, moreover, all had consistent and compatible goals in the various legal proceedings. ROA 107, 2-3. He also pointed out that the State had been aware of his representation of Mrs. Leal in the visitation matter for over eight months, without objecting. Id., 5-6. Mr. Polis expressly objected to being conflicted off his client's criminal case, on the ground that "The Sixth Amendment of the United States Constitution guarantees the right to counsel of one's choosing." Id., 6.

On September 14, 2006, Mr. Polis submitted affidavits of Mr. Leal and Mrs. Leal, waiving any potential conflicts of interest. ROA 104, 106.

On September 18, 2006, the trial court heard the matter. The prosecutor explained that Mr. Polis and his associate had assumed representation of Joseph in divorce proceedings with his wife Deanna. RT 9/18/06, 12-13. The prosecutor made clear that Mr. Polis's representation of Mr. Leal predated the divorce action or any

related civil representation. Id., 13. The prosecutor also relayed that Mr. Polis had represented Mrs. Leal in family law matters related to L.L., and Deanna and that this could pose a problem because Mrs. Leal was a primary State's witness who would be subject to cross-examination by Mr. Polis. Id., 15-16. The prosecutor also suggested that Mrs. Leal might perjure herself at the trial and that Mr. Polis could not adequately advise her about that. Id., 18. This was purely speculation and false. The prosecutor added that Joseph would also be a state's witness and subject to cross-examination by Mr. Polis. Id., 18. What the State presented to the court was a mere theoretical division of loyalties construed as an actual conflict [6].

Mr. Polis explained that he was proud of his family practice; that he often received referrals from one family member to another; that there were no actual conflicts in this case; that, specifically, the Leal family had budgetary issues that favored having one lawyer; that he had never spoken to Joseph about the criminal case at all and that Joseph had not witnessed any of the alleged criminal acts; and that he had no objection whatsoever to the Court appointing an independent lawyer for Mrs. Leal to advise her on potential perjury issues arising from her prospective testimony at trial. RT 9/18/06, 19-26. Mr. Polis reiterated his objection to being ordered off the case. Id., 27.

The trial court took the matter under advisement. RT 9/18/06, 30-31; ROA 87. On September 21, 2006, the trail court issued its ruling. ROA 88. It found as a fact that Mr. Polis had undertaken civil representation of Mrs. Leal and Joseph after undertaking Mr. Leal's criminal representation and noted that some of Mrs. Leal's

statements made to the police regarding the criminal accusations may have changed in the interim. Id., 1-2. Citing *Matter of Estate of Shano*, 177 Ariz. 550, 869 P.2d 1203 (App. 1993), the trial court found that it had the discretionary authority to disqualify counsel on the ground of representing conflicting interests if its decision was supported by a "reasonable basis in the record." ROA 88, 2. The trial court then proceeded to list the potential conflicts arising from Mr. Polis's representation of Mrs. Leal and Joseph. Id., 3-4. It found that the signed written waivers of conflict by Mr. and Mrs. Leal did not comply with Ethical Rule (ER) 1.7 comment 18 and that Mr. Polis had not obtained court approval as required by that ethical rule. ROA 88, 4. The trial court concluded that Mr. Polis had a conflict of interest that prevented him from effectively representing Mr. Leal in the criminal prosecution. Id., 5.

On September 28, 2006, Mr. Leal filed a Pro Se motion to dismiss the prosecution on various grounds See Appendix U Exhibits F, G, H, I. As is relevant here, he argued that his Sixth Amendment right to counsel of his choice had been denied by the trial court's removal of Mr. Polis. See Appendix U, Exhibit J. He also informed the court that he had been unemployed as a result of this prosecution and could not afford to hire a second private attorney. ROA 104, 3-4. On November 2, 2006, the trial court formally ordered Mr. Polis withdrawn from the case and ordered Mr. Leal to divulge his financial status in order to qualify for publicly-funded counsel. ROA 1, 10. The Public Defender was originally appointed but subsequently

withdrew; Mr. Tom Jacobs was ultimately appointed and represented Mr. Leal through the remainder of the trial court phase of the prosecution. ROA 111, 123, 126.

It is important to note as a reminder that Mr. Leal and his wife Irene Leal were not only sharing the same attorney (Mr. Bertram Polis) in Tucson, Arizona, but also sharing the same attorney (Mr. Larry Elms) in Lubbock, Texas; see two different "Affidavits" by Irene Leal made and "**Notarized"** in Mr. Elms office on October 6, 2005 and August 31, 2007. Appendix U, Exhibit A and Exhibit B. These facts support and demonstrate that Mr. Leal and his wife Irene Leal always shared their attorneys, shared a common purpose, and they and their attorneys had the same interests. Therefore, there was no conflict of interest with Mr. Polis representing Mr. Leal.

When Mr. Leal exercised his right to address the court at sentencing, he stated that he had hired Mr. Polis to represent him and that the State had strategically interfered with his counsel of choice, in violation of his Sixth Amendment rights and *United States v. Gonzalez-Lopez*, stating that "Tom Jacobs is not Bertram Polis. He doesn't have the same — the same strategies of how to defend a case." RT 2/6/09, 72-73. The trial court confirmed that Mr. Leal's constitutional objection to the removal of Mr. Polis had been preserved for appeal. Id., 56, 73

Legal argument

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense." "[A]n element of this right is the right of a defendant who does not require appointed counsel to

choose who will represent him." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S.Ct. 2557, 2561 (2006).

A trial court's erroneous refusal to permit a defendant to be represented by his counsel of choice is "structural error," a "violation [that] is not subject to harmless-error analysis." Id. at 150-52, 126 S.Ct. at 2564-66. The reason for this is that "[d]ifferent attorneys will pursue different strategies..., development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument." Id. at 150, 126 S.Ct. at 2564-66. The Court of Appeals of Arizona recently expressly recognized this structural error principle, followed it, and reversed the conviction for deprivation of the Sixth Amendment right to retain counsel in *Aragon*, 221 Ariz. 88, 9, 210 3d at 1262.

The Ninth Circuit made its decision based on the District Court's decisions and fact findings which are just repeated statements by the Arizona States Attorney's answer to Mr. Leal's Petition for a 28 USC Writ of Habeas Corpus.

The Ninth Circuit, District Court, and the Arizona Court of Appeals misunderstood or overlooked the facts of Mr. Leal's case and distinguishing between *Wheat* which involved counsel for co-defendants of criminal charges (that cause an actual conflict), and Mr. Leal, his wife, and their son who had consistent and compatible goals in the various legal proceedings. (ROA 107, 2-3), plus Mr. Leal was the one who retained counsel for his criminal representation first, then for the representation of his wife and son in separate civil matters. Mr. Leal paid for all of Mr. Polis's fees to represent himself, wife, and son.

The Trial Court on it's ruling to disqualify Mr. Polis cited "*Matter of Estate of Shano*, 177 Ariz. 550, 869 P.2d 1203 (App. 1993)", ROA 88, 2.

The Trial Court did not rely on *Wheat v. United States*, to remove Mr. Leal's counsel of choice. The record shows that the Trial Court relied on an cited "*Matter of Estate of Shano*", "the trial court found that it had this discretionary authority to disqualify counsel.....".

It is Appellant's contention that the Trial Court abused its discretion and committed a "Structural Error" by removing Appellant's paid for and retain counsel of his choice.

This Court should not allow the State to substitute *Wheat v. United States* in place of *Matter of Estate of Shano* in order to justify or remedy the Trial Court's error. The Trial Court clearly was contemplating the civil conflict of interests, by citing "*Matter of Estate of Shano*", where the attorney had an obligation with the initial client, not the criminal implications of the Defendants Sixth Amendment Constitutional right to have the assistance of counsel of his choosing.

The potential conflict, if any, could have been raised in the civil litigation, because of the pre-existing obligation to Mr. Leal in the criminal case. Thus, the parallel remedy here would have been to order Mr. Polis to cease representing the Leal family members in the civil matters.

Legal errors or misunderstanding by the District Court are as follows. The reason Petitioner/Appellant cited cases from the Seventh Circuit and from the Supreme Court of Iowa, was to illustrate authoritative decisions of other United

States Court of Appeals that have addressed the same issue, therefore, demonstrating that "jurists of reason would find it debatable whether the Petitioner states a valid claim of the denial of a constitutional right" and that questions of exceptional importance be further addressed to secure or maintain uniformity of the court's decisions.

The Ninth Circuit Court of Appeals has previously ruled "a constitutional claim is debatable if another circuit has issued a conflicting ruling". See *Allen v. Ornoski*, 435 F.3d 946, 951 (9th Cir. 2006), also see *Roy v. Lampert*, F.3d 964, 971 (9th Cir. 2006) "Where the court has no cases on point for legal guidance, it can look to cases from other circuits, acknowledging the persuasive value of authority from other courts."

The mere allegation of a conflict of interest by an overzealous prosecutor and the speculations made of a potential conflict of interest in Mr. Leal's case is an unreasonable determination of the facts in light of the evidence.

Legal Authorities:

The following legal authorities are in conflict or contrary to the District Court's ruling.

> **("Clearly established Federal law") which apply to Appellant's case – *Mickens v. Taylor*, 535 US 162, 171, 152 L. Ed 2d 291 (2002): (and "actual conflict" is a "conflict that affected counsel's performance – – as opposed to a mere theoretical division of loyalties").**
> **("Authoritative decisions of other United States Courts of Appeal that address the same issue") *United States v. Turner*, 594 F.3d 946, 952 (7th Cir. 2010); *Rodriguez v. Chandler*, 382 F.3d 670, 671-73 ((7th Cir. 2004), abrogated in part on other grounds. *Gonzales-Lopez*, 548 USC 140 (Reversal required under Sixth Amendment when retained counsel in criminal prosecution**

improperly disqualified due to attorney's representation of potential government witness in unrelated civil matter; no showing that technical conflict would have led to actual conflict of interest; other protective measures short of disqualification available).

Argument Against Wheat

In *Wheat*, Mr. Wheat, charged in a multi-defendant criminal conspiracy case, requested late in the game that he be represented by the same lawyer who already represented two of his co-defendants. The government objected to this request based on its potential for conflict-of-interest problems, and the Supreme Court upheld the trial court's rejection of this request for the same reasons. However, the representation in *Wheat* is clearly distinguished from Mr. Polis's representation of Mr. Leal, on multiple grounds.

First, the lawyer in *Wheat* had a preexisting attorney-client relationship with the other two co-defendants. The foundation for the analysis in *Wheat* is that the attorney's existing ethical obligations to those clients would pose significant potential for conflict should he also be permitted to represent Mr. Wheat. In Mr. Leal's case, the trial court correctly found as a fact that Mr. Polis represented Mr. Leal in this criminal case before his preliminary and limited representation of other Leal family members in civil matters that the State claimed posed a conflict. Thus, the parallel remedy here would have been to order Mr. Polis to cease representing the Leal family members in the civil matters, because of the potential that his overriding, pre-existing obligation to Mr. Leal might cause a conflict in the civil litigation.

Second, and in the same vein, the government in *Wheat* objected to the lawyer's representation of Mr. Wheat on the ground that it would cause the potential for

conflict in the existing prosecution of one of the other defendants (486 U.S. at 155-56). This was an appropriate stance for the government to take, as they were the opposing party in those prosecutions. Here, similarly, the State was a party to the pre-existing criminal prosecution of Mr. Leal and had every right to challenge Mr. Polis's representation of Leal family members in the civil cases on the ground of the potential to create conflicts of interest in the criminal prosecution. However, the State was not a party to the civil matters and had no equivalent standing to object to Mr. Polis's pre-existing representation in the criminal case.

Finally, if the timing of Mr. Polis's Leal family representations are not dispositive of the issue, constitutional considerations militate further toward reversal. Mr. Polis's representation of Mr. Leal in the criminal case was protected by the United States Constitution. *Gonzalez-Lopez* is based on the Sixth Amendment, which provides: "In all criminal proceedings, the accused shall have the right to assistance of counsel for his defense" (emphasis added). There is no equivalent constitutional right to counsel of choice in civil proceedings. (Cf Id.) In *Wheat*, the lawyer was properly precluded from representing Mr. Wheat due to his pre-existing obligations to the other two codefendants in the same criminal proceeding. Here, the Leal family members who were represented by Mr. Polis in civil matters may have had a contractual claim to his services, but no claim that trumped Mr. Leal's clear constitutional right to be represented by Mr. Polis. The only proper remedy consistent with the Sixth Amendment, assuming there was an actual conflict, was to order that Mr. Polis cease his representation of other Leal family members in the civil matters.

The authorities underlying the trial court's legal conclusion that there was a conflict compelling Mr. Polis's withdrawal are similarly inapplicable to the situation here. The trial court's primary cited authority was *Matter of Estate of Shano*, 177 Ariz. 550, 869 P.2d 1203 (App. 1993) (ROA 88, 2). In *Shano*, the attorney represented the beneficiary of a will he had filed on her behalf. When that will was contested in probate by the decedent's family, a special administrator was assigned as a fiduciary of the estate. The same attorney then associated as co-counsel to the special administrator. The decedent's family moved to have the attorney disqualified as counsel for the fiduciary. Because his duty to the beneficiary of the will actually conflicted with his fiduciary duty to the decedent's wife, the attorney was ordered disqualified from the latter representation, which was upheld on appeal. *Shano* does not support the trial court's decision here, but instead illustrates the timing issue that should have been dispositive in Mr. Leal's case: the attorney's existing duty to the beneficiary trumped his later-acquired fiduciary duties. Moreover, the representations at issue in *Shano* were all in civil law matters, meaning the Sixth Amendment was not at issue.

In summary, the trial court violated Mr. Leal's Sixth Amendment right to retain and be represented by his counsel of choice when it ordered Mr. Polis withdrawn from the case. To the extent there were any conflicts of interest in Mr. Polis's representation of Mrs. Leal in the visitation matter once the State decided to call her as a government witness, or in Mr. Polis's office's representation in Joseph Leal's divorce, the appropriate remedy was to order Mr. Polis to cease those

representations, which (a) post-dated his representation of Mr. Leal in the criminal matter; (b) did not implicate constitutional rights, and (c) involved far less grave ramifications for the respective Leal family clients in the relatively minor civil matters. Removal of a defendant's retained lawyer in an ongoing criminal prosecution -gave the State a strategic advantage in the prosecution and was not the appropriate remedy in light of the Sixth Amendment ramifications discussed supra. Moreover, the trial court's apparent conclusion that preclusion of Mr. Polis was the only available remedy if it found Mr. Polis had violated ER 1.7 was legally incorrect, and the authorities it relied on are clearly distinguished.

REASON TWO

This Court should decide an issue of first impression: Regarding common law marital privilege, whether the husbands privileged to communicate in confidence with his wife, entitles him to suppress statements made to her in the telephone communication?

This Court should exercise its supervisory power to decide the conflicting decisions of the Ninth Circuit, US District Court of Arizona: *Miguel Daniel Leal v. Charles L. Ryan*, Warden and Attorney General for the State of Arizona and the Tenth Circuit - US District Court of Colorado: *United States v. Neal*, 532 F. Supp. 942 (D.C. Colo. 1982) regarding the above mentioned question.

The Ninth Circuit adopted the US District Court of Arizona decision, and the US District Court had adopted the Arizona Court's decisions, therefore, the Petitioner will argue "Question Five" implicating "Question Two, Three, Six, Ten", for this Court's decisions.

The trial court erred in admitting Mr. Leal's statements to his wife during the confrontation call, because they were protected by the marital communications privilege.

Issue-specific facts and procedural history.

Mr. Leal moved to suppress the statements he made to his wife during the confrontation call, arguing they were privileged communications under A.R.S. § 13-4062, the anti-marital fact privilege (ROA 26 Also see Appendix U, Exhibit Q). At the hearing on the motion, Detective Thomason testified that, during his conversation with Deanna in the confrontation call, Mr. Leal had asked: "Where is my wife? If I could talk to her, I would explain things" (RT 4/17/06, 13; see id., 36). At that point, the Detective summoned Irene Leal from the waiting room and requested her to continue the conversation, although there had originally been no plan that she take part in the call (Id., 9-10). The Detective testified that, although Irene Leal must have realized the conversation was being recorded, Mr. Leal certainly did not know that the conversation was being recorded or monitored by the police (Id., 16-18).

Irene Leal testified that she did not think she had a choice but to participate in the confrontation call and to ask the questions the Detective wrote down for her (Id., 21-22, 26, 30). Irene Leal testified that "I didn't know, at the time when he [the Detective] asked me this, I didn't know that my rights were being violated and his [my husband's] rights were being violated" (Id., 29).

In hearing argument on and discussing the matter, the trial court (Judge Lee), appeared to focus on whether Irene's participation in the confrontation call was voluntary (see RT 4/17/06, 46-49) (trial court suggesting the analysis is equivalent to whether a suspect waives his Miranda rights or otherwise voluntarily talks to the

police). The trial court subsequently issued its under advisement ruling, finding Mr. Leal's statement made to his wife in the confrontation call to be admissible (ROA 39). The ruling concludes:

> **This issue turns on whether Irene [Mrs.] Leal voluntarily agreed to participate in the confrontation call. Here the evidence demonstrates [Mrs.] Leal voluntarily agreed to participate in the confrontation call and knew it was being recorded. The privilege does not extend to this situation given such voluntary participation by Mrs. Leal.**

(Id., 3). At trial, the statement was played to the jury and was a focus of the State's case. (RT 12/10/08, 18-20) (prosecutor begins her opening statement with confrontation call); (RT 12/12/08, 53-62; RT 12/16/08, 23-33) (50-/minute CD played); ((RT 12/16/08 (Closing Arguments), 17-24)) (focus of prosecutor's closing argument); (Ex. 29).

The trial court implicitly found that the communication between Mr. Leal and Mrs. Leal qualified as a privileged marital communication under (A.R.S. §13-4062). (See ROA 39). At the time of the confrontation call and the suppression ruling, A.R.S. SS §13-4062(1) provided: A person shall not be examined as a witness in the following cases:

> **A husband for or against his wife without her consent, nor a wife for or against her husband without his consent, as to events occurring during the marriage, nor can either, during the marriage or afterwards, without consent of the other, be examined as to any communication made by one to the other during the marriage. These exceptions do not apply in a criminal action or proceeding for a crime committed by the husband against the wife, or by the wife against the husband, nor in a criminal action or proceeding against the husband for abandonment, failure to support or provide for or failure or neglect to furnish the necessities of life to the wife or the minor children. Either spouse, at his or her request, but not**

otherwise, may be examined as a witness for or against the other in a prosecution for an offense listed in 13-604, subsection W, paragraph 5, for bigamy or adultery, committed by either spouse, or for sexual assault committed by the husband.

As the trial court found, none of the statutory exceptions to the marital communications privilege were applicable here (ROA 39). Irene Leal was clearly a hostile State's witness and did not request to testify against her husband. ((See Defense Ex. #A, admitted at 9/4/07 Suppression hearing (Affidavit of Mrs. Irene Leal)) (See Appendix U, Exhibit A). The trial court's ruling to allow the conversation between Mr. and Mrs. Leal to be introduced was based on its determination that Mrs. Leal knew the conversation was being recorded by police and freely participated in the confrontation call (Id). Thus, the trial court's ruling is ultimately a ruling that Mrs. Irene Leal waived the privilege. But even assuming there was sufficient evidence to support the factual predicate trial court's ruling, Mrs. Irene Leal's reluctant acquiescence to participate in the confrontation call did not waive the privilege for Mr. Leal.

The flaw in the trial court's reasoning is that it apparently considered the privilege to be held by Mrs. Leal, and that it was hers to waive. In fact, "Privileges as to confidential communications customarily belong to the person making the communication. Because it is that person's conversational privacy that is being protected, only he has the right to prevent revelation." *Joseph M. Livermore, et al., Law of Evidence* §501.1, at 123 (4th ed. 2000). "Ordinarily the holder of a communication privilege is the communicating party. That rationale applies, as well, to the martial communications privilege (Id. §501.3 at 136). See also *VIII J. Wigmore*

Evidence § 2333 (McNaughton rev. 1961). The US Supreme Court has long recognized the common-law privilege against disclosure of communications between spouse. See *Trammel v. United States*, 445 US at 51, 100 S. Ct. at 912. *Blau v. United States*, 340 US 332, 333, 71 S. Ct. 301, 302, 95 L. Ed. 306 (1951); *Wolfe v. United States*, 291 US 7, 13, 54 S. Ct. 279, 280, 78 L. Ed. 617 (1934). In fact, this privilege is the second oldest testimonial privilege recognized at common-law. Here, the person making the communication — Mr. Leal — had no idea the conversation was not a confidential discussion with his wife. In fact, that was Detective Thomason's whole purpose in setting up the confrontation call, to trick Mr. Leal into thinking he was talking confidentially to a family member in the hopes he would make incriminating statements. That strategy did not run afoul of any privileges as the confrontation call was originally implemented, between Mr. Leal and his daughter-in-law, Deanna. However, once Mrs. Leal was put on the line at Mr. Leal's specific request, his statements were covered by the marital communications privilege.

Even the Arizona Appellate Courts have found that the marital communication privilege is accorded even greater deference that the clergy-penitent or attorney-client privilege. See *Ulibarri v. Superior Court* in and for the County of Coconino, 184 Ariz. 382, 386-87, 909 P. 2d 449, 453-54 (App. 1995) (Marital communications privilege afforded greater protection than professional (attorney-client/priest-penitent/doctor-patient) privileges because latter exists primarily to promote the professions and professional behavior, and violations of confidences are

Similarly, in *People v. Dubanowski*, 394 N.E.2d 605 (Ill. App. 1979), the police installed a "body wire" listening device on a murder suspect's cooperate wife, and the suspect subsequently confessed to his wife at a restaurant in a conversation he thought was confidential. The Court held that the Illinois statutory marital privilege for confidential communications extended both to the recorded conversation and to any testimony about the conversation overheard by the police by means of the body wire.

Neal and *Dubanowskci* appear to be the two closest cases on point, and the prevailing resolution of the issue. See *Wayne F. Foster*, Annotation, Spouse 's betrayal or connivance as extending marital communications privilege to testimony of third person, 3 A.L.R. 4th 1104 (1981)

The marital communication privilege "encourages marital partners to share their most closely guarded secrets and thoughts, thus adding an additional measure of intimacy and mutual support to the marriage," and was "designed to protect and foster the sanctity of marriage, an institution deemed beneficial to society as a whole." *Livermore*, supra § 501.3, at 134-35 (internal quotation omitted). The statement at issue here epitomizes marital communication consistent with the purpose of the privilege and a desire to maintain the privilege: Mr. Leal, clearly shaken by the serious accusations against him that were also threatening to disrupt and jeopardize his close family, asked to, and did, confidentially speak to his wife about the matter, in private to the best of his knowledge. If the marital

communications privilege does not apply here, it is difficult to fathom where it would apply.

All marital communications are presumed to be confidential, and the party seeking to avoid the privilege has the burden of establishing a contrary intent, *Blazak v. Superior Court*, 177 Ariz. 535, 869 P.2d 509 (App. 1994). Even if, as the trial court found, the State showed that Mrs. Leal agreed to participate, that merely demonstrated her participation in the government's connivance to breach the privilege, which did not implicate Mr. Leal's privilege. Detective Thomason's testimony firmly establish that Mr. Leal thought his call was confidential and therefore, did not waive the privilege, which was the legally determinative question. The State did not meet its burden of proving that Mr. Leal's communication was not privileged or was validly waived. The trial court's reason for finding waiver was not legally tenable and was thus either an error of law or an abuse of discretion.

The error was not harmless

Absent the confrontation call, the State had little evidence supporting its case. There were no eyewitnesses to the alleged misconduct. There was no DNA or other physical evidence of sexual conduct or molestation. The State's remaining evidence consisted of the conflicting and internally inconsistent allegations and testimony of L. L., all of which had followed Michelle's suggestive questioning of her that, even if conducted in good faith, violated many of the professional standards for questioning suspected child molestation victims in light of children's heightened susceptibility to

suggestion. And even with the confrontation call evidence, the trial court entered a judgment of acquittal on amended Count One.

The recorded confrontation call was at the heart of the State's case. The prosecutor began her opening statement with a discussion of the confrontation call: it was the first thing the jury heard about facts of the case (RT 12/10/08, 18-20). The audiotape of the confrontation call was approximately fifty minutes; it was admitted into evidence, played for the jury, and accompanied the jury into the deliberation room (RT 12/16/08, 28, 33).

The confrontation call was also a focus of the prosecutor's closing argument, ((RT 12/16/08 (Closing Arguments), 17-24)), and her rebuttal argument (RT 12/17/08, 8-9, 13). Tellingly, in her rebuttal argument, responding to Mr. Leal's argument about the State's utter lack of forensic evidence, the prosecutor told the jury: "[M]ost significantly, ladies and gentlemen, some of the most powerful evidence that you have in this case is that corroborating piece of evidence, the confrontation call" (Id., 13). The prosecutor's arguments demonstrate that the error was not harmless, See *United States v. Williams*, 435 F.3d 1148, 1163 (9th Cir. 2006): A Fifth Amendment violation admitting unconstitutional confession was not harmless because error 'went to heart' of case. lt is clear from the prosecutor's closing argument that she wanted the jury to focus on defendant's statements. *State v. Charo*, 156 Ariz. 561, 563, 754 P.2d 288, 290 (1988) (prosecutor's reliance on improperly admitted other-bad-act evidence in closing arguments belied State's claim on appeal that evidence was unimportant).

The error was not harmless. This Court should reverse and remand with instructions that Mr. Leal's statements to his wife are privileged and inadmissible at any retrial.

REASON THREE

Mr. Leal's constitutional rights to due process, to compulsory process, and to present a defense, were violated when the trial court precluded defendants (Appellate Mr. Leal) sister from testifying in rebuttal to the state's "flight" theory of guilt. The District Court and Ninth Circuit Court by adopting its ruling, misunderstood or overlooked the points of law and facts, in the opinion of the Appellant, which are plain errors and, in some ways, supported by the District Court's (R&R). Also, on the same premise as stated on Claims One and Two, Appellant cites authoritarian decisions to illustrate that "jurists of reason would find the issue debatable"; per dicta.

Facts:

1.) The prosecutor falsely claimed that defense witness was disclosed late (See: ROA 233, TR 12/16/08, 36); again lied to the Court when she complained that she had not had the opportunity to investigate, corroborate, or rebut any perspective testimony by Mr. Leal sister, (Id. 38). (Proven to be false by next ~~te~~ two listed facts)

2.) The Defense filed their Rule 15.2 Disclosure on 8/08/06, under Rule 15.2 (B), listed witnesses Patricia Romo and Perlita Rodriguez, and under 15.2 (c) their names and their addresses were disclosed. (See ROA 73); (also see Appendix U, Exhibit K, 3.) Mr. Leal filed a Motion to Dismiss with Prejudice based on Doctrine of Collateral Estoppel on 9/27/06 (ROA 91), see Appendix U, Exhibit G, and provided the prosecution a copy of the Lubbock, Texas District Court Writ of Habeas Corpus hearing transcript, see Appendix U, Exhibit H, where the "flight" theory addressed; with witnesses Patricia Romo and Perlita Rodriguez, see Appendix U, Exhibit R, S

and T. (Result of hearing was that Mr. Leal had not fled, and released with instruction to report to Pima County.) This court should review the trial record in order to evaluate the inappropriateness of the "flight" instruction. Also see Appendix U, Exhibit D and H. The Petitioners due process claim that the admission of the flight issue was arbitrary and so prejudicial that is debatable that the Trial of Mr. Leal was fundamentally unfair. See *Walters v. Maass*, 45 F.3d 1355 (9th Cir. 1995): "The due process inquiry in federal habeas corpus review is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair." Even if the admitting of the flight evidence was not an abuse of discretion, the Trial Court committed an abuse of discretion for giving a very highly prejudicial "Flight Instruction" after precluding Mr. Leal's rebuttal witness an opportunity to present his defense. ("Authoritative decisions of other United States Courts of Appeal that address the same issue"): *Kuebler v. State*, __So. 3d__) Miss. 2016): WL 669948

> **"The defendant's conviction was reversed when the trial court erred by denying the defendant the opportunity to present his theory of defense, granting a flight instruction, and prohibiting the defendant from offering evidence to rebut the States argument that his flight indicated consciousness of guilt. At trial, the State use flight evidence to argue the defendant fled because he knew he was guilty. Once the State use flight to prove that fact, any evidence supporting Kuebler's alternative explanation for that flight had some 'tendency 'to make [that] fact more or less probable."**

Clearly Established Federal Law:

Chambers v. Mississippi, 410 US 284 (1973): "The right of an accused in a criminal trial 'due process' " is, in essence, the right to a fair opportunity to defend against the States accusations. The right to confront and cross-examine

witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

The State knew and had an opportunity to pursue court ordered depositions of these witnesses. Specifically, Deputy County Attorney Morrow filed a Motion to Depose these witnesses (see ROA 76). If the State did not follow up on their written motion, they cannot subsequently come back and say that they were deprived of an opportunity to interview or seek their testimony.

The trial court had other remedies against offending defense counsel, such as censure, fines, or bar complaints, which were available and would have sanctioned defense counsel for not adequately securing the appearance of defense witnesses Patricia Romo and Perlita Rodriguez (failure to subpoena witnesses), but would not have punished Mr. Leal for his counsel's deficiencies.

The State benefited from the extreme sanction of preclusion of a key defense witness.

The error was not harmless

Had the "flight" issue been properly defended, the instruction would not have been granted.

The prosecutor concluded her closing argument by stressing the evidence surrounding Mr. Leal's departure following the confrontational call, arguing, "now you can use that information, that evidence, that he skipped out and went to Texas, I submit to you, ladies and gentlemen, as evidence of consciousness of guilt." RT 12/16/08 (closing argument), 21-24.

In response, defense counsel attempted to explain Mr. Leal's departure to Texas, but he had no evidence on which to base his argument (RT 12/17/08, 4-7). In her rebuttal, the prosecutor argued, "Now, ladies and gentlemen, people with something to hide, run....I ask you to take the defendant's flight into consideration when you are rendering and deliberating your verdicts" (Id., 10). The prosecutor's arguments demonstrate that the error was not harmless. *Hughes*, 189 Ariz. At 72, 938 P.2d at 467; *Charo*, 156 Ariz. at 563, 754 P.2d at 290. Also see, *Stanley v. Bartley*, 465 F.3d 810 (7th Cir. 2006). Under the *Strickland v. Washington*, 466 US 668, 687-88 (1984) standard, the federal appeals court in *Stanley* found that the failure of trial counsel to interview and call witnesses was prejudicial, and that the State's contrary conclusion was not reasonable. The conviction was reversed.

This Court should reverse Mr. Leal's conviction as in *Stanley v. Bartley.*

REASON FOUR

Ineffective assistance of counsel: The combined errors, omissions and oversights of defense counsel during the trial constitute an ineffective assistance of counsel, denying Defendant of a fair trial.

The multiple issues taken in their entirety constitute ineffective assistance of counsel on the trial level on the following issues:

1.) Failure to pursue the "flight" risk issue via an objection to the instruction, filing a written objection to the "flight" instruction, presenting the evidence outlined herein and failure to take a special action on the issue;

2.) Failure to take a special action on the constitutional and evidentiary issues regarding the "confrontation" call and evidence issues;

3.) Failure to secure the attendance of rebuttal witnesses regarding Defendant's presence in Lubbock, Texas;

4.) Failure to investigate the issue of the victim's mental capabilities;

5.) Failure of trial and appellate counsel to present the rebuttal testimony of Patricia Romo and Perlita Rodriguez;

6.) Failure of trial and appellate counsel to present the issue of the improper testimony of Wendy Dutton; and

7.) Failure of trial and appellate counsel to protect Defendant's speedy trial rights. Although three issues were litigated on the Direct Appeal, they were not complete. In addition to the foregoing appellate counsel's failure to include the constitutional issues on the confrontation call preclude Defendant from having any appellate review on that particular issue. Trial counsel did not take said constitutional issue up on a special action and appellate counsel failed to raise it during the appeal.

Detailed Ineffective-of-Counsel Issue of Fact: See Appendix S, herein incorporated.

Legal Authorities

The combined errors, omissions and oversights of defense counsel during the trial constitute an ineffective assistance of counsel, denying Defendant of a fair trial.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 205 (1984) set up a two-prong test to determine whether an attorney or attorneys' actions or omissions constitute a violation of a defendant's rights to effective assistance of counsel. First,

the defendant must show that the attorney's performance was deficient. Second, the defendant must show that that deficit performance did result in a prejudice to the defendant.

It is Petitioner's position that his conviction was a result of two things: 1) the introduction of a tape recording set up by lead Detective Thomason and used by the prosecution in their opening statement, their case in chief and their closing statements; and 2) the "flight" instruction given by the court to the jury.

Petitioner acknowledges that both these issues were litigated at the trial level and raised on appeal. It is Defendant's position that trial counsel failed to adequately defend Mr. Leal on these issues, and had an adequate defense been raised there was no other evidence to convict him.

As noted above, there was no forensic evidence in this case. Defendant was acquitted on Count One, due to lack of evidence, Michelle being the person at L.L.'s trial who conducted her own investigation, secured a tape recorder and tape, which were "lost" prior to trial while in police property, and was leading the charge for Defendant's conviction. Without the "confrontation call" and/or the "flight" instruction, there would not have been sufficient evidence to convict.

Defense counsel's failure on several issues regarding Defendant's defense directly resulted in his conviction.

Petitioner's primary argument is that the representation of Defendant by Mr. Jacobs fell below the standard set forth in *Strickland*, supra. It is Defendant's contention that the several aspects of Mr. Jacobs' representation, taken together,

represented a combination of factors that deprived Mr. Leal (Petitioner) of his right to effective assistance of counsel.

Petitioner provided Counsel with complete and accurate information, and Counsel refused to assist his client in presenting evidence, witnesses, defenses, and jury instructions the Defendant told Counsel to present (see: Appendix J, P. 33-34, 39, 45).

By Mr. Jacobs' actual and constructive denial of the assistance of counsel altogether, gives rise to a strong presumption of prejudice.

Counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

Bullock v. Carver, 297, F. 3d 1036, 1047 — 1048 (10th Cir. 2002) "The relevant question is not whether Counsel's choices were strategic, but whether they were reasonable".

It is impossible for the reviewing Court to confidentially ascertain how the State's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer.

In *Chapman v. California*, 386 U.S. 18 (1967), the Supreme Court acknowledged that certain constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error". Among these rights is the right to the assistance of counsel, is entailed to the right of counsel, an abridgment of the former is equivalent to abridgment of the latter.

Counsel's errors had sufficient impact on the trial to "undermine confidence in the outcome". Grounds for overturning the conviction.

REASON FIVE

Denial of Speedy Trial as guaranteed by the Sixth Amendment.

The Petitioner was arrested on 8/8/05 in Lubbock, Texas on an Arizona NCIC Warrant, and arraigned on 8/9/05 on the Arizona charges. (See Appendix U, Exhibit D).

On or about 9/8/05, Mr. Leal's attorney Larry Elms filed a Writ of Habeas Corpus in the Lubbock, Texas District Court (See Appendix U, Exhibit D), and summons Pima County Extradition Department, Barbara Rauritzon (challenging probable cause and the legality of the arrest.) However, on 8/29/05 Pima County Prosecutors' office held a Special Grand Jury and obtained an Indictment. Pima County Attorney's Office failed to provide a copy of the Indictment and Grand Jury Transcript as required by law to Mr. Leal's attorney, Mr. Larry Elms. On 9/27/05, Mr. Leal had spent 51 days in the Lubbock County Jail, waiting proper documentation for Extradition by Pima County, Arizona, and waiting for Pima County to show probable cause; which Pima County Officials never did. (See Appendix U, Ex. D, P.5).

By Pima County, Arizona's "Failure to Appear" and failure to comply with all the legal requirements of the Uniform Criminal Extradition Act, and other laws and legal standards; Pima County Attorney's Office violated Habeas Corpus statutes, due process of law and equal protection of laws.

On 6/3/08, the Lubbock, Texas District Court ordered a Final Disposition of Miguel Daniel Leal, No. 2005-001,775, pertaining to Pima County case number PMA

050717424. ORDER "After a review of the application, the district clerk's file, and the testimony from the 9/27/05 hearing in the above entitled cause, this Court concludes that Applicant is entitled to relief." (See Appendix U, Exhibit D, p. 5)

Although, Mr. Leal's trial was continued on multiple occasions, most at the request of the prosecution, others for the defense, and yet others for the Court, it is clear that the statutory time for completion of the trial had passed; the matter did not get to trial until 12/9/08.

Specifically, on 12/14/07, (TR) defense counsel Mr. Jacobs moved the Court for dismissal due to speedy trial See (TR) Appendix U, Exhibit N, pages 3-6.

> **"The Court: Well, how about a 60-day bump... but no more delays.**
> **Mr. Jacobs: January 15th.**
> **The Court: Yeah And then at 60 days, with the understanding her status will be evaluated, the State can set it for trial or dismiss.**
> **The Court: that will be in March - let's go to March 19th.**
> **Mr. Jacobs: — over objection of the defense asserting speedy trial and request this matter be dismissed."**

In addition to the foregoing, Mr. Leal did prepare and forwarded to Mr. Jacobs a follow-up Motion to Dismiss for Speedy Trial Violation. A copy of said request, typed by Mr. Leal and presented to Mr. Thomas Jacobs, is attached hereto and incorporated herein as Appendix U, Exhibit P, also see Appendix U, Exhibit O.

Failure to dismiss and discharge Mr. Leal would seriously undermine the constitutional principles of a fair and impartial trial without delay, thus creating a miscarriage of justice.

The Sixth Amendment's Speedy Trial Guarantee

Speedy Trial is a fundamental right of an accused. *Barker v. Wingo*, 414 U.S. 919, 920 (1972);

Moore v. Arizona, 414 U.S. 25, 28 (1973) ("[T} he right to a Speedy Trial is as fundamental as any of the rights secured by the Sixth Amendment. ")

The Sixth Amendment to the United States Constitution and Article 2, 24, of the Arizona Constitution protect a criminal defendant's right to a SPEEDY TRIAL. *State v. Schaaf*, 169 Ariz 323, 327, 819 P.2d 909, 913 (1991).

In Mr. Leal's case, the state or the court was negligent in their duties to try Defendant in a timely manner. Moreover, they have failed to show good faith or diligent effort, to bring Defendant to trial quickly. As displayed by the lengthy undue delays, and curtailed liberties/freedom of the Defendant in this instant case. *United States v. Graham*, 128 F.3d 372, 374, (6th Cir. 1997).

The Supreme Court has repeatedly held that the prosecutor and the court have an affirmative Constitutional obligation to try the Defendant in a timely manner; and that this duty requires good faith and diligent effort to bring him to trial quickly. See *Moore v. Arizona*, 414 U.S. 25, 26, 94, S.CT. 188, 38, L.Ed. 2d 183 ((1973) quoting *Smith v. Hooey*, 393 U.S. 374, 384, 89 S. Ct. 575, 21 L. Ed. 2d 607 (1969)).

United States v. Goeltz, 513 F. 2d 193, 197, (10th Cir. 1975) To the extent that the Defendant's counsel waived time or had Defendant request continuances. This would not be attributed to Defendant, due to counsel's actions contradicting the best interest of Defendant, regardless of Defendant being bound by counsel's actions;

defense continuances don't excuse lengthy delays in the disposition of a case. United *States v. Lam*, 251 F. 3d 852 (9th Cir. 2001).

State v. Dowling, 110 So. 2d. 522, 523 (FLA. 1926) Therefore, petitioner should be released from custody immediately; and charges dismissed with prejudice to bar any re-prosecution of the criminal charges. Whereas, a violation of Sixth Amendment right to speedy trial or failure to prosecute requires dismissal.

Strunk v. United States, 412 U.S. 434, 439-40, 93 S.Ct. 2260 (1973); *McNeely v. Blanas*, 336 F. 3d 822 (9th Cir. 2003). Any denial of dismissal would be void being inconsistent with due process of law. *Omer v. Shalala*, 30 F.3d 1307, 1308 (1994), and *Bass v. Hoagland*, 172 F.2d 205, 209 (1949).

The actions of the State to delay trial of Defendant, has led directly, prejudicially, and unlawfully to a denial of right to speedy trial in this case. Through said delay, the Government seriously and intentionally infringed upon the right of due process of law, under the Fourteenth Amendment to the United States Constitution, which the Supreme Court has held to be the "The law of the land." In the instant case, the Court has no prerogative. *The Court must immediately order an immediate dismissal of all charges against the Defendant with prejudice.*

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

Miguel D. Leal

Miguel D. Leal
Petitioner, Pro Se

Date: May 10, 2019

END NOTES

[i] Additionally, the Ninth Circuit and the US District Court always denies Pro Se inmates Petitions, who are not represented by the assistance of an attorney, before ruling on Motions for The Appointment of Attorney, and/or Motions Requesting a Federal Evidentiary Hearing. Then deny emotions as moot. This practice is unfair to inmates who are not lawyers and cannot properly articulate their claims, due to the complexity of the legal issues involved; and the ineffectiveness of trial and appellate counsel's defending their US constitutional rights, presenting all evidence is available, including the subpoena of witnesses, and appealing all constitutional rights violations. This practice arises to a Miscarriage of Justice, where potential innocent individuals are in Prison due to lack of money to afford lawyers' fees, and effective legal representation.

[1] Michelle had no training or experience in interviewing children or suspected child abuse victims (RT 12/10/18, 141).

[2] Mr. Leal was in Tucson, came home later, and on 7/22/2005 was admitted into the hospital; he had been continuously ill for months prior to 7/24/05. See Appendix U, Exhibit E.

[3] Mr. Leal did include in his PCR several exhibits of supporting evidences. Id., Exhibit DD.

[4] The Arizona Court of Appeals issued its Mandate in April 2017 (Appendix L), upon conclusion of Mr. Leal's post-conviction proceedings. See: Mandate, *State v. Leal.* No. CR. 2005 3517 (Pima County Superior Court filed April 3, 2017).

[5] Invoking *United States v. Gonzalez-Lopez*, 548 US 140 (2006), Mr. Leal filed a Pro Se pleading arguing that the Trial Court had denied him his Sixth Amendment right to counsel of his choice by removing Mr. Polis (ROA 109) Appendix U, Exhibit J.

[6] See *Mickens v. Taylor*, 535 U.S. 162,171, 152 L. Ed. 2d 291 (2002).