IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

STATE OF FLORIDA, *Plaintiff*,	
v.	Case No.: 2016-CF-12745
SKYLER BLAKE FRANCIS, *Defendant*.	

DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

The Defendant, Skyler Blake Francis, by and through undersigned counsel, moves the Court pursuant to Fla. R. Crim. P. 3.850, for an order vacating his judgment and sentence, and states the following in support:

STATEMENT OF THE CASE

Defendant was charged in Brevard County, Florida with: Count I - Attempted Second Degree Murder of a Law Enforcement Officer, contrary to section 782.04(2), Florida Statues (F1); and Count II - Aggravated Battery Upon a Law Enforcement Officer, contrary to section 784.07(2)(d), Florida Statutes, (F1).

Defendant pleaded not guilty and elected a jury trial which was conducted October 29 through November 1, 2018. Defendant was found guilty in Count I of the lesser-included offense of Attempted Manslaughter by Act, and guilty of Count II. Defendant was sentenced on December 17, 2018, to 5 years' prison for Count I and to a consecutive 10 year prison term for Count II with a 5-year minimum mandatory, and a 15 year probation term. Defendant appealed his judgement and sentence to the Florida Fifth District Court of Appeal, which affirmed with an opinion on December 4, 2020. The mandate issued December 31, 2020. *Francis v. State,* 307

So.3d 1011 (Fla. 5th DCA 2020). Defendant sought discretionary review by the Florida Supreme Court, which declined to accept jurisdiction on June 21, 2021. *Francis v. State*, SC21-638, 2021 WL 2673654 (Fla. June 29, 2021) (unpublished).

Defendant was initially represented by Harley Gutin, Esq. and Stephen Wolverton, Esq. of 5190 North U.S. 1, Cocoa, Florida 32927. Messrs. Gutin and Wolverton withdrew as counsels in January 2018, and were replaced **public defender** by George Ollinger, Esq., of Ollinger Law Firm, 100 Rialto Place, Suite 700, Melbourne, Florida 32901. The State of Florida was represented by Assistant State's Attorneys William Scheiner, Esq. and Kari Keis, Esq. of 2725 Judge Fran Jamieson Way, Bldg. D, Viera, Florida 32940. The Hon. Robin C. Lemonidis presided over all judicial proceedings. There are no other motions or petitions pertaining to the judgement and sentence in the above-styled cause pending in this, or any other court.

STATEMENT OF THE FACTS

The charges in this case arose from an incident that occurred on January 26, 2016 in Brevard County, in which two Brevard County deputies responded to Defendant's residence in response to a 911 call that had been placed by Christina Dawson, a home healthcare nurse caring for a patient with a medical emergency two houses away from Defendant's home. Ms. Dawson told 911 operators that she heard a woman screaming at Defendant's residence, and that she suspected domestic violence was being committed therein. Ms. Dawson has an extensive history of being a victim of domestic violence.

Brevard County Sheriff's Deputies Michael Hriciso and Marie Skinner responded to the 911 call. Ms. Dawson repeated what she had told the 911 operator and further opined that there were guns at Defendant's residence, something she later said she had been told by her patient.

Hriciso and Skinner both reported hearing loud noises from Defendant's residence, which was surrounded by a 6-foot wooden privacy fence. The deputies approached Defendant's residence at the gated south fence line. Claiming not to have a way to enter Defendant's yard from the direction of their approach, the deputies went to the front-door of the residence, where they made no contact with anyone. They then proceeded north making their way to the back of the home at the north fence line where they made contact with Defendant's uncle, Michael Francis. Dr. Francis, confused by the demands coming from the other side of the fence and then being advised of a law enforcement presence, told the deputies that all was well and refused to grant entry to Defendant's home. Dr. Francis called out to Defendant and, without informing Defendant that law enforcement was present, told him to "come deal," with the situation. Defendant and his then-girlfriend, Courtney Johnson, came to the back fence and spoke to the deputies, who again demanded to enter the property, ostensibly to ensure the well-being of those present. Ms. Johnson raised herself over the fence line to show the deputies that she was not in distress and told them to "get the fuck out of [there]." Deputies later claimed that Defendant appeared agitated while they questioned him and Ms. Johnson through the fence, and that he was pacing back and forth.

Officer Hriscio decided that it was appropriate to make forced entry onto Defendant's property, which he accomplished by ripping down a section of the fence. At trial, it was disputed whether he and Deputy Skinner entered the yard with their service firearms drawn. Ms. Johnson testified at trial that Deputy Hriciso rushed toward Defendant while armed and snatched at him. Defendant responded by producing a thin metal expanding baton and striking Deputy Hriciso with it. Defendant testified that the deputies entered with guns drawn, that he feared an imminent life-threatening attack, and that he used the baton to defend himself.

Prior to trial, Defendant's predecessor attorneys, Messrs. Gutin and Wolverton, filed a motion to dismiss under Fla. R. Crim. P. 3.190(b), claiming that because law enforcement observed no criminal activity before entering Defendant's yard, they had engaged in outrageous conduct, essentially manufacturing the incident that led to Defendant's arrest. The trial court denied this motion, finding that the deputies entry was based upon a reasonable belief that someone in Defendant's backyard was in distress, i.e., that exigent circumstances justified the deputies' warrantless entry into Defendant's yard.

Defendant was evaluated for competency prior to trial by Dr. Eric Mings, who determined that Defendant was competent despite social presentation consistent with "mild impairment on the autism spectrum."

At a pre-trial calendar call, the Assistant Public Defender then representing Defendant, the Assistant State Attorney, and the trial judge discussed Defendant outside of his hearing. The Assistant Public Defender and Assistant State Attorney noted that Defendant had repeatedly called their offices "harassing people." The trial judge stated, "I'm quite sure he's difficult … he's kind of off the chain," and determined that the faster Defendant's case could get off her docket, the better.

Defendant retained Mr. Ollinger in September, who immediately moved for a continuance of trial based on the need to get up to speed on the case. The trial court denied this order, telling defense counsel that he knew a date certain had been set for trial when he accepted the case.

During jury selection, Mr. Ollinger suggested to the trial judge that she should recuse herself from the case as a material witness. In counsel's perception, the warrant issued for a search of Defendant's residence after the incident occurred was somehow a backhanded attempt

to justify the deputies' entry onto Defendant's property on January 26, 2016. The trial court denied counsel's ore tenus request for recusal.

At trial, Deputies Hriciso and Skinner both testified that they announced themselves as law enforcement while still outside of Defendant's property. Deputy Skinner testified that before denying them entry, Michael Francis told them that Defendant was bipolar and off of medications. Deputy Hriciso denied hearing this.

The deputies testified that they told Defendant and Ms. Johnson that they would make a forced entry if the two did not come out to speak to them. Ms. Johnson testified that she yelled that she was coming out and was on her way when they tore down the fence and entered. Deputy Hriciso testified that when he entered, he did not have his gun drawn. He approached Defendant and tried to grab him to stop him from moving, which is when he was attacked. Deputy Skinner testified that she approached Ms. Johnson, who ran towards Defendant and Deputy Hriciso when she saw them scuffling. Deputy Skinner testified that she observed Defendant repeatedly striking Deputy Hriciso with a metal baton. It was disputed whether Deputy Hrisciso was struck by more than one blow. Deputy Skinner testified that Defendant also struck her with the baton. Both deputies were treated at the hospital after the incident.

Defense counsel told the jury in opening statements that Deputy Hriciso was a diabetic which contributed to the severity of his reaction to the incident. He said the deputy had not eaten prior to the incident. Deputy Hriciso denied being diabetic, or that a medical condition contributed to his reaction.

Michael Francis testified that he thought deputies were responding to the residence in response to a noise complaint. He said that Defendant and Ms. Johnson had been having a loud argument, but that it had not been violent. He believed the deputies were there to deal with the

noise and advised Defendant to deal with the situation. He denied telling the deputies that they could not enter without a warrant, and confirmed that he told them Defendant was bipolar.

Courtney Johnson testified that she climbed onto the fence to show officers she was not in distress. They could have seen her from the waist up. She got off the fence when Defendant tugged at her from behind. She did not know the people outside of the fence were law enforcement officers until she climbed the fence. Once she saw who they were, she was going to walk outside to show them she was fine when they made their forced entry. She saw a firearm in the male deputy's hand and something in the female deputy's hand, which she assumed was a weapon.

Defendant testified that he did not have any form of violent physical contact with Ms. Johnson prior to the deputies' arrival. He did not hear law enforcement announce themselves and never told the deputies to return with a warrant. The people outside of the fence were using profanity and demanding to be permitted to enter the property. Ms. Johnson told the people she was coming to meet them, but before she could exit the property, a huge armed man ripped down the fence and charged at him. He also thought the female who entered the yard was armed. In the heat of the moment, he did not recognize that his confronters were police officers, but reacted self-defensively when the male charged him armed with what appeared to be a firearm. Both deputies denied being armed upon entry. He used the baton to create space between him and his perceived attacker. Everything happened in the space of about 40 seconds. After the initial contact between Defendant and Deputy Hriciso, Courtney Johnson threw herself onto Defendant and told him to stop.

At the charging conference, the Prosecutor announced that because the defense had not provided a proposed jury instruction regarding the use of force, the State prepared an instruction

regarding the use of deadly force. Defense counsel accepted the jury instruction, and did not request an instruction based on the use of non-deadly force. Also during the charging conference, counsel requested that the jury be instructed that Defendant could be found innocent if police were engaged in a home invasion robbery. Counsel indicated that he did not wish for the jury to be instructed that the deputies could have committed burglary be entering Defendant's property without permission and committing an assault or battery. The Prosecutor and the trial court repeatedly explained to counsel that the facts of the case in no way supported a home invasion robbery committed by the deputies because nothing had been taken. Counsel responded that the phone used by Courtney Johnson had been seized by law enforcement, and that the seizure supported the defense requested instruction.

The jury asked two questions during deliberations. They first wanted to review the initial statements made by the parties at the time of the incident, and to review the trial testimony of both deputies, Defendant, and Ms. Johnson. The trial court responded to this request by informing the jury that the testimony in question was nearly 5 hours in length and asked them to submit a more particularized request. The jury listened testimony regarding what happened from the time Deputy Hriciso ripped the fence down and when Defendant used the baton. The jury also asked for the definition of "depraved," before returning verdicts for the lesser included offense of Attempted Manslaughter by Act for Count I, and guilty for Count II.

Prior to trial, during jury selection, throughout trial proceedings, and frequently in the presence of the jury, the trial court judge displayed intemperate, impatient, and discourteous behavior toward defense counsel. The trial court imposed a rule at the outset of jury selection that defense counsel was only permitted to refer to Defendant by his surname. The judge

threatened counsel with contempt proceedings after warning him several times for slipping and referring to Defendant by his first name:

> This is your last warning … I am not going to separate my fingers to show the small space that I am near holding you in contempt. I have told you this yesterday. I told you this this morning. I told you -- I have told you way too many times. You felt it necessary to tell the jury panel, the venire, that you have been a member of the bar since 1977. I am appalled. I am frankly appalled.
>
> … we will take up the potential contempt hearing when the jury has left the room. Thank you.

The trial judge later ordered defense counsel to her chambers where she ordered him to stand and wait for acknowledgement before speaking an objection. In the defense motion for new trial, defense counsel stated that the judge's attention was often directed elsewhere when counsel stood to be acknowledged, and that the defense was thereby prevented from raising meritorious contemporaneous objections at trial. Defense counsel alleged that this denied Appellant his Sixth Amendment right to effective assistance of counsel. The trial court also expressed anger and distaste for defense counsel throughout the proceedings. The method employed by the trial judge to enforce her "surname rule," was to interrupt counsel by banging her gavel and speaking angrily to him in the presence of the jury. This occurred at least nine times over the course of the proceedings, from voir dire, witness testimony, and closing arguments. The trial court judge also admonished Defendant several times during the proceedings, including during his testimony. She repeatedly told him to "wipe that smirk, off your face." When Defendant protested that he had not been smirking, the trial judge told him she knew what a smirk was, and threatened to jail Defendant if he continued to give answers the judge did not like or that made her uncomfortable.

> I just said, we don't want to know whether you passed gas -- you didn't tell us that you brushed your teeth, you didn't tell us whether the Rice

> Crispies crackled or not, no. But you had to get that other part in? You know exactly what I'm talking about and wipe that smirk off your face once again.

The following exchange then occurred:

DEFENDANT:	I'm not -- I'm not smirking.
THE COURT:	Yes, you are. I'm looking at it. I know what a smirk looks like.
DEFENDANT:	It's just my face.
THE COURT:	Okay, fine. All right. You are on warning, sir. You are on very thin ice. Please bring them back in. And Mr. Ollinger, please tailor your questions carefully and --
COUNSEL:	And also --
THE COURT:	-- have no -- you have a witness that is not … being cooperative. He's deliberately trying to do something here to -- that is making me extremely uncomfortable.
COUNSEL:	Well its making all of us uncomfortable and you're intimidating this witness. I --

At various times during trial, including particularly during the charging conference, the trial judge insisted that defense counsel speed things up, and demonstrated visible impatience with counsel's objections to the State's proposed jury instructions.

In the defense motion for new trial, defense counsel referenced actions by the trial judge that were not apparent in the transcript of trial, including allegations that the trial judge: (1) was visibly hostile and in a rage toward defense counsel and the Defendant in front of the jury and the courtroom gallery; (2) scowled at the defense counsel and his paralegal with [her] head thrust forward, as well as to defense witnesses Michel Francis, Courtney Johnson, and Defendant; (3) "bullied, berated, and reprimanded defense counsel … banged her gavel while [defense counsel] was examining witnesses and banged her gavel at the Defendant while he was testifying. The

banging of the gavel was so loud and obnoxious that it sounded like gunshots and distracted the entire courtroom and the defense team."

Citing various canons of judicial conduct, defense counsel alleged that the judge was not patient, dignified, or courteous to the defense, and that she "screamed so loudly at the Defendant as he was starting to testify that the jury could hear her behind the thin walls of the jury waiting room…" Counsel alleged that being yelled at by the judge confused and upset Defendant, "who did not know what he did wrong," and that his testimony was chilled as a result because he did not want to further offend the judge and end up being jailed.

Defendant moved for a downward departure sentence alleging that he had a mental disorder unrelated to substance abuse or addiction, and that he was amenable to treatment. Defendant further alleged that law enforcement were the initial aggressors, that Defendant acted under "extreme duress," during the incident, and that he was too young at the time of the offense to appreciate the consequences of his actions. The trial court denied this motion at sentencing.

> [W]ith regard to a downward departure, it is a two-step process. One whether legally it is appropriate or legally justified by the evidence and -- but the second step of that analysis is whether or not it's appropriate.
>
> So, regardless of whether evidence supports it, which I find it does not, I do not find it's appropriate in any way. These folks are charged with being the ones that come charging into the house when someone is going through their darkest hour. "Help," they're screaming. "Help, help, help."
>
> And these folks in these uniforms that you see around here are fearlessly charging in when they have no idea what they're charging into. And sadly, Deputy Hriciso and Deputy Skinner charged into an ambush.
>
> And that was not just charging in, that was after they told you you needed to come out, they told you to come out, they commanded you to come out, they told you that if you didn't come out they were going in. Still without a response.
>
> And this was not just all, boom, boom, boom, boom, boom, boom. This took a period of time … And the decision you made was whip out, snap

out -- and don't shake your head at me, because I'm finding facts now, sir. And you can wipe that grin off right off your face because -- or save it for the folks in the Department of Corrections.

After Defendant presented mitigation evidence and testimony at sentencing, and after argument by the parties, the trial court remarked on the scoresheet, and the following exchange occurred:

THE COURT:	Okay. Let me ask something, Ms. Kies. You brought up the scoresheet and I just looked at this -- the Law Enforcement Protection Act and so forth and -- is there 1.5 multiplier that applies to the Deputy Skinner offense?
MS. KIES:	Let me check.
THE COURT:	It appears to.
MS. KIES:[1]	You're on 921 -- what's your statute you're on or the rule.
THE COURT:	If you look in the comments -- I was just looking at the comments because of 921 and I --
MS. KIES:	But I --
THE COURT:	All right.
MS. KIES:	I think there had to be a --
THE COURT:	Do you have the book?
MS. KIES:	Yeah.
THE COURT:	Page 1146, right hand column. "Law enforcement protection: If the primary offense is a violation of the Law Enforcement Protection Act under Florida Statute 775.0823(1), (3) or (4) -- and actually, Deputy Skinner falls under (10) or (11). It's aggravated battery on a law

[1] The trial transcripts of this exchange list the speaking Prosecutor as "Ms. Scheiner." It is believed, however that the speaker was Assistant State Attorney Kari Kies, Esq.

	enforcement officer. "The subtotal points are multiplied by --
MS. KIES:	Should be 1.5
THE COURT:	So I think the scoresheet is actually not quite -- unless you read it differently. I wasn't certain. I was just reading the comments and saw that. And it says that that does not have to be pled in the charging document and --
MS. KIES:	Yep, that's a mistake, Judge. I did the scoresheet. That's a mistake.
THE COURT:	Okay, so -- I don't know, but the other one, it would be as to the primary offense only.
MS. KIES:	Right.

After the trial judge pointed out that Defendant's sentencing points could be multiplied by 1.5 if the primary offense was changed from Count I, Attempted Manslaughter by Act, to Count II, Aggravated Battery on a Law Enforcement Officer, the State modified the scoresheet, characterizing the originally prepared scoresheet as a "mistake." The State then tendered the changed document to defense counsel, who raised no objection either to the trial court assisting the State to enhance Defendant's sentencing exposure, or to the late amendment of the scoresheet.

Following this trial, the Judicial Qualifications Committee made the following formal charges concerning the actions of Judge Robin Lemonidis in Defendant's case:

1. While presiding over the felony criminal trial and sentencing of State of Florida v. Skyler Francis (Brevard County Case No. 2016-CF-12745) you repeatedly displayed intemperate, discourteous, and impatient behavior when addressing individuals in your courtroom, including the defendant and his counsel. Examples of this inappropriate behavior include:

a. Repeatedly and angrily, interrupting the defense counsel while he was addressing the jury and questioning witnesses, to scold and berate him for addressing his client by his first name.

b. In scolding defense counsel, you repeatedly banged your gavel while glaring at the attorney.

c. At one point, during a side-bar, you threaten[ed] to hold the defense counsel in contempt for forgetting to use his client's last name.

d. You also used an inappropriate and intemperate demeanor while addressing witnesses.

2. Much of this inappropriate and intemperate conduct occurred while proceedings were under way, and while the jury was present in the jury box.

3. Most alarming is that much of this inappropriate conduct occurred after you were informed at the beginning of the second day of trial that potential jurors were overheard commenting about your perceived dislike of the defendant and his attorney.

In May 2019, Judge Lemonidis appeared before a JQC investigative panel in Orlando Florida, at which she admitted that her conduct was inappropriate, intemperate, and violated the Canons of Judicial Conduct. Both in writing and during sworn testimony before the commission, Judge Lemonidis admitted that her actions damaged the integrity of the judiciary. She agreed to accept a public reprimand, and to undertake stress management counseling as a means to ensure that she did not repeat her conduct in Defendant's case.

On February 5, 2020, Judge Lemonidis appeared before the Florida Supreme Court, and was publicly reprimanded by the court for her actions in Defendant's, (and other) cases.[2] In its reprimand, the Florida Supreme Court singled out the fact that Judge's Lemonidis's conduct was particularly egregious in this case because she had been previously placed on notice that potential jurors had been overheard stating that they perceived Judge Lemonidis disfavored the defense in this case, and that fact alone should have made her "conscious of the need to regulate [her] own conduct to preserve the impartiality required of judges."

This motion for postconviction relief follows…

INTRODUCTION

This is a case where the combination of an ill-prepared and unknowledgeable trial attorney, and the trial judge's clearly evident anger towards, and distaste for both trial counsel and the Defendant worked to deprive him of the fair trial to which he was entitled. There can be no dispute that the trial judge in this case acted inappropriately throughout the proceedings. She admitted doing so under oath and in formal written documents before the Judicial Qualifications Committee and the Florida Supreme Court, and was publicly reprimanded for her treatment of Defendant and his counsel in this case.

Defendant's counsel had the means to address the judge's apparent bias during trial instead of waiting for an *ex post facto* remedy from the JQC and the Supreme Court, which remedied *none* of the likelihood that the inappropriate conduct affected the outcome of the proceedings. By failing to take actions to protect Defendant's right to a fair trial, and additionally, by failing to understand and properly apply the law to the facts of Defendant's case, counsel was ineffective to an extent requiring postconviction relief.

[2] Judge Lemonidis's public reprimand can be viewed at https://www.youtube.com/watch?v=L6u2pd2frjE.

GROUNDS FOR RELIEF

GROUND ONE

INEFFECTIVE ASSISTANCE COUNSEL FOR FAILURE TO OBJECT AND MOVE FOR MISTRIAL BASED UPON THE TRIAL COURT'S PERSISTENT INTEMPERATE AND DISPARAGING TREATMENT OF DEFENSE COUNSEL AND DEFENDANT

Supporting Facts

Counsel's performance and representation fell below an objective standard of reasonableness when counsel failed to object and seek mistrial in response to the trial court's intemperate and disparaging treatment of defense counsel and Defendant throughout trial proceedings. Additionally, as a subclaim, counsel's performance was constitutionally deficient and prejudicial for failing to object to the trial court's insistence that counsel refer to Defendant at trial solely by use of his surname, depriving the defense of a humanizing tool widely used in criminal trials, and for which no support exists in the Florida Rules of Criminal Procedure.

Counsel's failure to object to the judge's surname rule was deficient performance which prejudiced Defendant not just because of the judge's negative treatment of counsel when he forgot and violated her rule, but because the defense preferred to portray Defendant as "Skyler," a young man with no violent previous history, who believed his actions in this case to have been justified. Had counsel been permitted to conduct the defense in this manner, which is certainly not prohibited by any rule of criminal procedure in Florida, there is a reasonable probability that the outcome of the proceedings would have been different.

As noted in the statement of facts and introduction above, there can be no dispute that the trial judge in this case acted with bias towards the State and disfavor towards Defendant and his counsel throughout these proceedings. The judge admitted to her improper conduct under oath in

formal disciplinary proceedings. The question, therefore, is whether counsel had sufficient means to protect Defendant's right to a fair trial by seeking to recuse Judge Lemonidis in the face of her egregious actions. The answer is yes.

Canon 1 of the Florida Code of Judicial Conduct requires judges to "uphold the integrity and independence of the judiciary." Canon 2, A, requires judges to "act at all times in a manner that promotes the public confidence in the integrity and impartiality of the judiciary." Canon 3 B(4) requires judges to be "patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals with in an official capacity." Finally, Canon 3B(5) requires judges to "perform judicial duties without bias or prejudice," and that judges may not "by words or conduct, manifest bias or prejudice."

All of the above Canons were violated by the trial judge in this case: (1) from threatening defense counsel with contempt for failing to abide by an arbitrary requirement to use only Defendant's surname; (2) from glaring at the Defendant and defense counsel with open dislike; (3) from ignoring clear signals from the venire panel that they perceived the judge as disfavoring the defense; (4) from interrupting defense counsel throughout the proceedings by banging her gavel enforcing her arbitrary surname rule so many times that defense counsel was compelled to ask to the jury not to hold the judge's dislike of the defense against them; (5) from intimidating Defendant during his testimony and threatening to jail him because she did not like portions of his (completely acceptable) statements to the jury; (6) from displaying extreme impatience with Defendant and his counsel at every stage of the proceeding; (7) and from actively assisting and encouraging the State to increase Defendant's sentencing exposure by suggesting that Defendant's scoresheet be modified before sentencing, the judge's clear bias and lack of impartiality vitiated the fairness of this trial.

Each of the judge's actions above required defense counsel to formally move the trial judge to recuse herself. Each instance above is a subclaim of this motion wherein Defendant asserts that his counsel's failure to seek recusal was deficient performance, and that had counsel moved to recuse the trial judge at each instance of misconduct, there is a reasonable probability that the judge would have recognized her own misconduct, (as she later did in formal disciplinary proceedings), and would have recused herself from the case, changing the outcome.

The cumulative effect of the trial judge's misconduct must also be considered. Even had the judge refused to recuse herself at counsel's first request, had counsel renewed the defense motion *at each instance of additional misconduct,* there is a reasonable probability that the judge would have eventually acknowledged that her repeated inappropriate actions were working to destroy the fairness of the trial, and would have removed herself from further involvement in the case.

"Failure to timely file a motion to disqualify a judge, or to file a legally sufficient motion to disqualify a judge, may be the basis for a postconviction claim of ineffective assistance of counsel. *Wheeler v. State*, 214 So. 3d 764, 766 (Fla. 5th DCA 2017) (*citing Thompson v. State*, 990 So.2d 482, 489 (Fla. 2008).

The test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984) governing ineffective assistance of counsel, still applies, however, to the failure to timely file a motion to disqualify. *Wheeler,* at 766. "That is, a defendant must demonstrate both that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant." *Id.*

An ineffectiveness claim based upon the failure to timely file a motion to disqualify, cannot be founded upon a disqualification motion containing only conclusory, unsupported allegations. A defendant "is required to set forth specific allegations as to how the lower court

proceedings were affected by the trial judge's bias." *Id.* at 766. Quoting *Jones v. State,* 998 So.2d 573, 584 (Fla. 2008), the Fifth District stated in *Wheeler:*

> A mere conclusory allegation that the outcome would have been different is insufficient to state a claim of prejudice under *Strickland* ; the defendant must demonstrate how, if counsel had acted otherwise, a reasonable probability exists that the outcome would have been different—that is, a probability sufficient to undermine confidence in the outcome.

Defendant assert that he was prejudiced by his counsel's failure to timely file a motion to disqualify the trial judge. The failure to move to disqualify a judge who has now been determined to have failed to conduct trial proceedings with the impartiality required of trial judges in this state affected the outcome because the judge's bias in this case clearly affected her rulings, the evidence that was permitted to come in, including the Defendant's intended testimony as noted in Ground Two below, and also as noted below it is structural error when criminal defendant is trial by an actually biased judge.

"[N]o other principle is more essential to the fair administration of justice than the impartiality of the presiding judge." *Mansfield v. State*, 911 So. 2d 1160, 1181 (Fla. 2005); *Porter v. Singletary*, 49 F.3d 1483, 1487–88 (11th Cir. 1995) ("The law is well-established that a fundamental tenet of due process is a fair and impartial tribunal.").

Florida courts have repeatedly confirmed the long-held precept that judges must maintain absolute neutrality during trial proceedings. The Florida Supreme Court has held that

> [i]t is the established law of this State that every litigant . . . is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of the court to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any manner where his qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice.

Mathew v. State, 837 So.2d 1167, 1168 (Fla. 2003).

Defendant raised the issue of the trial judge's lack of neutrality on direct appeal. The Florida Fifth DCA affirmed, holding that *defense counsel* failed to object to the trial judge's conduct, thereby also failing to preserve the issue. This left only for the appellate court to review for fundamental error.

Courts have held that "not every act or comment that might be interpreted as demonstrating less than neutrality on the part of the judge will be deemed fundamental error." *Lee v. State*, 264 So.3d 225 (Fla. 1st DCA 2018) (quoting *Mathew*, 837 So.2d at 1170). It is fundamental error, however, "in the rare cases where the interests of justice present a compelling demand for its application, such as where a trial judge's errors, taken cumulatively, render a trial fundamentally unfair as to amount to a denial of due process." *Grigg v. State*, 230 So.3d 943, 947 (Fla. 1st DCA 2017) (internal citations and quotation marks omitted).

Although the Fifth DCA did not find fundamental error, there is a difference between the fundamental error standard applicable on appeal, and the *Strickland* deficient performance / prejudice standard applicable in postconviction proceedings. Under the *Strickland* standard, a criminal defendant is not required to demonstrate that the "error reach[ed] down to into the validity of the proceedings of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *See e.g., Brown v. State,* 124 So.2d 148, 484 (Fla. 1960). A defendant must, rather, demonstrate that absent his counsel's deficient performance, there is a *reasonable probability* that the outcome of the proceedings would have been different. *Strickland,* 466 U.S. at 690.

Nor is Defendant estopped from raising this claim here because he raised Judge Lemonidis' conduct on direct appeal. Although the Florida Supreme Court has held that "issues which could have been raised on direct appeal cannot be couched in terms of ineffective

assistance of counsel to avoid the rule that postconviction proceedings cannot serve as a second appeal, [t]hat principle does not apply where a specific accusation is directed towards counsel's performance." *Walker v. State,* 765 So.2d 854, 855 (Fla. 5th DCA 2000) (citing *Knight v. State,* 710 So.2d 648 (Fla. 2d DCA 1998). Here, Defendant accuses his counsel of not objecting and moving to disqualify the trial judge at each instance of her misconduct.

Defendant is entitled to an evidentiary hearing for this claim because his allegations cannot be conclusively refuted by the record. *Balmori v. State*, 985 So. 2d 646, 649 (Fla. 2d DCA 2008) ("a postconviction defendant who alleges ineffective assistance of counsel is entitled to an evidentiary hearing on his or her claims if the defendant alleges specific facts which are not conclusively rebutted in the record and which demonstrate a deficiency in trial counsel's performance that prejudiced the outcome of the trial.").

In conclusion, although Defendant has pleaded *Strickland* deficient performance and prejudice herein, it is arguable the Defendant need not make a prejudice showing at all because "a structural error occurs when a judge, who is actually biased, presides over a trial." *Pinardi v. State,* 718 So.2d 242, 244 (Fla. 5th 1998) (citing *Arizona v. Fulminante,* 499 U.S. 279, 309-10 (1991), and, "[t] rials marred by structural errors are not subject to harmless error analysis because the entire conduct of the trial from beginning to end is obviously affected … by such error." *Id.* Judge Lemonidis' admissions during disciplinary proceedings prove her bias in this case. Given these admissions and according them proper weight in these proceedings suggests that Defendant is entitled to postconviction relief separate from his substantive prejudice allegations under *Strickland.*

Where counsel's failures permitted a biased an intemperate judge to continue to preside over Defendant's trial violated his Sixth Amendment right to a fair trial and the effective

assistance of his counsel, and where the trial judge's actual bias violated his Fourteenth Amendment right to due process, Defendant is entitled to postconviction relief.

GROUND TWO

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO OBJECT TO TRIAL JUDGE INTIMIDATING DEFENDANT AND PREVENTING HIM FROM PRESENTING HIS DEFENSE

Supporting Facts

Counsel's performance and representation fell below an objective standard of reasonableness when counsel failed to object to the trial judge's intimidation and threats to jail Defendant in response to statements to the jury by Defendant that the trial judge found distasteful.

A Defendant must be permitted to present his complete defense to the jury. The trial judge also admonished Defendant several times during the proceedings, including during his testimony. She repeatedly told him to "wipe that smirk, off your face," and when Defendant protested that he had not been smirking, the trial judge told him she knew what a smirk was, and threatened to jail Defendant if he continued to give answers she did not like.

The trial court told Defendant that she did not wish to know whether the Defendant "passed gas," on the date in question, whether his "Rice Crispies" crackled, or not, or whether he engaged in sexual relations with his girlfriend. The judge's glib comments about passing gas and what Defendant had for breakfast were unnecessary and intemperate. Her prohibition against relating that he and Courtney Johnson, were not being violent with one another, including that they engaged in sexual intercourse on the day the police forcibly entered his property for the ostensible purpose of protecting her went directly to the State's contention that the police believed Ms. Johnson was in danger, and that initiating the incident by ripping Defendant's fence

down and entering the property was reasonable. The State went to great lengths at trial attempting to prove that police did not know whether there was another woman on the property who Defendant could have been endangering, but *neither* officer testified that they ever asked Defendant, Ms. Johnson, or Michael Francis how many people were on the property, or who. It being clear to this jury, based upon the testimony of the parties that Ms. Johnson was the only female present, Defendant's friendly relations with her on the morning of the incident served to rebut the State's theory that she was in danger, notwithstanding her telling this to Deputy Hrisciso and Deputy Skinner herself.

A criminal defendant has an absolute right to testify on their own behalf at trial. Defendant attempted to explain what happened that morning, and to put the entirety of the incident into context for the jury. He was threatened with a contempt charge and with being jailed in response.

Trial counsel did tell the trial judge that she was intimidating Defendant from testifying freely by creating a fear that he would be charged with a criminal offense and jailed, but counsel had a duty to do more. He had a duty to strenuously object to limitations being placed on Defendant, who was entitled to his day in court. The trial court did not set forth any legal reasoning for prohibiting Defendant from describing the events that transpired leading to the confrontation with the deputies. She articulated no valid legal rationale for threatening Defendant with jail if he did not conform his testimony to her expectations. Her threats not only prevented Defendant from giving his version of events to the jury, they also created such fear in him that he attempted to tailor the rest of his testimony in a manner that would not anger her. He was, thus, prevented from freely exercising his constitutional right to explain his version of what happened to the jury.

The failure to protect Defendant's constitutional right to testify as long as he violated no legal rule while doing so was deficient performance. Defendant was prejudiced, where, had he been able to give his full version of events during testimony, his explanation that even though he and Ms. Johnson were arguing when the deputies arrived, this was by no means abnormal, and was never violent. He would have explained to the jury that he and Ms. Johnson had been experiencing a normal and typical day in their lives together, and that had police inquired about events that day rather than simply demanding entry, he would have explained the same thing to them. Defendant's testimony would have cast the actions of the deputies in a different light to the jury. Both deputies testified that they were not angered or agitated when Ms. Johnson told them to "get the fuck out of [there]," but this belies common sense, and flies in the face of the events that actually transpired. The police were going to enter Defendant's property one way or the other. Whether their actions were reasonable, and whether the results of their actions were the product of inappropriate zeal when they had ample time to obtain a warrant and could have more extensively questioned the parties before ripping Defendant's fence down, are questions the jury would have answered differently had the trial court not engaged in completely improper intimidation and threats *intended* to limit and curtail Defendant from freely giving testimony on these matters. But for counsel's deficient performance, the outcome of the proceedings would have been different.

Counsel's failure to object, and if overruled, to seek recusal and a mistrial violated Defendant's Sixth Amendment right to the effective assistance of counsel and a fair trial, and his Fourteenth Amendment right to due process. He is entitled to an evidentiary hearing because his allegations herein cannot be conclusively refuted by the record.

GROUND THREE

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO FILE A MOTION TO DISMISS UNDER FLORIDA'S STAND YOUR GROUND LAW

Supporting Facts

Counsel's performance and representation fell below an objective standard of reasonableness when counsel failed to move to dismiss the charges in this case pursuant to Florida' Stand Your Ground Law.

Defendant's previous counsels, Messrs. Gutin and Wolverton, filed a motion to dismiss pursuant to Fla. R. Crim. P. 3.190(b) asserting that Deputies Hriciso and Skinner violated due process because they essentially manufactured the charges in this case by improperly entering Defendant's property without a warrant in the absence of truly exigent circumstances. Counsels did not assert, however, that Defendant was entitled to statutory immunity under Florida's Stand Your Ground Law, nor did successor counsel, Mr. Ollinger assert Defendant's pretrial immunity when he took over the case.

Chapter 776, Florida Statutes, popularly known as Florida's "Stand Your Ground," law provides that a person who uses force as permitted in sections 776.012, 776.013, or section 776.031 "is justified is using such force and is immune from criminal prosecution." § 776.032(1), Florida Statutes.

Under Subsection 776.032(1) a person may not use force if against a police officer who identifies themselves, was performing official duties, or the person knew, or reasonably should have known the person against force was used was a police officer.

A person claiming immunity from prosecution under section 776.013, Florida Statutes, who used deadly force, must show that: (1) he or she was in a dwelling or residence where they had a right to be, § 776.013(1); and, (2) he or she reasonably believed that the use of such force

was necessary to prevent imminent death or great bodily harm, or to prevent the imminent commission of a forcible felony. § 776.013(1)(b).

A person claiming immunity from prosecution under section 776.013, Florida Statutes, who used deadly force, must show that: (1) he or she was in a dwelling or residence where they had a right to be, § 776.013(1); and, (2) he or she reasonably believed that the use of such force was necessary to prevent imminent death or great bodily harm, or to prevent the imminent commission of a forcible felony. § 776.013(1)(b).

A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm if either: (1) the person against whom the defensive force was used was in the process of unlawfully entering or had unlawfully and forcibly entered a dwelling, residence, or occupied vehicle. § 776.013(2)(a); and, (2) the person who used or threatened to use defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred. § 776.013(2)(b).

Under section 776.013(3)(c), the section 776.013(2) presumption does not apply if the person who used or threatened to use defensive for was engaged in criminal activity.

Under subsection 776.032(4), a defendant seeking immunity must first state a prima facie case noting the applicable section under which immunity is sought. The burden then shifts to the State to prove by clear and convincing evidence that immunity should not attach. § 776.032(4) ("once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity"); *State v. Kirkland*, 276 So.3d 994, 996 (Fla. 5th DCA 2019).

The proper procedure for asserting statutory immunity under the Stand Your Ground Law is by filing a motion to dismiss under Fla. R. Crim. P. 3.190(b). *Dennis v. State*, 51 So. 3d 456, 462 (Fla. 2010) ("Florida Rule of Criminal Procedure 3.190(b)—rather than rule 3.190(c)(4)—provides the appropriate procedural vehicle for the consideration of a claim of section 776.032."). A motion filed under rule 3.190(b) will "ordinarily … require the defendant to testify or point to evidence from which the justifiable use of force can be inferred." *Langel v. State*, 255 So.3d 359, 362-63 (Fla. 4th DCA 2018).

Had defense counsel moved to dismiss under Stand Your Ground by stating a facially sufficient prima facie case for immunity, the burden would have been on the State to prove Defendant did not qualify for immunity by clear and convincing evidence. *See* § 776.032(4) ("once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity"); *State v. Kirkland*, 276 So.3d 994, 996 (Fla. 5th DCA 2019). Counsel's failure to move for statutory immunity was deficient performance.

Defendant was prejudiced by counsel's failure. It would be easy to presume, under the particular facts of this case, that because the trial judge displayed rampant bias and lack of neutrality throughout the proceeding, and because she denied almost all defense pretrial motions, overruled nearly all defense objections at trial, and sustained nearly all of the State's objections, she would have simply denied a defense Stand Your Ground motion as part of this bias. This may indeed be the case. The trial court found that the police did not act egregiously when they ripped down Defendant's fence and stormed onto his property, but Stand Your Ground requires application of a different evidentiary standard. While it is likely that the trial judge's dislike of

Defendant and his counsel may indeed have led to the denial of a Stand Your Ground motion, had such a denial occurred, the trial court would have been required to make specific findings of fact to defeat the motion, findings that that the Fifth District Court of Appeal may have viewed differently.

When a trial court determines on the merits that a defendant is not entitled to immunity under the stand-your-ground law, the defendant may file a petition for a writ of prohibition seeking appellate court review. *Jefferson v. State*, 264 So. 3d 1019,1023 (Fla. 2d DCA 2018).

Had counsel filed and argued a Stand Your Ground motion, Defendant would have explained that: (1) he did not know the persons accosting him from outside of the fence were law enforcement officers; (2) Deputies Hrisico and Skinner's sole communication with him and Ms. Johnson was to demand entry. They did not ask Defendant to explain the situation that led to their arrival and never asked if any female besides Ms. Johnson was present on the property; (3)Deputies Hrisico and Skinner charged on his property with guns drawn, then charged him without first taking stock of the situation or asking a single question; (4) the deputies did not identify or announce themselves as officers prior to ripping his fence down; (5) Defendant did not have time to ascertain the identity of his assailant prior to reacting with defensive force. He ceased using force and permitted himself to be handcuffed upon realizing the identity of the persons who entered his property; (6) a motorcycle deputy who arrived on the scene immediately charged, tackled, and seized Ms. Johnson's phone, in an apparent effort to prevent her from recording actions or statement by the police after they charged onto the property; (7) Deputy Hrisciso knew Defendant, was friends with his father, yet at no point did identify himself as law enforcement while asking to enter the property, which would have changed the entire situation. Instead, the Deputy used profanity, became angered and undertook a warrantless entry, then

attacked Defendant for refusing him permission to enter. Defendant would have additionally called Ms. Johnson and Michael Francis to corroborate his testimony.

Of course, the deputies would have testified differently. As filed, Defendant's motion to dismiss faulted the police for egregious conduct, and did not assert Stand Your Ground immunity. The conduct of the police, however, would have factored into a Stand Your Ground motion. Whether Defendant's fear of attack was objectively reasonable based upon the actions of the police, whether the police did, in fact, announce themselves as officers prior to ripping down the fence, the amount of force Defendant used, and other factors would have been required considerations in determining immunity. As likely as the biased judge's denial would have been, counsel would have been able to seek appellate review of the denial. The Fifth DCA would not have had the bias displayed by the trial court in this case but would have instead reviewed the facts adduced at a Stand Your Ground hearing, which would not necessarily have been identical to the facts adduced at trial. First, different evidentiary standards applied. Second, considerations regarding evidence appropriate for a jury to consider would not have applied at a Stand Your Ground hearing, and finally, although the State improperly told the jury that Defendant was engaged in illegal activity when police forced entry, this argument was improper. There was no evidence whatsoever that Defendant was breaking any law before the police entered. He was in a place he had a right to be, he was never charged with domestic violence or any other offense committed before the incident with the deputies. The Fifth District would have reviewed these facts under the applicable standard for a writ of prohibition. There is a reasonable probability that the endpoint of such review would have been the granting of prohibition and Defendant's discharge from custody even had the trial court denied his motion. Counsel's failure to seek statutory immunity violated Defendant's Sixth Amendment to effective assistance of counsel and

a fair trial, and his Fourth Amendment right to due process. He is entitled to an evidentiary hearing on this claim because his allegations herein cannot be conclusively refuted by the record.

GROUND FOUR

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO OBJECT TO STATE'S USE OF UNCHARGED ALLEGED CONDUCT TO ARGUE THAT DEFENDANT WAS ENGAGED IN CRIMINAL ACTIVITY PRIOR TO POLICE ENTRY

Supporting Facts

Counsel's performance and representation fell below an objective standard of reasonableness when counsel failed to object to the Prosecutor's use of facts not in evidence, improper references to uncharged alleged conduct to convince the jury that Defendant was not entitled to be acquitted because he was engaged in illegal activity before the police entered his property, and misstatement of the law.

Courtney Johnson testified and first opined that her interaction with Defendant could have qualified as domestic violence. She then changed her testimony and insisted that none had occurred. The State presented no testimony or evidence rebutting Ms. Johnson's testimony. Defendant was not charged with domestic violence either on the date of the incident or thereafter. In closing, the Prosecutor made the following statements:

> This is the -- if you're not engaged in illegal activity and you have these reasonable fears, you get to stay right you are and engage your threat. But if you're engaged in criminal activity, **which I would suggest Mr. Francis was on the 26th of 2016** [sic], or had at least just finished it, which is why law enforcement officers were there to investigate. Then he doesn't get the same protection.
>
> And that makes sense, right? The Judge will tell you that you get to to use your common sense. If you're engaged in criminal conduct and criminal behavior, you don't then get to the use the shields and protections that people that aren't engaged in criminal conduct get…
>
> …
>
> So I would suggest to you that right there, part one of thar, it doesn't -- **he doesn't get the protections of self-defense.**

Counsel's performance was deficient for not objecting to the statements above. First, the Prosecutor referenced facts not in evidence. There were no facts in evidence at trial proving that Defendant had committed domestic violence before the police entered. Asking the jury to infer that Defendant could not assert his affirmative defense based on unproven, uncharged conduct was improper. *See e.g., Servis v. State*, 855 So.2d 1190, 1194 (Fla. 5th DCA 2003) (explaining that it is improper for prosecutor to suggest that evidence not presented at trial provides additional grounds for finding the defendant guilty).

Next, and more egregiously, the Prosecutor misstated the law to the jury without objection from defense counsel. Section 776.041, Florida Statutes, governs self-defense. Aside from forcible felonies, the statute contains no provision for the unavailability of self-defense at a criminal trial. And even if—by stretching it—domestic violence could be said to fall under the definition of a forcible felony under subsection the 776.08 definition, which includes "any … felony which involves the use or threat of physical force or violence against any individual," subsection 776.041(1), which precludes self-defense when a person is "attempting to commit, committing, or escaping after the commission of a forcible felony," would still not apply because there was *no* evidence Defendant had attempted, committed or was escaping from committing domestic violence. Evidence that the police *suspected* criminal activity is not evidence *of* criminal activity. It is Florida's Stand You Ground law, where under subsection 776.013(3)(c), the section 776.013(2) presumption does not apply if the person who used or threatened to use defensive force was engaged in criminal activity. Self-defense was available to Defendant. It was a misstatement of the law to suggest otherwise to the jury, and counsel was deficient for not objecting.

Defendant was prejudiced where, under the particular circumstances of this case, where the jury acquitted Defendant down from the original charge of Attempted Murder of a Law Enforcement Officer to Attempted Manslaughter by Act, and where the evidence regarding Defendant's interaction with the officers was based upon their very questionable decision to force entry when they might have at least either questioned the occupants beforehand or obtained a warrant, there is reasonable probability that, had counsel objected, and insisted that the jury not be presented with facts not in evidence and misstatements of the law as to either the availability of self-defense or Stand Your Ground, the jury would have found that Defendant had a reasonably objective fear that justified his use of defensive force and returned an acquittal accordingly.

Counsel's failure to object deprived Defendant of his Sixth Amendment right to effective assistance of counsel and a fair trial, and his Fourth Amendment right to due process. Defendant is entitled to an evidentiary hearing on this ground, which cannot be conclusively refuted by the record.

GROUND FIVE

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO OBJECT TO TRIAL JUDGE'S SUGGESTION TO THE STATE THAT IT SHOULD MODIFY DEFENDANT'S SENTENCING SCORESHEET IN A MANNER THAT SIGNIFICANTLY INCREASED HIS POINTS

Supporting Facts

Counsel's performance and representation fell below an objective standard of reasonableness when counsel failed to object to the trial court's suggestion of a method to the Prosecutor for increasing Defendant's sentencing exposure by switching the position of the primary offense.

When the trial court prepared to sentence Defendant, she stated that she reviewed section 921.0024(b), Florida Statutes, which provides that, if the *primary* offense is a violation of the Law Enforcement Protection Act under § 775.0823(2), the subtotal sentence points are multiplied by 1.5. Defendant's originally prepared scoresheet listed Aggravated Battery on a Law Enforcement Officer as a secondary offense. At the trial court's suggestion, and without objection by defense counsel, the Prosecutor stated that the order in the which the offenses were scored was a "mistake," and prepared a new scoresheet that switched the primary offenses. This changed the points scored from 96.2 to 114.30, and Defendant's final score, the lowest permissible sentence, from 51.15 months to 87.225 months, an over three year increase.

Counsel had a duty to object to the trial judge's intentional display of bias and lack of neutrality by suggesting to the State that it should enhance Defendant's sentencing exposure. The operative question is not whether the judge would have imposed the same sentence absent her display of improper bias, but rather that counsel did not recognize the judge's violation of her duty to remain impartial during sentencing, to object, and to then move to disqualify the trial judge so that Defendant could be sentenced before an unbiased court.

"Although it is permissible for a trial judge to ask questions deemed necessary to clear up uncertainties as to issues in cases that appear to require it … **the trial judge serves as the neutral arbiter in the proceedings and must not enter the fray by giving 'tips' to either side."** *Williams v. State,* 160 So.3d 541, 543 (Fla. 4th DCA 2015) (internal quotation marks and citations omitted). The record in this case provides a clear demonstration that the trial judge "entered the fray," on the side of the State long before the sentencing hearing. Counsel was aware of this, and had complained at various junctures stopping short of formal objection. Yet counsel failed to object and seek disqualification in the face of a clear display of partisanship by

the trial court at the sentencing hearing. *See Williams, supra; Carmmarata v. Jones,* 763 So.2d 552, 553 (Fla. 4th DCA 2000) (disqualification required where the trial judge "suggested to [plaintiff's] counsel alternatives of how to proceed strategically."); *Crescent Heights XLVI v. Sea Air Towers Condo Ass'n,*729 So.2d 420, 421 (Fla. 4th DCA 1999) (disqualification required where judge "offer[ed] legal advice" to plaintiff.); *Cabriano v. State,* 46 Fla. L. Weekly D1858 (Fla. 4th DCA August 18, 2021) (holding claim that judge departed from neutrality by actively assisting the State with its case cognizable in rule 3.850 postconviction proceedings.).

To be clear: The issue here is not whether the State was empowered to switch the primary offenses and recalculate Defendant's scoresheet with the section 921.0024(b) multiplier. The issue is whether the State would have even thought of doing so had the trial judge not actively undertook to increase the lowest permissible sentence by giving the State a "tip" on how to do so. Her behavior during the trial was bad enough. But to then arrogate to herself the authority to dictate that Defendant's sentencing exposure be enhanced beyond the range contained in the originally prepared scoresheet was a further demonstration of her clear and improper bias against Defendant. Respectfully, the trial judge in this case should not have been permitted to sentence him. Had counsel objected, pointed out that the judge's actions showed not only the judge's lack of impartiality, but also clearly discernable animus toward Defendant, there is a reasonable probability that the judge would have either agreed that her lack of neutrality had tainted the fairness of the case, or the issue would have been preserved for appellate review.

Appellant raised this issue on direct appeal as fundamental error, but he is not precluded from raising it in postconviction proceedings in the context of his counsel's failure to address and preserve the error:

> Because of strict rules limiting claims for ineffective assistance of counsel on direct appeal, the appellate courts typically reject the issue as both premature and requiring evidence beyond the appellate record.
>
> Accordingly, **unless a direct appeal is affirmed with a written opinion that expressly addresses the issue of ineffective assistance of counsel**, an affirmance on direct appeal should rarely, if ever, be treated as a procedural bar to a claim for ineffective assistance of counsel on a postconviction motion.

Corzo v. State, 806 So.2d 642, 645 (Fla. 2d DCA 2002) (emphasis added).

Counsel's failure to object and move to disqualify the trial judge violated Defendant's Sixth Amendment Right to effective assistance of counsel and a fair trial, and his Fourteenth Amendment right to due process. He is entitled to an evidentiary hearing on this ground, which cannot conclusively be refuted by the record.

GROUND SIX

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO UNDERSTAND THE LAW AND THE TIMELINE OF THE CASE LEADING COUNSEL TO IMPROPERLY ACCUSE THE TRIAL COURT OF DOCTORING COURT RECORDS TO CONFORM TO THE STATE'S CASE

Supporting Facts

Counsel's performance and representation fell below an objective standard of reasonableness by failing to understand the law, failing to review the timeline of the case, which led counsel to destroy the defense relationship with the bench by accusing the trial court of doctoring court records to remedy a defect with the search warrant issued *after* the incident leading to the charges in this case.

The incident in this case happened on January 26, 2016. Two days later, the trial court judge issued a search warrant for the purposes of discovering any potentially relevant evidence at Defendant's residence.

During jury selection, defense counsel made an *ore tenus* "suggestion" to the trial judge that she should recuse herself as a material witness in the cause. Counsel citied Judicial Code of Conduct Canon 2.11 and section 38.02, Florida Statues. Counsel argued that, although the trial court stated that the officers performed a warrantless entry on Defendant's property, the Court later backdated a search warrant to January 26, 2016 as a means to transform the warrantless entry into entry justified by a search warrant:

> And then in the record there is a warrant that's filed with the court in the clerk's office that's stamped January 28, 2016. Do it appears that there wasn't a warrant or there was a warrant and, you know, the Defense would like an explanation of why there's a warrant that was signed by you on the 26th and then filed with the clerk on the 28th, two days later, after the incident.
>
> And it's agreed by all, which your language, that there wasn't. So it just -- it's a mystery and a curiosity to the Defense as to what's going on with the warrant.

The Prosecutor then pointed out that the warrant was signed for a search of Defendant's property after the incident. The trial court denied the motion, but the damage had been done. Any possibility of a professionally amicable relationship between the defense and the trial court was destroyed by counsel essentially accusing the judge of committing a crime. Counsel's improper suggestion that the trial judge doctored up documents to better fit the seams of the State's case very likely led to the animus displayed by the judge throughout the rest of the proceedings, which clearly destroyed the fairness of the trial. A simple review of the docket, or a simple conversation with the Prosecution could have clarified the issue for the defense and removed the need for counsel's ill-advised suggestion to the judge that she backdated court documents to provide legal justification for the police entry on to Defendant's property.

In the context of protected speech, in *De Ritis v. McGarrigle,* 861 F.3d 444, 453 (3rd Cir. 2017), the Third Circuit Court of Appeals noted that is undisputed that attorneys have a duty to

"build rapport with the Court and other attorneys … [a]nd for good reason because attorneys, both private and public are "officers of the Court." The court further noted that even off the record "idle chatter" by an attorney is "official communication" with "official consequences" because attorney statements "may affect the judicial process," and may affect a case based on a judge's perception of counsel acting as a "proxy" for his or her client. *Id.*

Such is the case here, but rather than idle, off the record chatter, counsel in this case directly suggested that the trial judge would likely face inquiry as a material witness and would be required to explain why she falsified records in the case. Any chance of rapport between the defense and the trial court was thereby destroyed to Defendant's prejudicial detriment.

This is not to suggest that the trial court's subsequent actions were excusable. The trial judge had a duty to remain judicially impartial, even in the face of counsel's frivolous suggestion of impropriety, or to recuse herself if she believed herself unable to overcome the bias engendered by counsel's accusation. Counsel's conduct throughout the rest of the trial did not help matters. He clearly frustrated the trial judge by making lengthy meritless objections to the introduction of evidence, standard jury instructions, and other issues which required the trial court to halt the proceedings, entertain the objections, and then correct counsel's numerous misapprehensions of the law. These delays, especially in light of the meritless or frivolous nature of counsel's repeated objections further eroded the trial court's patience, and by extension, the fairness of the trial.

Defendant was prejudiced by counsel's false—and worse, uninformed—accusation. Had counsel taken the time to properly understand when, and why the warrant had been issued, there is a reasonable probability counsel could have avoided the adversarial treatment his conduct created, changing the outcome of the proceedings. This is because the trial court's subsequent

unfairness to the defense infected the entire trial through sentencing, something that could have been avoided had counsel gotten his facts straight before accusing the judge on the record. Counsel's failure in this respect violated Defendant's right to effective assistance of counsel and a fair trial, and his Fourth Amendment right to due process. He is entitled to an evidentiary hearing on this ground, which cannot be conclusively refuted by the record.

GROUND SEVEN

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO IMPEACH DEPUTY WITH MEDICAL RECORDS AFTER PROMISING THE JURY EVIDENCE THAT DEPUTY WAS DIABETIC IN OPENING STATEMENT

Supporting Facts

Counsel's performance and representation fell below an objective standard of reasonableness when counsel failed to impeach Deputy Hriciso after telling the jury in opening arguments that the Deputy was agitated and irascible during his encounter with Defendant because he was a diabetic, that the hospital had administered insulin to the deputy afterward, and that his decision to rip Defendant's fence down and enter the property was the product of low blood sugar, as was his subsequent collapse at the scene. On cross, Deputy Hriciso denied being diabetic, denied receiving insulin at the hospital, denied being agitated before his encounter with Defendant. Counsel had medical records proving that the hospital had in fact treated the Deputy with insulin, suggesting that if his blood sugar were at a level necessitating the administration of insulin, such levels might well have contributed to his decision to rip down the fence and charge onto the property. Counsel did not, however, seek the introduction of these records, leaving Deputy Hriciso's testimony unrebutted, and diminishing the credibility of the defense.

Being careful not to overstate evidence is basic trial strategy every attorney should reasonably be expected to know: "The only thing a trial lawyer has is his [or her] credibility. Hence, nothing is more damaging than to overstate the facts in your opening statement. The jury will remember it, resent your misrepresentation, and no longer trust you." THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES (5th Ed. 2000) (emphasis added).

The passage above illustrates the point precisely: After he alluded to Deputy Hriciso's condition as a diabetic in opening, the jury reasonably expected the Deputy to confirm these details during testimony. When the deputy denied being diabetic or affected by his blood sugar level on the date of the incident, however, such denials permitted counsel to impeach the Deputy with medical records obtained before trial. The failure to do so was deficient performance. The medical records were admissible as business records, and probative of the Deputy's subjective intent and medical status at a critical time preceding the incident. Leaving the Deputy's denials during testimony unrebutted contributed to an inference by the jury that the deputies acted reasonably in entering Defendant's yard, which adversely affected his affirmative defense that his actions were undertaken in response to Deputy Hriciso's unnecessary armed entry into his yard, and were defensive. It is reasonably likely the jury remembered defense counsel's statements at opening, considered the statements disproved during the Deputy's testimony, and that Defendant was prejudiced as a result because the evidence went to his sole defense. There is a reasonable probability that, if counsel had impeached Deputy Hriciso with evidence that his responses at trial had not been truthful, such impeachment would have diminished the weight the jury accorded to the testimony of both deputies to an extent sufficient to have resulted in Defendant's acquittal, at minimum, on the charge related to Deputy Hriciso.

Defendant is entitled to an evidentiary hearing for this claim which is not conclusively refuted by the record. His counsel's errors deprived him of his Sixth Amendment right to the effective assistance of counsel, and of his Fourteenth Amendment right to due process.

GROUND EIGHT

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO REQUEST A JURY INSTRUCTION ON THE USE OF NON-DEADLY FORCE

Supporting Facts

Counsel's performance and representation fell below an objective standard of reasonableness when counsel failed to request a jury instruction on the use of non-deadly force.

At trial, Defendant testified that he used force in self-defense and did not intend to harm Deputy Hriciso or Deputy Skinner. In closing argument, defense counsel told the jury that Defendant had not used deadly force against the deputies, but did not request a jury instruction on the use of non-deadly force, which was deficient performance. Defendant's theory of the case was that he was defending himself, that he lacked subjective intent to harm anyone.

Section 776.012(1) defines deadly force as force "likely to cause death or great bodily harm," whereas non-deadly force is justified under section 776.012(1) if a person "reasonably believes [its use] is necessary to defend himself or another against the imminent use of unlawful force." Defendant's testimony at trial conformed to the section 776.012(1) requirements. He testified that he was not aware the persons entered his property were law enforcement officers, that the persons who entered his property were armed, and that when Deputy Hriciso charged him, he used the baton to create space between himself and his assailant, who he believed was acting unlawfully.

Defendant's use of a baton during the incident did not automatically equate to the use of deadly force. *Copeland v. State,* 277 So.3d 1137, 1140 (Fla. 5th DCA 2019) ("[T]he use of a deadly weapon in self-defense does not summarily equate to the use of deadly force."); *also DeLuge v. State,* 710 So.2d 83, 84 (Fla. 5th DCA 1998) (explaining that the "even a deadly weapon, such as a knife, can be used without deadly force.").

Citing its holding in *Cruz v. State,* 971 So.2d 178 (Fla. 5th DCA 2007), the Florida Fifth District Court of Appeal recently noted that:

> Where the evidence at trial does not establish that the force used by the defendant was deadly or non-deadly as a matter of law, the question is a factual one to be decided by the jury, and the defendant is entitled to jury instructions on the justifiable use of both type of force.

Claudio-Martinez v. State, 2D19-3639, 2021 WL 3233526, at *2 (Fla. 2d DCA July 30, 2021) (finding ineffective assistance of counsel on the face of the record for the failure to request a non-deadly force instruction.).

The only use-of-force act that has been deemed deadly *as a matter of law* is the discharge of a firearm. *Caruthers v. State,* 721 So.2d 371, 372 (Fla. 2d DCA 1998). Thus, although the testimony of Courtney Johnson also supported Defendant's use of non-deadly force, his testimony alone indisputably entitled him to an instruction on the use of non-deadly force because it was not established at trial that he used deadly force as a matter of law. *See e.g., Wright v. State,* 705 So.2d 102, 104 (Fla. 4th DCA 1998) (explaining that even supporting evidence is "flimsy," a defendant is entitled to have the jury instructed on this theory of the case if there is any evidence to support it.).

To be justified under section 776.012(2), a person using deadly force must reasonably believe that such use is "necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony," whereas section

776.012(1) only requires a reasonable belief that the use of non-deadly force is necessary for defense of oneself or another against the imminent use of unlawful force.

Defendant was prejudiced by counsel's failure to request a non-deadly force jury instruction. First, counsel agreed that the jury should be instructed on the use of deadly force, (then argued non-deadly force in closing). The failure to ask for a non-deadly force instruction, however, left the jury to believe that they could only consider deadly force, where, as in *Claudio-Martinez,* the omission of a non-deadly force instruction "may have actually made it more difficult [Defendant] to prevail on his theory of defense because the use of deadly force is permitted in a narrower set of circumstances than the use of non-deadly force." *Id.* at *3.

Here, the jury could have believed that Deputies Hriciso and Skinner acted unlawfully by entering Defendant's property without a warrant, and that they were the aggressors in the situation, but based upon the deputies' testimony that they were unarmed upon entry, the jury could have found that the deputies did not present an "imminent threat of death or great bodily harm," that would have rendered Defendant's use of force justifiable. Had the jury been instructed on the use of non-deadly force, however, the jury would have been able to decide if the actions of the deputies presented an imminent use of unlawful force that justified Defendant's use of non-deadly force in response. Had counsel requested a non-deadly force instruction, again as in *Claudio-Martinez,* there is a reasonable probability the jury would have concluded that Defendant's actions were justifiable given the unique circumstances under consideration. Instead, they were left "with no choice but to decide [Defendant's] fate without the benefit of a proper instruction to evaluate his best, and arguably only, defense." *Id.* at *4 (citing *Copeland v. State,* 277 So.3d 1137, 1142 (Fla. 5th DCA 2019).

Counsel's failure to request a jury instruction to which Defendant was entitled and which was supported by the evidence at trial violated Defendant's Sixth Amendment right to effective assistance of counsel and a fair trial, and his Fourth Amendment right to due process. He is entitled to an evidentiary hearing on this claim, which cannot be conclusively refuted by the record.

GROUND NINE

THE CUMULATIVE IMPACT OF TRIAL COUNSEL'S ERRORS VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL

Supporting Facts

This is a case where the cumulative errors of counsel combined to work as much unfairness as the biased treatment of Defendant and defense counsel by the trial judge. Counsel not only filled the trial with meritless objection requiring extensive argument and explanations by the court and the State, he did so, while at the same time *not* raising any number of useful objections that could reasonably have changed the outcome of the proceedings. Counsel demonstrated repeatedly that he failed to understand the law. For example in raising objections to the perfectly proper standard jury instructions submitted by the State, by asking for a jury instruction requiring that the police believed exigent circumstances existed before entering Defendant's property, by asking that the jury be instructed they could find Deputies Hriciso and Skinner committed a home invasion robbery, and that such finding could be supported by the fact that police seized a cellular telephone from Ms. Johnson at the scene, which counsel characterized as the "robbery" aspect of his requested instruction. By objecting to an instruction that the deputies had instead committed a burglary by entering the property with intent to assault or batter Defendant, while at the same time failing to ask for a jury instruction on the use of non-deadly force that could reasonably have changed the jury's verdicts, by raising an utterly

frivolous and potentially sanctionable objection to the warrant issued after the incident, which included a not-subtle on the record accusation of criminal conduct by the trial judge, by failing to object to numerous examples of bias on the part of the trial judge and seeking recusal, including the judge's suggestion to the State of a way to more severely score the offense prior to sentencing. The list is substantial, and it raises serious concerns that defense counsel's combined errors vitiated the fairness of this trial, undermining confidence in the verdict.

The cumulative impact error doctrine is intended for a court to determine if the residual harm from each error accumulated to a point affecting the fairness of the trial, rendering the verdict unreliable. Reasoning that failed individual claims preclude cumulative prejudice ignores the fact that, had an individual claim not failed, no cumulative analysis would be required because relief would already be due the defendant. "[T]aken on its face, [this] would render the cumulative error inquiry meaningless." *Darks v. Mullin*, 327 F.3d 1001, 1017–18 (10th Cir. 2003).

The problem has been a presumption by courts that an error not warranting relief under the performance / prejudice prongs of *Strickland* is, in reality, no error at all—it does not exist—and should be removed from the court's overall calculus. But this ignores the purpose of the doctrine. As the Florida Supreme Court has recognized, even where multiple errors are found to be individually harmless, their cumulative effect must be still be evaluated. *Jackson v. State*, 575 So.2d 181, 189 (Fla. 1991); also *McDuffie v. State*, 907 So.2d 312, 328 (Fla. 2007) ("[E]ven though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants …").

Each of these claims amply meets the individual substantive prejudice test under *Strickland.* Taken together, however, the record in this case demonstrates that the cumulative impact of counsel's deficient performance also prejudiced Defendant by depriving him of the fair trial to which he was constitutionally entitled. Combined with the trial judge's lack of neutrality, however, no fair review of these proceedings can reasonably yield a conclusion that confidence can be had in the verdicts. Accordingly, Defendant should be granted post-conviction relief based on the combined impact the errors had on the outcome of this case.

CONCLUSION / RELIEF SOUGHT

WHEREFORE, the Defendant respectfully moves the Court to vacate his judgment and sentences. Any further relief the Court deems just and proper is also respectfully requested.

Respectfully submitted,

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OATH

UNDER PENALTIES OF PERJURY and administrative sanctions by the Florida Department of Corrections, including forfeiture of gain time if this motion is found to be frivolous or made in bad faith, I certify that I understand the contents of the foregoing motion, that the facts contained in the motion are true and correct, and that I have a reasonable belief that the motion is timely filed. I certify that this motion does not duplicate previous motions that have been disposed of by the court. I further certify that I understand English and have read the foregoing motion.

/s/ Skyler B. Francis
Skyler Blake Francis
DC# 170168
Martin C.I.
1150 S.W. Allapattah Road
Indiantown, Florida 34956

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Post-Conviction Relief has been furnished to the State Attorney via e-service at brevfelony@sa18.org this 29th day of November 2021. An original, signed copy of the motion has been or will be filed with the Brevard County Clerk of Court

/s/ W. Charles Fletcher
W. Charles Fletcher
Fla. Bar. No. 01257