No.

IN THE SUPREME COURT OF THE UNITED STATES

RANDY W. TUNDIDOR, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Supreme Court of Florida err in concluding, contrary to *Hurst v. Florida*, 136 S. Ct. 616 (2016), that a jury's unanimous "advisory sentence" per se makes harmless the imposition of a sentence under a statute that violates the Sixth and Fourteenth Amendment?

2. Did the state court, err in affirming Petitioner's death sentence even though, contrary to *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985), the trial court told the jury that its advisory sentence would be a recommendation not binding on the court?

3. Did it violate the Due Process Clause that there were pending criminal charges against the trial judge who denied Petitioner's motion for new trial and sentenced him, and was Petitioner deprived of his right to effective assistance of counsel in so far as counsel filed an untimely motion to disqualify the judge?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Randy W. Tundidor respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida in this case.

OPINION BELOW

The decision of the state supreme court (App. A) is reported as *Tundidor v. State*, 221 So. 3d 587 (Fla. 2017). The order denying rehearing (App. B) is not officially reported, but may be found at *Tundidor v. State*, SC14-2276, 2017 WL 2794223 (Fla. June 28, 2017).

JURISDICTION

The state supreme court affirmed Petitioner's convictions and sentences on April 27, 2017. App. A. It denied rehearing on June 28, 2017. App. B. On September 25, 2017, Justice Thomas granted petitioner's application to further extend the time to and including November 25, 2017. Because that day is a Saturday, the petition is due on Monday, November 27, 2017. This Court has jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed … .

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law … .

STATEMENT

Petitioner was convicted of one count of first-degree murder, two counts of attempted first-degree murder, two counts of armed kidnapping, one count of armed burglary, two counts of armed robbery, and one count of arson in the Seventeenth Judicial Circuit of Florida (Broward County).

1. According to the State's evidence, the crimes arose from a dispute between Petitioner and his landlord, the victim of the murder.

The State's case rested largely on the testimony of Petitioner's drug-addicted son, Randy H. Tundidor, referred to as "Junior" in the proceedings below.

Junior testified that, at Petitioner's direction, he entered the landlord's home, tied up the landlord and his wife and took them to an ATM to withdraw money. He then took them back to the home, after which Petitioner entered and killed the landlord and tried to set the house on fire in an apparent attempt to kill the wife and the couple's child. App. 7a-8a.

Various inmates testified that Junior had told them that he committed the crimes with his brother Shawn and that Petitioner was

not involved in the crimes. App. 11a, 15a.

After the jury found Petitioner guilty of first-degree murder, he waived presentation of mitigation at the proceeding at which the jury made its advisory sentence recommendation. He did, however, contest the State's case for aggravating circumstances.

The jury returned an advisory sentence unanimously recommending a death sentence.

2. After the jury proceedings, which occurred in 2012, the trial judge (Judge Imperato) was arrested for drunk driving on November 6, 2013. At the time of her arrest, there was a hearing scheduled for November 12 for presentation of evidence and argument as to the sentence pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

When court convened on November 12, Judge Backman presided, saying that Judge Imperato had been relieved of her criminal caseload: "As you know, Judge Imperato has, on her request, been transferred out of criminal; and I have been asked to take over the division. What I can't tell you is if or when she will ever be back. My thought is, obviously, I can't do a *Spencer* hearing." Trial court transcript, 4327. The Assistant State Attorney argued that "the only way Judge Imperato

should be removed" would be if she could not longer proceed due to death or disability under Florida Criminal Rule 3.231. (Rule 3.231 sets out the procedures governing a substitute judge who has over a case mid-trial or during posttrial proceedings.) Judge Backman replied that, for the case to go back to Judge Imperato, "each and every one of you, including Mr. Tundidor, would have to waive the issue presented by her situation." *Id.* at 4330. Defense counsel said Petitioner objected to Judge Imperato returning to the case and that there should be a new trial or sentencing with a new judge. *Id.* at 4331-32. The prosecutor said that the defense needed "to put whatever they are asking for in writing," and the judge agreed. *Id.* at 4332.

Judge Backman continued the case to December 2. On that date, he said that the case was still Judge Imperato's. Defense counsel immediately objected. *Id.* at 4343-44.

Three days later, on December 5, defense counsel filed the motion to disqualify Judge Imperato. Trial court record, page 802. Judge Imperato denied the motion.

During the course of subsequent proceedings, the defense presented evidence from additional inmates who said that Junior had

denied that Petitioner was involved in the crimes.

Eventually, Judge Imperato denied Petitioner's motion for new trial, which concerned the credibility of various witnesses who testified at trial and in post-trial hearings, and sentenced him to death, finding five aggravating circumstances and seven mitigating circumstances.

3. On appeal, Petitioner argued that his death sentence was unconstitutional because it was imposed by use of the statute found unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016) (holding unconstitutional statute providing that judge, rather than jury, was to make predicate findings to allow death sentence), and that the error was not harmless.

The Supreme Court of Florida acknowledged that, as stated in *Hurst*, a jury's "mere recommendation is not enough" to satisfy the Sixth Amendment, App A, 21a, but it then held that the constitutional error was harmless because the jury's unanimous advisory sentence recommendation cured the *Hurst* error:

> The standard for evaluating whether the error was harmless beyond a reasonable doubt "is whether there is a reasonable possibility that the error affected the [sentence]." *Id.* at 68 (quoting *DiGuilio*, 491 So. 2d at 1139) (alteration in original). "As applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be

> clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances." *Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016), *petition for cert. filed*, No. 16–8569 (U.S. April 3, 2017); *accord Hurst*, 202 So. 3d at 67–68.
>
> In this case, the penalty phase jury returned a unanimous recommendation for a sentence of death. "[This] recommendation[ ] allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." *Davis*, 207 So. 3d at 174. Further:
>
>> Even though the jury was not informed that the finding that sufficient aggravating [factors] outweighed the mitigating circumstances must be unanimous, and even though it was instructed that it was not required to recommend death even if the aggravators outweighed the mitigators, the jury did, in fact, unanimously recommend death. From these instructions, we can conclude that the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations.
>
> *Id.* at 175 (citation omitted).
>
> Thus, we conclude that the State has sustained its burden of demonstrating that any *Hurst* error in Tundidor's penalty phase was harmless beyond a reasonable doubt. The jury unanimously found all of the facts necessary for the imposition of the death sentence by virtue of its unanimous recommendation. Accordingly, Tundidor is not entitled to a new penalty phase.

App. 21a-22a.

Petitioner also argued that the death sentence was improperly

imposed because the jury was repeatedly instructed that its sentence determination was advisory and not binding, contrary to *Caldwell* v. *Mississippi,* 472 U.S. 320, 341 (1985) and *Romano* v. *Oklahoma*, 512 U.S. 1, 8 (1994) ("We have also held, in *Caldwell v. Mississippi,* that the jury must not be misled regarding the role it plays in the sentencing decision."). The state supreme court necessarily rejected this argument in affirming the death sentence.

With respect to the motion for disqualification of the judge, Petitioner argued that the trial court should have granted the motion under state law and he was denied his rights under the Due Process and Cruel and Unusual Punishment Clauses of the federal constitutions. Amends. VIII, XIV, U.S. Const.

The State argued in response that counsel had failed to file the motion within the 10-day time period allowed for such a motion under Florida Rule of Judicial Administration 2.330(e) ("A motion to disqualify shall be filed within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion.").

Petitioner replied that, so far as defense counsel failed to file a proper motion within the required time period, he was deprived of his

right to effective assistance of counsel under the Counsel and Due Process Clauses. Amends. VI and XIV, U.S. Const.

The state supreme court held that counsel did not file the motion within the rule's ten-day time period:

> Tundidor argues that the trial court erred in denying his motion to disqualify the trial judge after the guilt and penalty phases but before the Spencer hearing. Because the motion was untimely, we affirm its denial.
>
> A motion to disqualify must be filed within 10 days after discovery of the facts that are the grounds for the motion. Fla. R. Jud. Admin. 2.330(e).
>
> In this case, the trial judge's DUI arrest on November 5, 2013, was the basis for Tundidor's motion. The arrest was public knowledge on November 6, 2013, yet Tundidor did not file the motion until December 5, 2013. Because the motion was filed well outside of the 10–day timeframe, it was untimely.
>
> Therefore, the motion was properly denied because it was untimely.

App. 16a.

REASONS FOR GRANTING THE PETITION

I. THE FLORIDA SUPREME COURT ERRED IN APPLYING ITS RULE OF FINDING *HURST* ERROR AUTOMATICALLY HARMLESS WHEN THE JURY'S ADVISORY SENTENCE RECOMMENDATION IS UNANIMOUS.

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Court held that Florida's death penalty scheme violated the Sixth Amendment,

Apprendi v. New Jersey, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), because it left to the judge the determination of the facts required to allow a death sentence—specifically (1) whether there were sufficient aggravating circumstances to justify a death sentence and (2) whether they were not outweighed by the mitigation.

In so holding, the Court ruled that the State "cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Id.*, __ U.S. __, 136 S.Ct. at 622. The Court remanded for harmless error review.

In the present case, the state supreme court acknowledged that the unconstitutional statutory scheme was used at bar, but held that the error was harmless under its case law holding that such error is per se harmless if the jury's advisory recommendation for a death sentence is unanimous. App. 37a-38a.

In this regard, the court cited its prior decision in *Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016), which held that a unanimous advisory sentence recommending a death sentence made *Hurst* error harmless per se. App. 38a.

Both *Davis* and the present case are part of a line of cases in

which the Florida Supreme Court has applied the unanimity test in finding *Hurst* error harmless in every single case where there has been a unanimous jury recommendation. *See Guardado v. Jones*, 42 Fla. L. Weekly S552 (Fla. May 11, 2017); *Cozzie v. State*, 225 So. 3d 717 (Fla. 2017); *Morris v. State*, 219 So. 3d 33 (Fla. 2017); *Middleton v. State*, 220 So. 3d 1157 (Fla. 2017); *Oliver v. State*, 214 So. 3d 606 (Fla. 2017); *Jones v. State*, 212 So. 3d 321 (Fla. 2017); *Hall v. State*, 212 So. 2d 1001 (Fla. 2017); *Kaczmar v. State*, 42 Fla. L. Weekly S127 (Fla. Jan. 31, 2017); *Knight v. State*, 225 So. 3d 661 (Fla. 2017); *King v. State*, 211 So. 3d 866 (Fla. 2017).

Likewise, the Florida court has "consistently held that *Hurst* error is not harmless in cases where the jury makes a non-unanimous recommendation of death." *Glover v. State*, 42 Fla. L. Weekly S810, 816 (Fla. Sept. 14, 2017).

The effect of the state supreme court's ruling was that, contrary to *Hurst*, it treated the jury's advisory sentence recommendation "as the necessary factual finding that *Ring* requires." *Hurst*, __ U.S. __, 136 S.Ct. at 622. Thus the court's harmless error analysis is an end run around *Hurst*, establishing a per se rule of

affirmance.

The Florida Supreme Court's use of this per se unanimity test to determine harmless error is improper and unconstitutional.

First, as *Hurst* stated, an advisory sentence recommendation is not a substitute for the necessary fact finding.

An advisory sentence recommendation does not amount to fact finding such as to warrant the automatic conclusion that the failure to make the required fact finding is harmless. Where a jury is informed that its advisory sentence is merely a recommendation and not binding there is an unconstitutional diminution of the jurors' responsibility. There is a danger jurors will make symbolic gestures (sending a message against killing) rather than diligently weighing in on the circumstances of the case and the defendant's background—that responsibility would fall on the actual sentencer. Using a jury's advisory recommendation as a determinative litmus test for harmless error is improper.

Even where the error of diminishing responsibility was by argument, rather than by instruction in a related Eighth Amendment context in *Caldwell v. Mississippi*, 472 U.S. 320 (I985), the error was

not harmless although the jury's verdict for death was, as required by Mississippi law, unanimous.

The Florida Supreme Court seems to have fashioned its per se rule of harmless to conform with its holding in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), that the jury's advisory sentence recommendation must be unanimous. But unanimity does not magically convert a recommendation into the necessary factual finding that *Ring* requires.

The court may also have created its per se rule to avoid trying to read the jurors' minds. But such reasoning conflicts with *Hurst*, under which trial judges may not substitute their findings for jury findings even though they are present at the trial. It would be strange indeed to say that an appellate court, even more removed than the trial judge, may fill in the gap left by the absence of a jury verdict.

Second, the Florida Supreme Court's application of harmless error in this case was invalid because there was no valid jury verdict upon which such an analysis could be based. As the Court explained in the context of a defective reasonable doubt instruction in *Sullivan v. Louisiana,* 508 U.S. 276 (1993):

> Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-

> error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. ... The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt...[t]hat is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action...it requires an actual jury finding of guilty.

Id. at 279-80 (internal citations and punctuation omitted)

Justice Scalia explained for the Court: "A reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, the wrong entity judges the defendant guilty." *Id.* at 281 (internal citations and punctuation omitted).

Because there should not be an automatic test in order to determine harmless error and because there was no valid jury verdict upon which a harmless error analysis could be based, this Court should accept this case for review, and reverse the Florida Supreme Court's decision affirming petitioner's death sentence.

II. THE DEATH-SENTENCING PROCEDURE USED IN THIS CASE DID NOT COMPLY WITH THE EIGHTH AND FOURTEENTH AMENDMENTS AS THE JURORS WERE REPEATEDLY TOLD BY THE COURT THAT THEIR ADVISORY SENTENCE WOULD BE A RECOMMENDATION AND NOT BINDING.

Petitioner was tried under a statute that made the judge the finder of the ultimate facts authorizing a death sentence. *See Hurst*; § 921.141(2) and (3), Fla. Stat. (2009).

Pursuant to the statute, and to standard jury instructions adopted by the state supreme court, the trial judge told Petitioner's jury again and again that punishment was the court's responsibility and the jury's advisory sentence was a recommendation and was not binding. For instance, the judge instructed the jurors: "It is now your duty to advise the court as to the punishment that should be imposed upon the defendant for the crime of First Degree Murder. … . As you have been told, the final decision as to which punishment shall be imposed is the responsibility of the judge. … . However, the law requires you to render an advisory sentence as to which punishment should be imposed; life imprisonment without the possibility of parole, or the death penalty."

In *Caldwell*, the Court discussed the problems with informing the jurors of the limits of their role in the death penalty context. In that

case, the jury heard through argument by the prosecutor that its capital sentencing decision would be reviewed by the state supreme court.

This Court reversed the death sentence writing, "[i]n the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences where there are state-induced suggestions that the sentencing jury may shift its responsibility to an appellate court." *Id.*, 472 U.S. at 330.

Because the jury's sense of responsibility was improperly diminished, the Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Id.* at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires"). The Court wrote that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29. Three dissenting Justices agreed in principle, taking exception only to the majority's characterization of the

prosecutor's argument. *Id.* at 343-50 (Rehnquist, J., dissenting).

To establish error under *Caldwell*, a defendant "must show that the remarks to the jury improperly described the role assigned to the jury." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (internal citations and quotation marks omitted).

In our case, the jury was repeatedly told that it was the court that would ultimately determine the propriety of the death sentence and that the jury's role was merely advisory. This instruction improperly described the role assigned to the jury under *Hurst*. Petitioner's death sentence violates the Eighth Amendment under *Caldwell*.

The fact that the jury heard about its diminished role from the judge, rather than counsel, weighs even more heavily in favor of a new sentencing proceeding. The argument of counsel is "likely viewed as the statements of advocates," as distinct from jury instructions, which are "viewed as definitive and binding statements of the law." *Boyde v. California*, 494 U.S. 370, 384 (1990). *See also Buck v. Davis*, __ U.S. __, 137 S. Ct. 759, 777 (2017) ("A prosecutor is seeking a conviction. Jurors understand this and may reasonably be expected to evaluate the government's evidence and arguments in light of its motivations.").

“The influence of the trial judge on the jury is necessarily and properly of great weight, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge’s last word is apt to be the decisive word.” *Bollenbach v. United States*, 326 U.S. 607, 612 (1946).

Unanimity does not cure an instruction which diminishes jury responsibility. In *Caldwell* the diminishment of the jury’s responsibility was not made harmless by the jury’s unanimous vote for death. In other words, unless the jury is fully and adequately instructed as to its responsibility, the jury’s unanimity will not decide the validity of the death sentence.

Any reviewing court can do no more than speculate that all the jurors would have voted for the prosecution, as to all necessary factors and as to the final recommendation, had it been conveyed to them that those decisions were theirs and theirs alone.

The instructions minimized the jury’s role and relieved them of the weight that sentencing another human being to death would place on one’s conscience. *See Caldwell*, 472 U.S. at 333 (“the uncorrected suggestion that the responsibility for any ultimate determination of

death will rest on others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role”).

The jury may have decided to “ ‘send a message’ of extreme disapproval for the defendant’s acts” even if it was unconvinced that death was the appropriate punishment, with the belief that if they were wrong and advised death when the sentence should be life, the judge would correct their mistake and spare his life. *See Caldwell*, 472 U.S. at 331.

In these circumstances, the death sentence must be set aside under *Caldwell*.

III. SINCE THE TRIAL JUDGE FACED CRIMINAL PROSECUTION BY THE STATE, DUE PROCESS REQUIRED HER REMOVAL FROM THE CASE. SO FAR AS COUNSEL BOTCH THE MOTION TO DISQUALITY THE JUDGE, PETITIONER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL.

A. Although most issues concerning disqualification of a judge do not rise “to a constitutional level,” it is still true that a “fair trial in a fair tribunal is a basic requirement of due process.” *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (internal citations and quotation marks omitted).

The question involves an “objective” inquiry to determine whether

the case involves a circumstance "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* at 877 (internal citations and quotation marks omitted).

"The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules." *Id.* at 883. This objective inquiry considers "whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* at 883-84 (internal citations and quotation marks omitted).

In the present case, the judge's arrest involved substance abuse and she had to decide issues about the credibility of substance abusers. She also had to evaluate evidence concerning Petitioner's substance abuse. Further, while facing her own criminal charges, she had to assess the credibility of persons charged with crimes.

A realistic appraisal of psychological tendencies and human weakness in these circumstances necessarily leads to the conclusion

that the judge's disqualification was constitutionally mandated. And of course she had a unique relationship with one of the parties—the State was prosecuting her. Someone subject to prosecution by the State has a strong incentive to curry the State's favor.

B. The state supreme court did not dispute the foregoing, but ruled that the defense attorney botched the filing of the motion by missing the ten-day deadline.

But Petitioner's claim was presented to the state court, and the judge abused her discretion by not removing herself from the case. *See State v. Oliu*, 183 So. 3d 1161, 1163 (Fla. 3d DCA 2016) ("Although we have denied the petition, we note that rule 2.330(i) permits a judge to enter an order of disqualification on his own initiative. Fla. R. Jud. Adm. 2.330(i) ('*Judge's Initiative*. Nothing in this rule limits the judge's authority to enter an order of disqualification on the judge's own initiative.').").

On these facts, Petitioner fairly presented his federal issue to the state court, so that there should be no bar to federal review.

In *Davis v. Wechsler*, 263 U.S. 22 (1923), Wechsler brought suit in state court for injuries on a railroad. The defendant "pleaded a general

denial and also that the Court was without jurisdiction" on federal law grounds. *Id.* at 24. The complaint was later amended to name a substituted defendant, who entered an appearance and adopted his predecessor's answer. On appeal from judgment for Wechsler, the appellate court held that the successor defendant had waived the federal jurisdictional argument by entering an appearance.

This Court determined that there was no bar to federal review, with Justice Holmes writing for the Court: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. … . The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of Federal right." *Ibid.*

This rule applies to criminal cases. In *Douglas v. Alabama*, 380 U.S. 415 (1965), counsel objected and moved for a mistrial regarding the State's use of a co-defendant's confession, saying that it was hearsay and not subject to cross-examination. The state appellate court applied a procedural default because he did not continue to object to the

testimony about the confession. This Court ruled that Douglas had fairly presented the ground for the objection to the judge, and wrote that "an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here." *Douglas v. Alabama*, 380 U.S. at 422. *See also Osborne v. Ohio*, 495 U.S. 103 (1990) (rejecting, on the basis of *Douglas*, claim that criminal defendant procedurally defaulted federal claim in state court trial); *Lee v. Kemna*, 534 U.S. 362 (2002) (holding, pursuant to *Douglas* and *Osbourne*, that criminal defendant did not default federal claim despite state court ruling of procedural default).

C. Regardless, so far as there was a procedural default, Petitioner was denied effective assistance of counsel under the Sixth and Fourteenth Amendments.

A criminal defense attorney is the fiduciary of the defendant's liberty, and holds in trust the client's rights. Petitioner had a strong interest in having the judge removed and had the absolute right to pursue that interest within the law. There can be no dispute about the

fact that everyone knew below that Petitioner and counsel did not want Judge Imperato to preside after her arrest. Petitioner had the constitutional right to have counsel pursue this goal competently.

The standards for an ineffective assistance claim are well-settled. Defendants must show first that counsel's error was "so serious that counsel was not functioning as the counsel guaranteed ... by the Sixth Amendment." *Buck*, __ U.S. __, 137 S. Ct. at 775 (internal citations and quotation marks omitted). Second, they must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, __ U.S. __, 137 S. Ct. at 776 (internal citations and quotation marks omitted).

In our case, there was no strategic reason not to file the motion and in fact counsel did undertake to do so, although the state court ruled that he made a hash of it. On these facts, counsel was not functioning as the counsel guaranteed by the Constitution.

Further, the prejudice to the client is obvious. Under Florida law, the trial court would have been obliged to grant the motion. *See Moskowitz v. Moskowitz*, 998 So. 2d 660, 662 (Fla. 4th DCA 2009) (holding that judge's arrest for misdemeanor possession of marijuana

required disqualification from civil case and noting that it "hardly generates a … supposition that litigants in cases over which he presides while his own criminal charges are unresolved need have no reason to fear his impartiality has been impaired.")

Notably, *Moskowitz* arose from the same trial court circuit as the present case, and the decision of the Fourth District Court of Appeal in that case was binding on the trial court in the present case.

Under the circumstances of this case, there is a reasonable likelihood that the result would have been different but for counsel's blunder. Once the judge was removed from the case under *Moskowitz*, a new trial would have to be ordered under Florida law.

This is because, after denial of the recusal motion, the trial court ruled on Petitioner's motion for new trial which argued, among other things, that the evidence was contrary to the weight of the evidence. A successor judge cannot rule on such a motion because he or she was not present at the trial, so that a new trial was necessary. *See McCloud v. State*, 150 So. 3d 822, 823 (Fla. 1st DCA 2014) ("a successor judge, who was not present at trial, could not competently assess the weight of the evidence as required to resolve Petitioner's motion for new trial.

Accordingly, we reverse and remand for a new trial."); *Porter v. State*, 895 So. 2d 1240 (Fla. 4th DCA 2005).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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