

PROVIDED TO
MARTIN CORRECTIONAL INSTITUTION
ON 11/28/23
FOR MAILING (23)

No. _____

23-6256

ORIGINAL

Supreme Court, U.S.
FILED

NOV 28 2023

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH RAY BRABHAM — PETITIONER
(Your Name)

vs.

State of Florida — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

District Court of Appeals Second District
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

KENNETH RAY BRABHAM
(Your Name)

1150 S.W. Allapattah Rd.
(Address)

Indiantown, Fla. 34956
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Whether intended or not does a trial judge give the appearance of partiality by taking sua sponte actions in favor of the state?

Is it a structural defect in a trial when the judge expresses his 'feeling' that he 'needs to lord over it all. To make sure it doesn't get screwed up' and 'having to cover for people'?

When a prosecutor who commits misconduct of dishonesty, deceit, and fraud on the court in bad faith; does it require a dismissal of the charges under the double jeopardy clause?

Is a new trial required when the trial court's failure to hold a Richardson hearing is in the belief of the trial judge, may not exist?

Does a prosecutor have a continued obligation to disclose 'favorable to the accused' evidence to the defense in a timely fashion that makes it of value to the accused, even in a Notice of Expiration of Speedy Trial time period?

Does a juror who expresses that they have an extrajudicial concern that may keep them distracted from hearing testimony constitute structural error?

Does a trial judge who rules on a defense motion before the defense presents it show partiality for the state, who benefits from the ruling?

A lawyer who abandons a client on appeal after it was

Per Curiam Affirmed and does either file a rehearing or to withdraw from that case; causing the clients own motions in pro-se to be stricken, due to having counsel, nor adopting his clients motion, constitute ineffective assistance of Appellate counsel?

Is it a constitutional violation for appellate counsel to not raise fundamental error that is stronger than the issues raised by counsel.

LIST OF PARTIES

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

RELATED CASES

Brabham v. State of Florida, 21-07305 CF, Circuit Court of the Sixth Judicial Circuit in and For Pinellas County, Florida. Judgment entered 22 April 2022.

Brabham v. State of Florida, 22-1729, District Court of Appeal of Florida Second District. Judgment entered 1 September 2023.

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	13
CONCLUSION.....	41

INDEX TO APPENDICES

APPENDIX A	Decision of District Court of Appeal of Florida Second District	42
APPENDIX B	Judgment and Sentence in the Circuit Court, Sixth Judicial Circuit in and for Pinellas County Florida	43
APPENDIX C	Mandate From District Court of Appeal of Florida Second District	47
APPENDIX D	Decision on Rehearing En Banc in the District Court of Appeal Second District	48
APPENDIX E	Decision on Motion to Supplement the Record in The District Court of Appeal Second District	49
APPENDIX F	Decisions of Motion for Clarification and Rehearing EN BANC in the District court of Appeals Second District	50
<u>APPENDIX E</u>	Letter From Bolotin, 1 Sept. 23	51
	Letter From Bolotin, 17 March 23	52
	Motion for Extension of Time	56

Table of Authorities Cited

<u>CASES</u>	<u>PAGE</u>
Banks v. Dretke, 540 U.S. 668 (2004)	32
Barnhill v. State, 140 So.3d 1055 (FL 2d DCA 2014)	14
Bass v. State, 547 So.2d 680 (FL 1st DCA 1989)	36
Bell v. State, 902 So. 2d at 847	35
Berger v. U.S., 295 U.S. 78 (1935)	27
Binger v. Pest Control, 401 So. 2d 1310 (FL 1981)	19
Briggs v. State, 455 So. 2d 579 (FL 1st DCA 1984)	28
Canakaris v. Canakaris, 382 So. 2d 1197 (FL 1980)	34
Craig v. State, 685 So. 2d 1224 (FL 1996)	27
Cumbe v. State, 345 So. 2d 1061 (FL 1997)	29
Davila v. Davis, 137 S.Ct. 2058 (2017)	39
Delno v. Market Street Ry. Co., 124 F. 2d 965 (9 CIR 1942)	34
Dodson v. Pessell, 390 So. 2d 704 (FL 1980)	19
Donahoe v. State, 464 So. 2d 281 (FL 1986)	29
Fischam v. Suen, 672 So. 2d 644 (FL 4th DCA 1996)	35
Franquial v. state, 699 So. 2d 1312 (FL 1997)	16
Gant v. state, 477 So. 2d 17 (FL 3d DCA 1985)	29
Gant v. Roe, 389 F. 3d 908 (9 CIR 2004)	31
Gomez v. U.S., 490 U.S. 855 (1989)	18
Gonzalez v. State, 97 So. 2d 127 (FL 2d DCA 1957)	27
Gosliminski v. state, 132 So. 3d 678 (FL 2013)	35
Guzman v. Inch, 220 US DIST LEXIS 31154 (11 CIR) (S.D. Fla)	39
Henry v. State, 700 So. 2d 797 (FL 4th DCA 1997)	36
Hitchcock v. State, 636 So. 2d 572 (FL 4th DCA 1994)	37
J.F. v. State, 718 So. 2d 251 (FL 4th DCA 1998)	15
J.L.D. v. state, 4 So. 3d 24 (FL 2d DCA 2009)	15, 17
Johnson v. state, 252 So. 3d 1114 (FL 2018)	37
Jones v. Barnes, 463 U.S. 745	39
Kyles v. Whitley, 514 U.S. 419 (1995)	32

<u>CASE</u>	<u>PAGE</u>
Lavado v. State, 492 So. 2d 1322 (FL 1986)	16
Lewis v. State, 591 So. 2d 922 (FL 1991)	37
Love v. State, 569 So. 2d 807 (FL 1st DCA 1996)	14
Lyles v. State, 742 So. 2d 842 (FL 2d DCA 1999)	15
McCray v. State, 220 So. 3d 1119 (FL 2017)	8
McFadden v. State, 732 So. 2d 1180 (FL 4th DCA 1999)	15
Neborgall v. State, 293 So. 3d 517 (FL 4th DCA 2020)	35
Pendaris v. State, 752 So. 2d 75 (FL 2d DCA 2000)	27
Perez v. State, 595 So. 2d 1096 (FL 3d DCA 1992)	37
Porter v. Singletary, 49 F.3d 1483 (11 CIR 1995)	14
Raffone v. State, 483 So. 2d 761 (FL 4th DCA), dismissed, 491 So. 2d 281 (FL 1986)	29
Richardson, 246 So. 2d at 775	29
Roberts v. State, 279 So. 3d 271 (FL 1st DCA 2019)	37
Roberts v. State, 842 So. 2d 298 (FL 3d DCA 2003)	15
Rodriguez v. State, 842 So. 2d 1053 (FL 3d DCA 2003)	37
Salgado v. State, 829 So. 2d 342 (FL 3d DCA 2002)	35
Scull v. State, 569 So. 2d 1251 (FL 1990)	19
Seago v. State, 23 So. 3d 1269 (FL 2d DCA 2010)	15, 18
Smart v. State, 179 So. 3d 477 (FL 4th DCA 2015)	15
Smith v. Robbins, 528 U.S. 259 (2000)	39
Smith v. States, 500 So. 2d 125 (FL 1986)	28
Somerville v. Ahula, 902 So. 2d 930 (FL 5th DCA 2005)	34
Sparks v. State, 740 So. 2d 33 (FL 1st DCA 1999)	18
State v. Hall, 509 So. 2d 1093 (FL 1987)	28
State v. Hayden, 130 P. 3d 124 (Kan 2006)	18
State v. McLeon, 640 S.E. 2d 770 (N.C. App 2007)	18
Steinhorst v. State, 636 So. 2d 498 (FL 1994)	18
Strickler v. Greene, 527 U.S. 263 (1999)	31
Sydeman v. Benson, 463 So. 2d 533 (FL 4th DCA 1985)	35

Cases

	<u>page</u>
Tarrant v. State, 668 So. 2d 223 (FL 4th DCA 1996)	29
U.S. v. Agurs, 427 U.S. 97 (1976)	32
U.S. v. Davenport, 753 F.2d 1460 (9th Cir 1985)	32
U.S. v. Mitchell, 690 F.3d 137 (3d Cir 2012)	18
Lainwright v. Stokes, 433 U.S. 72 (1977)	39
Walker v. State, 724 So.2d 1322 (FL 4th DCA 1999)	16
Whitfield, 479 So. 2d at 215	29
Williams v. State, 901 So. 2d 357 (FL 2d DCA 2005)	15

Statutes and Rules

Evidence Code 90.613	19, 21
Florida Rules of Criminal Procedure 3.191(m)	15
Florida Code of Judicial Conduct Canon 3(B)(4)	14
3(B)(5)	15
3(D)(2)	17
5(A)	17

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Sixth Judicial Circuit court appears at Appendix B to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 1 September 2023.
A copy of that decision appears at Appendix A.

☒ A timely petition for rehearing was thereafter denied on the following date: 31 October 2023, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment [V.]

nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

Amendment [VI.]

In a criminal prosecution, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Amendment [XIV.]

nor shall any state deprive any person of life, liberty, or property; without process of law; nor deny to any person within its jurisdiction the equal protections of the law.

STATEMENT OF THE CASE

A. Pretrial

Appellant, KENNETH RAY BRABHAM, was charged in Pinellas County, Florida with armed Kidnapping, armed attempted sexual battery, and aggravated battery of P.F. The arrest date was 4 August 2021. Early in the proceedings the defense moved for Speedy trial. The presiding Judge, Phillip Frederico set the trial date for 21 March 2022 over defense objection. This was met with, "Why? Because its not within 180 days from the arrest date." From Frederico, "YES," replied the defense, only to receive, "Well its a 180 days from today." Brabham admits these statements are not in this record, but only because Appellate Counsel, Steven Bolotin, refused to Supplement the record, upon Brabham's request for him to do so. On 9 February 2022 Brabham was found guilty of aggravated battery and false imprisonment. On 22 April 2022 he was sentenced to 30 years with a 15 year mandatory and a 5 year concurrent sentence. 16 March 2023 Brabham's direct appeal was filed with the Second District Court of Appeals. On 1 September the 2d DCA affirmed Brabham's Appeal. Also the public defender's office concluded their efforts on your behalf. On 4 October 2023 the 2d DCA struck Brabham's pro-se Motion for Rehearing En Banc, 16 October 2023 struck a pro-se Motion to Supplement the Record, and 31 October 2023 struck Motions of Clarification and to Except as timely filed and for Rehearing En Banc all due to having counsel, see Appendix C.

On 26 January 2022 Brabham Filed a pro-se Notice of Expiration of Speedy Trial Period and defense Counsel, Adam Teichler, adopted it the next day after a video visit and learned that Brabham had no intention of waiving his right to speedy trial (T33-35, R353-361, 377-378). Frederico does make comments to the effect of, "I thought that's why we set trial in March." But the fact is in the Pretrial that Brabham attempted to

supplement the record with. On 2 February 2022 a status check hearing is held without Brabham. Frederico does note that speedy trial was suspended for a time due to the pandemic, but it was reinstated or the court would not have granted a speedy trial to begin with. After many attempts to get Brabham to waive his right to speedy due to not having depositions. Once waived it can not be recovered. Ultimately the trial was moved up to 8 February 2022 (R 354, 377-378). Frederico announced, "as long as were done by Wednesday its fine. I'm going on vacation, leaving town on Thursday. So you guys assured me that you could get the witnesses here, we could do it between Monday and Wednesday" (R 355). Then learned that there would be no jurors available for Monday. "What's the chances of doing it in two days?" asked Frederico. Counsel from both sides agreed it could be done (R 366-368).

At the 7 February Motion hearing the judge reiterated the circumstances which the trial date was moved up (R 377-378); "As I said, I'm on a plane out of here on Thursday, so we got to do it in two days. I would prefer to have three days." The states motion in limine was to exclude P.F.'s history as a prostitute (R 378-407). "Central to the defense" is the theory of the defense is, that is how she held herself out that night, demanding money, then attempting to extort it out of Brabham by hanging out the window yelling, when that did not get the desired result, kicked the gearshift into reverse damaging Brabham's truck (R 385, 394). Pointing out that P.F.'s in camera statement to police that she has worked as a prostitute but not that night (R 382-393). Judge asked about the rape shield law, but "consent" was not Brabham's defense but rather to explain P.F.'s actions and to use her statement as "opening the door" to the prostitution claim that corroborates the defense theory.

Frederico kept returning to, "you didn't get to take a depo because your guy put you in a box by moving up his trial date. So you don't know what she's going to say about whether she was engaged in prostitution then or if the facts of any of those alleged prostitution are in any way similar to this case..." (R391). "And we don't know even what the hell she's going to say under oath about any prostitution because your depo that you tried to do with her has been thwarted and now similarly thwarted again by your client's not giving you time to try and get her in between now and a trial date..." (R392), and "You didn't get her under oath because she didn't show. And now your guy wants his trial moved up. So you live with your decisions..." (R399).

The defense asked the court if he could ask P.F. a couple of questions "outside of a deposition setting." Frederico's answer was vindictive: "Yeah. No. I don't -- under these circumstances your putting on a clock. So I'm not -- if he wants a continuance, he gets a continuance." (R456-457). Frederico continued to feature the proceeding around speedy trial and that the defense had no depositions and no less than 9 times offered or insinuated a continuance, which would permanently waive speedy.

B. Jury Selection

At the outset of jury selection Frederico told "all" prospective jurors, "How long are we going to be here, right. You want to know that. Today and tomorrow. How do I know for sure? Because I'm getting on a plane going out of town on Thursday. So we will finish tomorrow. Either that or I'm in big trouble with the wife at the house, and I'm not taking that on." (T27-28)

Upon completing the judges portion of voir dire he told counsel, Jury One wants to know if we want any reserves. We either got to get it out of this panel or we're out of luck, because if we spent

all day picking a jury. There's no way we can finish tomorrow. I mean that's the bottom line. So I would say no to reserves. I think we got to make some choices on the causes, but I think we have enough that if your-- if you guys used 10, you're not gonna get a jury out of this panel."

Out of the original 52 jurors only 26 remained after the first round of cause challenges, "We've dynamited half of them by my count... You can't do anymore dynamiting if you want to get a panel. Either that or somebody's giving up peremptories. Probably the state (T105).

During the second round of cause challenges the state moved for Ames (29). The state recognizing the bias and moved for cause to the bafflement of the court (T232-233).

Court: Ames? What did he say?

Teichler: I have him marked too. He indicated that his best friend is a police officer and that cops all start ahead.

Court: He was kind of on the fence.

Teichler: We're moving for cause on 29 based on his law enforcement bias.

Court: And your in agreement state?

Constantine: Yes.

Court: I guess I don't get a vote in that scenario, do I?...

I was hoping to get rid of Lenko and keep Ames but great plans.

The next juror challenged by both the state and defense, 40 (Mussett) was met with unreasonableness from the court. Ms. Mussett is a school director who is still suffering staff shortages from the pandemic, whose absence would be problematic with her school. When asked how much of a distraction the school issue would be and whether she would be able to "put it out of her mind" to give us a fair and impartial trial, her replies were "I would hope so", "I hope not", "I cannot", "I would try," "I cannot say 100% that I would be able to". These statements to the judges, prosecutor's and defense attempts to pin her down as to the school distraction. Even the judge felt she was not fit to have a seat on the jury. (T234).

Court: No. I'm not getting rid of Mussett. You guys are gonna have to eat that one if you want to kick -- do I think she should be on? No...

Are you wanting Mussett off, 40? You're not getting her either way, but you might as well make a record

There was talk from the court about "you guys use 10, we're coming back in March." Ultimately it came down to the defense using their last peremptory on 52, the last juror, busting the panel with Mussett still a potential juror. "You got one left. So you make the call, today or March" (T246). The defense struck 52 and immediately asked for an earlier date than March.

Then the state announced that they would take one back, "We're gonna take one back. We're trying this case today." The juror who the state wished to take back was not by rule a legal juror to "unstrike". Juror Allen who was seated due to the state's "unstrike" from the courts Back to the Future maneuver that ended up "unstriking" a total of 4 jurors, 2 from the state and 2 from the defense. No one but the prosecution had heard of such a maneuver before this was brought up. After some discussion of the maneuver Frederico allowed a recess for the state to do some research on the "unstrike". Presented to the court was McCray v. State, 220 So.3d 1119 (FL2017), in the Florida Supreme Court declined to adopt a blanket rule prohibiting the withdrawal of a peremptory strike after a party has exhausted all of their peremptory challenges, but before the jury is sworn. Here the state had 6 peremptories left. This was objected to and argued at length by defense. The court ruled to go back to the point the state struck Allen then restoring defenses peremptories (T272-277). The defense chose not to change any of their peremptory challenges while maintaining their objection and "We don't accept the panel." Challenging the procedure used to seat the jury (T278).

C. Trial

During state's witness testimony of Haley Sample the state elicited a highly prejudicial opinionated statement from her. "He looked like he was gonna kill her." The defense objected as this specific statement was the subject of a defense Motion in Limine to exclude from testimony. Then it coming from a bias witness which defense counsel failed to challenge the witness on. (R445).

Saldivar: The only part I wanted to check with defense counsel before I took it out, she does say at one point-- she alludes to the fact that she was raped.

Teichler: I'd rather it yeah.

This was argued at length and denied by the court with an air of, "It's one of these there's no perfect trial. She gave her observation of what it was."

During detective Blumberg's testimony the state did knowingly and willfully elicit false testimony from the detective who also knew the testimony was false. The defense challenged the statement on 3 fronts. 1) the statement's falsity, 2) the notes were not given to the defense prior to the detective's testimony, 3) During the argument for this the defense counsel alludes to the state using a gamesmanship maneuver to obtain otherwise inadmissible evidence; meeting the ire of the judge who interjected his own emotions and personal opinion:

Teichler: the recorded is not in a position to be presented to the jury at this point. So the fact that the--

Court: Not my fault. Not my problem.

Teichler: the state is now-- has elicited these quotes from the detective, knowing that the video is not in a state to be presented to the jury--

Court: I don't like the implication of that what they're doing something underhanded by doing that because your guy referred to how many times he's been in prison.

While arguing this the court repeatedly kept turning the substance of the argument from the notes that were introduced to the courtroom by

the state into a need for the recorded interview being transcribed and completely ignoring the false testimony portion all together, and not having the same courtesy for the defense as it showed the state earlier, time to find a case or statute. Then Frederico changed direction into the detective quoting other statements of, "Whos saying that he gave -- that the things he said are in quotations?" Everyone involved in the argument.

The second time the defense brought up the false testimony, "And we -- in preparation for trial, we reviewed the audio recording, obviously, and it doesn't -- there are parts of it that don't quite seem totally accurate. Which having the -- " Was met with, " Well go ahead and play your client's interview then if you want. You want to impeach him with that? Go ahead put it all in... The notes are a red herring you're introducing into the whole process. The notes are not the problem. So impeach the hell out of him with it."

Later, after some discussion with state about preparing the detective for trial, Judge Frederico said, " I just have to be honest... There's days where I feel like I got to lord over the whole thing to make sure it doesn't get 'screwed up'... It gets really, really aggravating, after 28 years, 'having to cover for people.'" (TG18-19)

After detective Blumberg's testimony the state rested their case. Defense moved for an acquittal. Then the state disclosed potential "Favorable to the accused" impeaching evidence against P.F. The state admits it was a late disclosure, "First one of coordinators told me this morning. He does our travel. He indicated to me this morning that the victim may have been prostituting at the Hotel. I blew it off because --" This was met with ire, "So what the hell does that have to do with my case?", "So what are you bringing it up for?" The state's reply admits he would not have disclosed this evidence had his supervisor not intervened and told him to do so. "Because the supervisor told us to bring it up to you,

because of the nature of the case and the possible penalty. I don't think it's an issue, but I've got my marching orders and I'm disclosing it." But before disclosing "the favorable to the accused" evidence, the state released for the witnesses for the day. Prosecution had to know the defense upon learning of this evidence would want to (re)call witnesses to examine this new evidence. There's no question that the state knew of the judge's hard deadline to finish the trial that night and with precision gamesmanship was able to keep this evidence away from the jury. Once the defense asked to be able to proffer P.F. and (re)call witnesses the court replied, "You can't do a -- start an investigation after jeopardy attaches. What is it you want me to do? I'm getting on a plane tomorrow. You want me to stop the trial and say what, we're going to conduct an investigation tonight? You knew today was the day." The court ultimately ruled that it would continue the trial, if he's acquitted you won't have to worry about it otherwise you can make a motion for new trial." if there's anything to this ridiculousness."

D. Motion For New Trial

The defense brought up another Brady violation to the court that the state never disclosed. There was a pair of ninja style swords found in Brabham's truck that were never disclosed to the defense. This brought a tidal wave of ire from Frederico; upon asking for a Richardson hearing brought another wave of ire, "You don't know they exist" with a flat refusal to conduct a Richardson hearing. While the court did clarify with defense counsel that he knew of them leading up to trial. (R327-331).

Court: So where is it in the motion?

Teichler: It's not and that's on me... it might have slipped my mind

Court: He told you leading up to trial?

Teichler: **YES**

Court: I'm going to hold a Richardson hearing on something that may not exist.

The court denied the Motion without hearing the rest of it.

E. Appellate Counsel

Appellate Counsel, Steven Bolotin, is ineffective for not raising Fundamental error that is stronger than what he in Brabham's direct appeal. There was communication between Bolotin and as to what should be raised. Bolotin did raise 4 issues on appeal after filing a Motion for Extension of time where he informed the court Brabham's case is factual and complex and would be raising at least 6 issues and may well need a motion to exceed the word limit. There was no motion Motion to Exceed the Word Limitation filed and he left out Fundamental and structural error, attempting to waive an issue against Brabham's express wishes and then abandoning Brabham on the rehearing causing Brabham's Motions to be stricken. SEE Appendix's D and E.

REASONS FOR GRANTING THE PETITION

Brabham's case is so far departed from the accepted and usual course of judicial proceedings as to be of public importance as to require the attention of this court. The principle that society's search for the truth is the polestar that guides all judicial inquiry and when the judge allows the integrity and impartiality of the court to come into question, it erodes the public confidence in the system. The judge must avoid improprieties which include violations of law, court rules, and other provisions of the Code of Judicial Conduct as well as maintaining the professional ethics of the lawyers present in his courtroom. When the judge not only allows but covers for a prosecutor who knowingly presents false testimony and or misleading argument to the jury casts an impenetrable cloud over that polestar. And not only is that a corruption of the truth seeking function and a violation of procedural due process but a manifest departure from the essential requirements of the law in violation of clearly established law resulting in a miscarriage of justice. A judge whose irresponsible and improper conduct manifests bias on any basis in a proceeding impairs the fairness of the proceedings and brings the judiciary into disrepute and violates the rights of the accused. Truth is the critical operation of our judicial system.

This writ of certiorari should be granted to mend and repair the public confidence in the system.

ISSUE I.

Judge Frederico violated Brabham's due process rights by being partial and allowing his emotions and personal vacation plans to infect his decisions throughout all the proceedings of this case

1) The ultimate goal of Brabham's trial was that it be completed by Wednesday night so that it not affect Frederico's vacation plans with his wife, come hell or high water. To all prospective jurors; "How long are we going to be here, right. You want to know that. Today and tomorrow. How do I know for sure? BECAUSE I'm getting on a plane going out of town on Thursday. So we will finish tomorrow... Violating the Florida Code of Judicial Conduct Canon 5(A) (T27-28). 2) Frederico's self admitted "attitude" (T738). 3) Judge's rude, irate, and sarcastic behavior that was consistently displayed throughout all the proceedings. The judges comments are far too numerous to be able to list them all here. There were multiple demeaning remarks directed at counsel as well as Brabham including telling him to "shut up" (R332), violating Florida's Code of Judicial Conduct Canon 3(B)(4). Several references to counsel during pretrial hearings of "Your guy put you in a box" (R391, 394, 399), "You got a rabbit, you pull it out of your hat here too or what?" (R398), also showing directly an appearance of bias toward Brabham, "let's bring in our guy, some kind of guy." (R353), "Tell me I'm not the only person in the building with a law degree that actually knows what something about it actually means. Good God." Just to name a few. See Barnhill v. State, 140 So. 3d 1055 (FL 2d DCA 2014); Porter v. Singletary, 49 F.3d 1483 (11 Cir 1995); Love v. State, 529 So. 2d 807 (FL 1st DCA 1990).

4) Frederico took sua sponte actions in favor of the state, a) in voir dire when "unstriking" a that also involved "the unstriking" of 2 of the defenses peremptory challenges which also "unstruck" a second

of the states in an unauthorized procedure then restoring the peremptories, b) later during trial by denying a defense motion before the defense made the motion, "You can make the motion. I'm not gonna grant it." See Lyles v. State, 742 So. 2d 842 (FL 2d DCA 1999); J.F. v. State, 718 So. 2d (FL 4th DCA 1998).

5) Direct comments of partiality and bias from judge Frederico, "I got to 'lord over' the whole thing to make sure it doesn't get 'screwed up'... 'having to cover for people'" (T618-619). Violating Canon 3(B) (5) of Fla. Code of Judicial Conduct.

6) Frederico conducted voir dire with what he knew in advance may not be enough potential jurors, "it's going to be close" (R364). "Jury One wants to know if we want any reserves. We either got to get it out of this panel or we're out of luck, because if we spent all day picking a jury, there's no way we can finish tomorrow. I mean that's the bottom line." So I would say no to reserves... if you guys use 10, you're not gonna get a jury out of this panel (T93). It ended in a busted panel which tolled speedy trial, see Fla. R. Crim. P. 3.191 (m); Smart v. State, 179 So. 3d 417 (FL 4th DCA 2015); and Roberts v. State, 842 So. 2d 298 (FL 3d DCA 2003). Leading the state "unstriking" a juror and the judge jumping into the fray, "No they're using they don't want to screw around with the whole speedy trial issue in this case is why they're taking back their strike" (T259). See Seago v. State, 23 So. 2d 1269 (FL 2d DCA 2010); J.L.D. v. State, 4 So. 3d 24 (FL 2d DCA 2009); J.F. v. State; McFadden v. State, 732 So. 2d 1180, 1184 (FL 4th DCA 1999). Here Frederico allowed his emotions and the misapplication of legal principles to close his mind to impartiality and reason, giving up the appearance of impartiality. Judicial impartiality is the core of our system of criminal justice. Trial judges serve as the neutral arbiter in the proceeding and must not enter the fray. See Williams v. State, 901 So. 2d 357 (FL 2d 2005).

Also during voir dire Frederico limited the prosecutors questions

Concerning witnesses with prior felonies. This is what the defense needed to know above all else, whether the jury could accept the defense of the accuser fabricating the story to shift blame from themselves. The defense needed to know how the jurors viewed people with prior convictions. (T187). See Walker v. State, 724 So. 2d 1322 (FL 4th DCA 1999); Franquell v. State, 699 So. 2d 1312, 1322 (FL 1997); and Lavado v. State, 492 So. 2d 1322 (FL 1986). Thus preventing the defense from knowing if any of the jurors were biased or prejudiced against Brabham.

7) Still during voir dire Frederico made it clear he wanted to keep a bias juror for the panel. Though grudgingly did make the correct call and release the juror, with "I guess I don't get a vote then in that scenario, do I?". Only to bully counsel from both sides into keeping juror Mussett, who should have been excused. Frederico even agreed with counsels that she should not be seated, "Do I think she should be on? No.. Are you wanting Mussett off, do? You're not getting her either way, but you might as well make a record."

8) Trial Judge refused to allow a proffer of witnesses due to his own pending vacation plans rather than any legal matters. Any judge with 28 years of experience would know that if he allowed the recorded to be expanded by these 5 witnesses of which none were at the courthouse (T657-662), having been released for the day by the prosecution who absolutely knew they would be disclosing this possible "favorable to the accused" impeachable evidence and common sense would tell any lay man that the defense would want to recall witnesses. With having to stop the trial until the witnesses returned to the courthouse (3 of which not subpoenaed), proffering the testimony, giving the testimony to the jury, closing arguments, jury deliberations, jury instructions, with a late dinner thrown into the mix, the judge would not have made his vacation flight.

This was a clear gamesmanship maneuver by the state playing upon the judge's timeline that should have been recognized by the judge and acted upon. Instead Frederico chose to violate Brabham's due process to satisfy his own desires. After hearing Frederico say, "I got to 'lord over' the whole thing to make sure it doesn't get 'screwed up'... having to cover for people". Can it be said that this was inadvertant? Brabham contends it was done in "bad faith".

9) Twice defense counsel attempted to notify Frederico that the state had elicited false testimony from detective Blumberg. The judge kept pivoted the objection argument away from the actual subject. Refusing to allow defense time to research the matter as the court allowed the prosecution earlier. As this objection had 3 arguments intertwined. SEE ISSUE II. (T599-619)

Once the defense began to bring up the gamesmanship maneuver the state was implimenting the judge exploded with, "I don't like the implication of that what they're doing underhanded by doing that because your guy referred to how many times he's been in prison before". Frederico made it plain and clear he would not brook that kind of objection, in clear defence of the state. Once again pointing to his words, "lord over... screwed up... having to cover for people"... This is a violation of Fla. Code of Judicial Conduct cannon 3 (D) (2) for not taking action of a lawyer who has violated the Rules Regulating the Fla. Bar. SEE J.L.D v. state, 4 So.3d 24 (FL 2d DCA 2009)(... if the judge doesn't extend to opposing counsel an opportunity to object in a context that makes it clear that an objection won't engender the ire of the judge).

Judge Frederico's attitude, demeanor, comments, facial expressions, and body language throughout Brabham's trial not only presents a grave due process concern but also was a misimpression upon the jury possibly alone causing a guilty verdict

to be rendered and depriving Brabham of his constitutional right to a fair and impartial adjudicator. The Florida Supreme Court has held that a trial judge whose impartiality may be reasonably questioned "Proceedings involving criminal charges... must both be and appear to be fundamentally fair," see Sparks v. State, 740 So. 2d 33 (FL 1st DCA 1999); Steinhorst v. State, 636 So. 2d 498, 500-01 (FL 1994). Here in this case the judge intentionally ignored the opportunities that would have operated to break the erroneous pattern of errors. See Seago v. State, 23 So. 2d 1269 (FL 2d DCA 2010).

A trial judge's protracted behavior can so infect a criminal proceeding as to deny the defendant his constitutional right to a fair trial before an impartial adjudicator. See State v. Hayden, 130 P. 3d 124 (Kan 2006). And the cumulative effect of a judge's conduct and remarks can deprive a defendant of a fair trial. See State v. McLean, 640 S.E. 2d 770 (N.C. App. 2007). Denial of a defendant's right to an impartial adjudicator, "be it judge or jury" is a structural defect in the trial which must be remedied by retrial and can never be written off as harmless." Both have occurred here in Brabham's trial. "A court abuses its discretion when it makes an error of law"... and implied bias is against the law. U.S. v. Mitchell, 690 F.3d 137 (3d Cir 2012) citing Gomez v. U.S., 490 U.S. 855, 876 (1989).

This was an angry and bias judge who lashed out abusing his power to pave the way for his own personal concerns. This comes across loud and clear on the printed page. See Hayden 130 P. 3d at 126. There were options open for the court besides the path taken. Another judge could have presided over the case or he could have allowed Soedy to "toll" as it should have. Instead he chose to repeatedly abuse his power in accordance with his own whims that changed like the seasons. "Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by

adversarial parties. In this aspect "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of individuals". Scull v. State, 569 So. 2d 1251 (FL 1990).

ISSUE II.

Prosecutor did knowingly and willfully present false testimony to the court and jury in a gamesmanship maneuver to gain a tactical advantage.

This is a 3-pronged issue that all occurred at the same time.

1) The state did not disclose the handwritten notes that are not a part of the detective's police reports pursuant to the Evidence Code 90.603, FLA. R. Court. 2) Which contained fabricated false testimony. 3) The handwritten notes were not disclosed so that the state could elicit the false statement from the detective before the defense could object to it and so that the jury gets to hear the false and misleading statement that puts the defense into a Hobson's choice, in a clear gamesmanship maneuver. The Fla. Supreme Court emphasized in Binger v. Pest Control, 401 So. 2d 1310, 1314 (FL 1981) that the "search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than gamesmanship, surprise, or superior trial tactics" (quoting Dodson v. Pessell, 390 So. 2d 704, 707 (FL 1980)). The only justification for not disclosing the notes that contain false, misleading testimony was a belief it would go undetected and would either allow in otherwise inadmissible evidence or be used as an admission of guilt in a surprise attack. The intentional nondisclosure, combined with the surprise and disruption occasioned by the falsified notes and the inability to alleviate these problems prejudiced the defense.

Success in the instant case means prison for Brabham and a

readily repeatable template for renewal in future occasions. The conception and implementation of this plan was intentional and calculated to deprive the defense of its rights. Once the jury heard the falsified statement it very well may have been misconstrued as an admission of guilt and no amount of cross-examination short of an admission of perjury from the detective could cure the damage of the prejudicial statement. So the defense was stuck with either accepting the falsified statement that is tantamount to an admission, or cross-examining for an accurate depiction of what Brabham said which now admits otherwise inadmissible evidence, (13 prior felony convictions).

During pretrial motions the prosecutor sums up the case for the judge (R450): in the interview with law enforcement the defendant indicates that he got out of the car, went to the victim, grabbed her shoulder, turned her around and then fell in the sand. **That's the extent of what he'll admit to touching her.**

Then during trial a different statement surfaces that even a public defender was questioning (T599-619):

Blumberg: I have the quote written. May I refresh my memory?

Saldívar: Yeah

Blumberg: Spun her around. I don't know. maybe that's the reason my chest hurts. I don't know. that's what caused me to go off. I don't know.

Saldívar: The sternum thing, had Mr. Brabham been complaining about his sternum throughout the interview?

Blumberg: He had.

Saldívar: he indicated maybe she elbowed him in the sternum and that's what caused him to go off?

Blumberg: Yes

At this point the defense asked for a bench conference to object so that the jury would not get a misimpression from the objection. This was for 1) the falsity of the statement and 2) then the handwritten

notes the detective was quoting from. At no time was either of these abandoned at any time. The judge kept the focus on the discovery and away from the false statement as soon as the prosecutor said they were in the interview but not in the supplement. Despite defense counsel's argument that the statement is not accurate.

Teichler: I'm not sure what supplement he's referencing. But it's not in the one I have.

Court: You're saying that what you have, those statements are not included in the supplement you have?

Teichler: Right.

Saldívar: They're in the recorded interview the defense has.

Court: So they're in the recorded interview but not in the supplement?

Teichler: He appears to be reading off a prepared sheet that that was not provided to us

Saldívar: he took notes on the video to prepare him to testify

Court: I'm not sure what you're alleging. His summary of his notes so he can testify is somehow a discovery violation?

Johansen: So any statements that are going to be elicited by the defendant by the state have to be provided to the defense in writing.

Court: No, they don't have to be -- you don't get to pick what form you get them, so long as you get discovery. What they got to be in triplicate and autographed also? They weren't so somehow it's a discovery violation?

Johansen: according to the rule, it has to be provided in writing. If you can give me 5 minutes to pull up some --

Court: So if you have it in the tape but you don't have it in a written report, somehow what, it's excluded or it's a discovery violation?

Johansen: Yes. If you recall --

Court: No we're not taking a break.

The court erroneously errs heavily here clearly favoring the state by not allowing Ms. Johansen a few moments to find 90.613

of the Evidence Code, Refreshing the Memory of a Witness. This would've shown the defense was correct and could have returned to the false statement and a proper sanction for the notes. The judge goes on to clarify with the state and detective that the falsified is in the interview according to them. The court takes the position of the statement being based solely on their word over defense counsel. The statement so important to the state was not reduced to the synopsis of a police report. There is no plausible reason to leave a defendant's statement, that is a tantamount to an admission out of a police report.

Court: Just so I'm clear, detective the statements you're attributing to him are in the recorded interview?

Blumberg: Yes

Court: Did you reduce those to your police report?

Blumberg: They're just in the recorded interview. My police reports are a synopsis of the whole interview.

Court: The stuff about -- the last thing about him, that's what caused me to go off, was that in your synopsis of the report or just in the recorded interview?

Blumberg: That's in the recorded interview

Court: And what you're testifying or what you're using to refer to, is that in your report or some notes you made from your report in preparation for trial?

The court decides to put the detective's notes aside. The court takes them as a court exhibit. The detective claims he created an "At-A-Glance" but has another set of notes that are clearly not a part of the "At-A-Glance" notes that he was testifying from. (R107-111).

Court: You got a case that says nah, nah, you're in trouble if you give the recording and it somehow isn't reduced to writing, that that's somehow prejudicial or in violation of discovery rules?

Teichler: Just the fact that he obviously reduced this to writing. He's reading off verbatim. So the fact this list was not--

Court: I agree he should-- we're gonna put aside his notes. What would you describe those as? Just for purposes of discussion? He's not referring to his police report. So what is it?

Saldivar: They're notes he made in preparation for trial.

Court: Why? Because he knew he was gonna forget.

Saldivar: it's a quote. If I'm asking him to quote what the defendant said

Court: So why are we not playing the recorded interview?

Saldivar: Because that would be a mess. The amount of time he talks about being in prison and the things he says, it's so intertwined it's -- no.

The defense brings up the falsity of the statement for the second only to be ignored by the court concerning that.

Court: So he can't make notes contemporaneous to his testifying to try and remember specifics from an hour-and-a-half to 2 hour interview?

Teichler: If he does that, he needs to provide that, because he obviously has intended to testify to that, given the fact he did testify to it. And we-- in preparation for trial, we reviewed the audio recording, obviously, and, it doesn't-- there are parts of it that don't quite seem totally accurate, which having the--

Court: Well go ahead and play your client's interview then if you want. You think you want to impeach him with that? Go ahead. put it all in.

Teichler: That would mean we're having to choose between rights here. We either have to choose between an accurate depiction of what Mr. Brabham said or we have to admit all these otherwise inadmissible things in order to ensure accuracy. So the issue here and the discovery violation here is--

Court: There is no discovery

Teichler: -- if the state had provided us with the list of Quotations that was intended to be elicited we would have avoided all this.

Court: The notes are a red herring you're introducing into this whole process. The notes are not the problem. His recollection -- you're complaining his recollection of what's in the taped interview is the problem. So impeach the hell out of him with it.

Teichler: he's reading what he claims to be direct Quotations. So if these were provided to us in advance, we would be in a position to do that. Now I'm not in a position unless the court wants to take a significant recess ...

Court: Who's saying that he gave -- that the things he said are in Quotations?

Teichler: He's reading them as if they are in Quotations?

Court: No. That's your interpretation of that. Get whatever he's got as handwritten notes.

Soldivar: The only thing he Quoted was the last thing.

Here the prosecutor attempts to mislead the court again while strengthening his leverage with the court. Only everyone involved with this objection has agreed that the detective has been Quoting Brabham. Now the defense attempts to show the court the states gamesmanship maneuver, but the judge jumps to the states defence.

Teichler: the recorded interview is not in a position to be presented to the jury at this point. So the fact that the --

Court: Not my fault. Not my problem.

Teichler: the state is now -- has elicited these Quotes from the detective knowing that the video is not in a state to be presented to the jury

Court: I don't like the implication of that what, they're doing something underhanded by doing that because your guy referred to how many times he's been in prison before?

Teichler: No. I'm just saying that we're in a position now that we have to choose between what rights--

Court: You don't have to choose between anything. He's refreshing his recollection from his notes, and you're trying to turn it into something else.

With defense counsel now facing this ire from the court backpedals away from that argument but at no time abandoned it.

Court: Well you could have objected contemporaneous with that. Now you're trying to turn it into something else.

Teichler: I did object, which is why we approached the bench

Court: OKAY. I'm not getting stuck in this morass. There is no discovery violation here, IF there is, what is it that you would ask for as a sanction? He's not allowed to give testimony about the interview?

Teichler: I would ask that it be stricken, yes.

Court: OKAY. Great. Great idea. No. Denide...

With only a 10 minute recess and the judge knew upon entering the courtroom that the state could not redact the video recording. Could it even be said that the state even attempted to. With these facts, then with the state revealing their strategy that when put into context clearly shows gamesmanship surprise tactics.

Court: So you determined that the tape was gonna be admissible...

Saldívar: it's 2-fold. Generally what you said, yes. more so, there was a lot of stuff in there that got convoluted and would have taken a lot of time to do to edit it. And second-fold, we were going to strategically, based on, NOCK, The Fla. Supreme Court 256 So.3d 828, pick the statements we wanted to come out, and if they wanted to come out, and if they wanted to elicit the rest of the statements, they could, but then his judgment and sentences would come in. So that's our strategy, on that, putting it all out there.

Court: So in preparing the detective, you told him to use his police reports or make handwritten notes, or did you not have that conversation with him?

Saldívar: Over the days, I've told him to watch that video numerous times and then we reviewed it, and I told him likely what I would be questioning him about and what I was looking to elicit and he would-- if he didn't remember it, he'd go watch that portion and either corroborate what I was saying I thought I heard that was true or not.

Court: I just have to be honest, there's days where I feel I got to run from one table to the other, and I got to 'lord over' the whole thing to make sure it doesn't get 'screwed up'. I got to run from here to run over there and run over there to make sure, I mean, I understand there is a learning process, but these are not the kind of cases that we go through an entire learning process on. I'm sorry. It just gets really, really aggravating, after 28 years, 'having to cover for people', I won't go further. It really becomes aggravating. It really does.

During cross-examination the defense brought from detective Blumberg that Brabham never admitted to striking, hitting, or battering P.F. 5 times.

(T636) Teichler: So but you're aware that Mr. Brabham had told you-- or denied outright striking Ms. Falcon, right?

Blumberg: He did deny that, yes sir.

Teichler: That he never hit her, right?

Blumberg: Correct sir.

(T637) Teichler: again, Mr. Brabham denied ever using those, right?

Blumberg: He did deny, yes

(T643) Teichler: So you didn't notice any injuries to his hands, right?

Blumberg: I did not, no

(T645) Teichler: So in kind of concluding his statement to you he indicates or tells you specifically that he denied ever hitting Ms. Falcon, right?

Blumberg: He did

Teicher: Denied ever striking Ms. Falcon?

Blumen: Yes, he did

Failure to abide by a prosecutor's duty to ensure the fairness of a criminal proceeding is essential to evaluating the gravity violated in this case. The Oath of Admission to the Florida Bar provides in part that an attorney "will never seek to mislead the judge or jury by any artifice or false statement of fact or law." No breach of Professional ethics, or of the law, is more harmful to the administration of justice or more harmful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process.

This court observed that a prosecutor has a responsibility beyond that of an advocate, and a higher duty to assure that justice is served. The U.S. Attorney is a representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done ... While he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Berger v. U.S., 295 U.S. 78 (1935). Thus a prosecutor has a duty not only "to fairly present the evidence and permit the jury to come to a fair and impartial verdict." Pendaris v. State, 752 So.2d 75 (FL 2d DCA 2000), but also "properly function in a quasi-judicial capacity with reference to the accused... to see that the accused is afforded a fair and impartial trial." Gonzalez v. State, 97 So.2d 127 (FL 2d DCA 1957). A criminal prosecution "is not a game where the prosecution can declare its for me to know and you to find out." Craig v. State, 685 So.2d 1224 (FL 1996), and a prosecutor is duty bound to remember that obtaining a conviction at the expense of a fair trial is not

justice" Briggs v. state, 455 So. 2d 519, 521 (FL 1st DCA 1984).

ISSUE III.

Trial court did violate Brabham's due process rights by refusing to conduct a Richardson Hearing.

Trial court violated Brabham's due process by refusing to hold a Richardson hearing regarding a pair of ninja style swords that were in the back passenger floorboard with the handles angled 40 toward the drivers seat, within easy reach of the driver and out of sight of a passenger. The presence of the swords within reach and readily available for use, even while driving puts the entire case in a different light that supports the defense's theory of P.F. fabricating the charges against Brabham to shift blame from herself. But this was met with the same partial minded and angry judge that presided over Brabham's trial. With: (R334) A Richardson hearing. Okay. This is an example of a little knowledge is a dangerous thing. A Richardson hearing on something that doesn't exist or that we don't know exists, right? Why if it doesn't exist would it have to be disclosed?" In State v. Hall, 509 So. 2d 1093 (FL 1987) (The 4th DCA has certified the following question of great public importance: "Is a new trial required when the trial court's failure to conduct a Richardson hearing inquiry is, in the opinion of the reviewing court harmless beyond a reasonable doubt?" We answered this question in the affirmative in Smith v. State, 500 So. 2d 125 (FL 1986). Richardson states that although the trial court has discretion in determining whether the state's noncompliance with the discovery rules resulted in harm or prejudice to the defendant, such discretion could be exercised only after the court made an adequate inquiry into all the circumstances. At a minimum the inquiry should cover such

questions as whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial and most importantly, whether the violation affected the defendant's ability to prepare for trial. Cumbe v. State, 345 So. 2d 1061 (FL 1977); Richardson, 246 So. 2d at 775; Raffone v. State, 483 So. 2d 761 (FL 4th DCA), dismissed, 491 So. 2d 281 (FL 1986); Whitfield, 479 So. 2d at 215; Gant v. State, 477 So. 2d 17 (FL 3d DCA 1985); Donahoe v. State, 464 So. 2d 281 (FL 1986). Based on Richardson, a trial court's failure to hold such an inquiry has been treated as Per se reversible error.

In Tarrant v. State, 668 So. 2d 223 (FL 4th DCA 1996) It is well settled that the state is charged with constructive knowledge and possession of evidence withheld by state agents, including law enforcement.

ISSUE IV

Prosecutors did withhold Potential Favorable to the accused evidence from defense until after the state rested its case using the judge's hard deadline to finish the trial that night as a strategy to keep the defense from getting value from the evidence

Prosecutors received the evidence the morning of the last day of trial. Had this evidence of P.F. prostituting at the Hotel the state was putting her up in, been disclosed to the defense immediately, as it should have been, the defense would have been in a position to make use of the evidence, to investigate it, (re)call witnesses, to proffer testimony without having to reopen the case, which should not have closed anyway. Compounding it further and proving gamesmanship tactics, the state had already released the witnesses knowing of judge Frederico's vacation the next day and the hard deadline to finish the trial that night with it

already being late in the day, Saldivar was hoping the court would not hear him out on the subject. But the court did hear it. (Tloss).

Saldivar: there is something we need to bring up. It's an evolving situation. You're gonna lose your mind. I'm losing mine right now. But I need 10 minutes. I'm asking for it. I know you're not gonna give it to me. So you can just tell me your not gonna give it to me and then I can go...

First one of our coordinators told me this morning. He does our travel. He indicated to me this morning that the victim was prostituting at the hotel. I blew it off because --

Court: Where did that information come from?

Saldivar: He said the victim advocate. Well the victim advocate was just here.

Court: Was she arrested last night? Clearly not she's here today.

Saldivar: No

Court: So what the hell does any of this have to do with my case?

Saldivar: I don't think anything but we--

Court: So what are you bringing it up for? What does it have--

Saldivar: Because the supervisor told us to bring it up to you because of the nature of this case and the possible penalty. I don't think it's an issue, but I've got my marching orders and I'm disclosing it

Saldivar admits that he would not have brought forth the evidence of his own will and only did grudgingly because his supervisor gave him orders to do so. Clearly violating Brady and Giglio rules. Then at such a time that has no value to the defense.

Discussion of vetting and investigating the evidence arises. The part that is missing to which the prejudice comes from is how come it wasn't vetted throughout the day, and the late disclosure. Eventually the court gets to:

Court: Did you ask the victim if she did it?

Saldivar: I haven't seen her today

Court: Is she here?

Constantine: Today? She said she dropped her off at the Murphy Hotel.

Saldivar: So she's not here.

Here's the state's ace up the sleeve. The witnesses are not at the courthouse to be questioned concerning this allegation. Once the asks to proffer testimony and (re)call witnesses the judge becomes agitated knowing too much time would be invested in this mid-trial investigation and testimony for him to make his vacation flight (true):

Court: You can't do a -- start an investigation after jeopardy attaches. What is it you want me to do? I'm getting on a plane tomorrow. You want me to stop the trial and say what, we're going to conduct an investigation tonight? You knew today was the day.

As if the defense had any control over this situation. Whereupon Ms. Constantine enters the courtroom and reads information as to the allegation. But what the state failed to disclose was it was a different shift of personnel at the Hotel than when she called about the prostitution. How could these people have any relevant information? Leading to the state's "key witness" having a dental procedure done late that day. And it stays unclear as to who learned of what first. Saldivar says on (T656) the coordinator told him this morning and that the victim advocate told him. But after an investigation and a missed deposition (again in this case), it's now the other way around.

In Gantt v. Roe, 389 F.3d 908 (9 Cir 2004) (Brady isn't confined to evidence that affirmatively proves a defendant innocent; even if the evidence is merely "favorable to the accused," its suppression violates Brady if prejudice results. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed2d 286 (1999). The evidence the prosecution failed to disclose here surely satisfies the "low favorable to the accused" standard. That these pieces of information were found (or their

relevance discovered) only in time for the last day of testimony underscores that disclosure should've been immediate: Disclosure "must be made" at a time when it would be of value to the accused. U.S. v. Davenport, 753 F.2d 1460, 1462 (9 Cir 1985). Prosecutor may have been so busy preparing to wrap up his case that he failed to make the connection... But Brady has no good faith or inadvertent defense. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed2d 490 (1995); U.S. v. Agurs, 427 U.S. 927, 110, 96 S.Ct. 2392, 49 L.Ed2d 342 (1976) ("Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness of a prosecutor. If evidence highly probative of innocence is in the file, he should be presumed to recognize its significance even if he has overlooked it.")

As this Court reiterated, "a rule... declaring a 'prosecutor may hide, defendant must seek', isn't tenable in a system constitutionally bound to afford defendants due process." Banks v. Dretke, 540 U.S. 668, 1243 S.Ct. 1256, 157 L.Ed2d 1166 (2004). Petitioner's case presents an even stronger argument for disclosure than does Banks, as defense counsel here relied on not merely the force of Brady but also with the prosecutors claimed "open file" policy in Strickler at 276... defense was surely entitled to rely on prosecutors representation that he was sharing fruits of police investigation.

ISSUE V

The Court created structural error by not excusing Juror Mussett for cause after the state and defense both moved for cause, and even the agreed she should not be seated.

Ms. Mussett is a school director suffering major staff shortages after the pandemic with 140 kids at her school. Who began voir dire distracted and worried about her school staff and children there.

Ms. Mussett never retracted from her statements of being distracted. It was obvious to all involved that Ms. Mussett should not have a seat on the panel, but the court went out of its way, abusing its in bullying Attornies from both sides into keeping her, an incompetent juror on the panel.

When asked by the judge "How much is that school issue gonna be a distraction for you". Her answer was, "It might be a distraction". (T39). Next up was the prosecution, "Could you do it?" asked Saldivar. Mussett's reply "I could try to figure it out", "I would hope so". When asked "Can you give me anymore", Ms. Mussett was firm with "I cannot". (T171-72). So the defense took their shot with, "Is that something that's gonna weigh on you while you listen to the evidence?" Mussett replied "I hope not". When asked if she'd "be able to put it out of her mind?" she affirmed "I would try ... I cannot say 100% that I would be able to". (T216-17)

During the first round of cause challenges it was up in the air on how everyone felt about Ms. Mussett with her distracted. It was (T103) decided to "let's leave her for now". This took a major turn during the second round of challenges (T234):

Constantine: 40

Court: No, I'm not getting rid of Mussett. You guys are gonna have to eat that one if you want to kick -- do I think she should be on? No. Am I taking another off for cause on that? She said she could do it. She didn't want to do it but she said she could. Are you wanting Mussett off, 40? You're not getting her either way, but you might as well make a record.

Teichler: We are moving for cause on Ms. Mussett, and I think all 3 of us tried to pin her down on whether or not she'd be able to give her full attention to this and the best we could ever get even after multiple attempts was "I'll try"

Court: I didn't get that. I got she could do it. I think she
made it clear she doesn't want to do it, but I think she--
I'm not convinced that she can't. She's obviously smart
enough. She took-- she rattled off the correct answers
to every question she got asked. She's running a school.
She'd be the smartest person on the jury. It's just that
it's tough with her running the school. If you don't
want her because she's on the school with the distraction
that's fine but there's no doubt in my mind that she can
do it.

In which courtroom was Judge Frederico in when he heard
Ms. Mussett say she could do it? Nowhere within this record did
Ms. Mussett say she could, only that she would "try". It is clear
that Frederico prejudiced Brabham and created structural error
when he chose Mussett for the jury.

It's well established that such a decision is within the discretion
of the court, but the ruling should be based on matters that appear
of record before the court. Here the record illustrates that Ms.
Mussett should have been released. See Canakaris v. Canakaris,
382 So. 2d 1197 (FL 1980) (Quoting Delno v. Market Street Ry. Co., 124
F.2d 965, 967 (9 Cir 1942) Discretion is abused when the judicial
action is arbitrary, fanciful, or unreasonable, which is another way
of saying that discretion is abused only where no reasonable man
would take the view adopted by the court. The discretionary power
that is exercised by a trial judge is not, however, without limitation.
The trial court's discretionary power is subject to the test of
reasonableness, but that test requires a determination of whether
there is logic and justification for the result. The trial court's
discretionary power was never intended to be exercised in accordance
with whim or caprice of the judge nor in an inconsistent manner.
There is a battery of case law that states if it's a close call the juror
should be excused. It doesn't get closer than judge, state, and defense
all agreeing, the juror should not be seated. Somerville v. Ahula,

902 So.2d 930 (FL 5th DCA 2005); Sydeman v. Benson, 463 So.2d 533 (FL 4th DCA 1985) "The impartiality of the finders of fact is an absolute prerequisite to our justice system." "Close cases should be resolved in favor of excusing the juror rather than leaving a doubt as to her impartiality." A juror who can only promise to be impartial, or thinks she can or is ambivalent should be excused. "A juror's promise that she will try to be impartial is simply not enough to guarantee that a defendant will be given a fair trial. A qualified promise to be fair raises reasonable doubt. Bell v. State, 902 So.2d at 847 (citing Salgado v. State 829 So.2d 342 (FL 3d DCA 2002) We view the seating of a juror as to whom there is reasonable doubt concerning impartiality an abuse of discretion and thus 'manifest error'.

ISSUE VI

Brabham's due process was violated when the court allowed a witness to give opinionated testimony, invading the province of the jury

During Pretrial motions the defense moved the court for a motion in limine specifically to exclude the statement "He looked like he was gonna kill her" from state's witness Haley Sample. During the trial the state elicits that statement from Sample claiming, "Quite honestly. I didn't even remember it". A motion in limine is so that you have to stand up and object. So the jury doesn't have to think that you're trying to hide evidence. And that's what we have here. After she blurts something out that was specifically excluded and the way it comes out... A prudent lawyer can avoid giving the impression that he is concealing something crucial. Nebergall v. State, 293 So.3d 517 (FL 4th DCA 2020); Fischam v. Suen, 672 So.2d 644 (FL 4th DCA 1996). In Gosliminski v. State, 132 So.3d 678 (FL 2013) "The comments must

either deprive defendant of a fair trial ... "Whether or not it materially contributes to the conviction" or is so inflammatory that it might have influenced the jury to reach a more severe verdict... be so fundamentally tainted as to require a new trial... In the present case, this statement did deprive Brabham of a fair trial as this was a "classic swearing match" with no physical or DNA evidence, the statement did materially contribute to the verdict.

In Pretrial motions it was established that Ms. Sample had told the 911 controller on the phone that she was a rape victim in the past. (R445). Effectively making her an unchallenged bias witness. When defense counsel allowed that to be removed from the tape.

Brabham argues that Ms. Sample's statement was an attempt to intentionally inject a harsher element into the proceedings to ensure Brabham be jailed. This statement was not given to the 911 controller but to officers after they arrived. The defense this for what it was and is, speculation.

The trial court erroneously erred here. "It's really the classic lay opinion in which you give an opinion as a lay person because there's no better way to explain what they saw. The amalgamation of what they actually saw." (T388) With air of "It's one of these, there's no perfect trial. She gave her observation of what it was." Based on the judge's own words and the fact that Sample who works as a nurse at "Johns Hopkins All Children's Emergency Department (T373) she is obviously smart and could have explained what was observed better without opinion about possible future actions rather than what's happening at the moment. This biased opinion invaded the province of the jury. While the admission of such evidence may be harmless, this case turned on the credibility of the witnesses testimony, thus increasing the likelihood the error was harmful. See Henry v. State, 700 So. 2d 797 (FL 4th DCA 1997); Bass v. State, 547 So. 2d 680 (FL 1st DCA 1989). There is a battery of cases under "Classic

swearing matches". See Lewis v. State, 591 So. 2d 922 (FL 1991). Like the Lewis case, here the defendant's defense is that the alleged victim fabricated her accusations to cover up her own actions and the entire case was based upon P.F.'s accusations. In Rodriguez v. State, 842 So. 2d 1053 (FL 3d DCA 2003) In such cases as this where there's a credibility contest between victim and defendant, the error isn't harmless; Hitchcock v. State, 636 So. 2d 572 (FL 4th DCA 1994) When credibility determination is at the heart of the trial, the improper admission of statements bolstering victim's testimony constitutes prejudicial error, necessitating reversal. Perez v. State, 595 So. 2d 1096 (FL 3d DCA 1992).

In Roberts v. State, 279 So. 3d 271 (FL 1st DCA 2019) (A lay witness can not testify about an opinion or inference because it invades the province of the jury. Johnson v. State, 252 So. 3d 1114 (FL 2018). Therefore Brabham was prejudiced by the admission of Sample's opinion.

Issue VII

Appellate Counsel was ineffective for not raising Fundamental error on appeal as well as refusing to adopt Brabham's pro se Motions that counsel refused to file himself.

Appellate Counsel, Steven Bolotin, did refuse several issues of Brabham's choosing for appeal. The issues Brabham raises against Bolotin are because he did not raise Fundamental error and an attempt to waive an issue without Brabham's consent as well as it being poor judgment on his part, secondly Bolotin did abandon Brabham's case once the 2d DCA affirmed it. A letter was sent to Brabham stating, "my office has concluded

its efforts on your behalf." This clearly means the Public Defenders will do no more to assist Brabham, without filing to be withdrawn from the case so that Brabham could begin to file his own motions. This causing all of Brabham's motions to be stricken, and while this writ is timely filed but rushed without adequate time to prepare while dealing with the 2d DCA. Appendix D contains the decisions to Brabham's pro se motions within the 2d DCA.

Bolotin can not claim that he did not know Brabham wished for a rehearing as the first rehearing motion denial was sent to Bolotin's office then forwarded to Brabham without any response from him. A rehearing is still within the scope of direct appeal, and there was no attempt to adopt it. Thus creating a violation of Brabham's 6th Amendment right to effective appellate counsel.

Bolotin was notified that if he were to Supplement the Record he would find more evidence to back all these claims.

Brabham was sent a letter dated 17 March 2023 concerning correspondence from Brabham. This contained case law to back Bolotin's that Brabham needed to defer to his professional judgment. However, the case he relies on was reversed and states, "Appointed Counsel's unwillingness to present particular arguments at appellant's request functions not only to abridge defendant's right to counsel on appeal, but also to limit the defendant's constitutional right of equal access to the appellate process... The Court of Appeals went on to say that, "having demonstrated that appointed counsel failed to argue colorable claims at his request, an appellant need not also demonstrate a likelihood of success on the merits of those claims." And Justice Blackmun, concurring: as an ethical matter, an attorney should argue on appeal all nonfrivolous claims upon which his client insists. And the attorney by refusing to carry out his client's express wishes, cannot forever foreclose review of nonfrivolous constitutional claims... "For such overbearing conduct by counsel, there is a remedy..." I state my view that counsel's

Failure to raise on appeal nonfrivolous constitutional claims upon which his client insisted must constitute "cause and prejudice" for any resulting procedural default under state law. See Lainmaright v. Sykes 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed 2d 594 (1977). This from Jones v. Barnes 463 U.S. 745 (1983).

Here in the instant case, Bolotin waived the Richardson issue in the 2d DCA against Brabham's express wishes. This issue is addressed in ISSUE III, Bolotin never raised the fact that the prosecutor presented false testimony from detective Blumberg, hence not fundamental error, see ISSUE II, he did not raise the opinionated bias testimony of Haley Sample see issue VI, nor did he raise that the fact of the late disclosure of possible favorable to the accused evidence that still hasn't been concluded which made it unvaluable to defense, see issue IV, and he did not raise the structural error of incompetent juror Mussett having a seat on the panel who should have been released for cause issue V. These issues are stronger than what Bolotin raised in appeal so the presumption of effective assistance of counsel is overcome. See Buzman v. Inch, 220 US Dist LEXIS 31154 (11 CIR) (S.D. Fla); Smith v. Robbins, 528 U.S. 259 (2000); Davila v. Davis, 137 S.Ct. 2058 (2017).

On 12 January 2023, Bolotin Filed a Motion for Extension of Time explaining to the Appellate Court: "3. The record on appeal is now 1283 pages in length. Undersigned counsel tentatively expects to raise at least 6 points on appeal, several of which are factually and/or procedural complex. In addition, several of the issues involve the court's behavior toward Brabham and toward the attorney's for both sides throughout the entirety of the pretrial, jury selection, trial, and sentencing proceedings. It is anticipated that the brief will closely approach the word limitation and may well require a motion to exceed it." The record shows that Bolotin raised 4 issues, the brief was 35 words short of the limitation, and that counsel did not

attempt to file a motion to exceed the word limitation. Counsel's argument to Brabham concerning these issues in his 17 March 2023 letter is, "(1) The brief is only 40 (now 35) words short of the word limit, and the 2d DEA very rarely permits longer briefs." His argument here is proof within itself and it can and does happen. So Brabham was deprived of effective appellate counsel.

The letters from Bolotin and the Motion he filed are in Appendix E. The decisions from the 2d DEA on Brabham's Motions are in Appendix D.

Conclusion

Brabham was prejudiced in each and every issue brought within this writ as well as his constitutional due process rights were violated. Brabham's convictions and sentences must be reversed for a new trial before a different judge. If "bad faith" is found to have occurred Brabham's case should be dismissed under the double jeopardy clause, Oregon v. Kennedy.

Certification of Compliance

I certify that this document contains 40 pages.

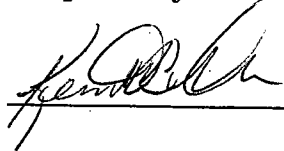
29 November 2023


Kenneth Brabham prose

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 28 November 2023