No. _____

In the Supreme Court of the United States

MICHAEL D. CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *PETITIONER*,

v.

ANTHONY JOSEPH FARINA, *RESPONDENT*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

PAMELA JO BONDI
Attorney General of Florida
Tallahassee, Florida
Carolyn M. Snurkowski*
Associate Deputy Attorney General
*Counsel of Record
Carolyn.Snurkowski@myfloridalegal.com
Charmaine M. Millsaps
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Telephone: (850) 414-3300
COUNSEL FOR PETITIONER

CAPITAL CASE

QUESTION PRESENTED

During the penalty phase, the defense presented a minister who testified as to the defendant's conversion to Christianity as mitigation. The prosecutor cross-examined the minister regarding the Christian view of being law-abiding and the death penalty. Defense counsel on redirect then also explored the Christian view of the death penalty. A panel of the Eleventh Circuit granted habeas relief finding ineffective assistance of appellate counsel for not raising the issue of the cross-examination in the direct appeal despite the lack of objection at trial. The panel basically held that a prosecutor may not cross-examine a minister about religion who testifies regarding religion during the direct examination and that to do so is fundamental error. The panel rejected the state court's conclusion, as a matter of state law, that there was no fundamental error. The panel granted habeas relief despite the fact that there is no clearly established precedent from this Court holding that such a cross-examination is improper, much less any clearly established precedent that it amounts to unwaiveable structural error. The panel concluded that appellate counsel must raise the issue in the direct appeal and the failure to do so is a violation of the right to effective appellate counsel despite the numerous problems with raising such an issue on appeal identified by the state court. The panel's decision is contrary to both the AEDPA and numerous cases from this Court.

The question presented is:

Whether a habeas court may evade the highly-

deferential standard of review in the habeas statute by characterizing its legal and policy differences with the state court as unreasonable factual determinations and grant the writ on the basis of ineffectiveness of appellate counsel when the state court held that the cross-examination of the mitigation witness was not fundamental error under state law?

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PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The Eleventh Circuit's opinion is unreported but available at *Farina v. Sec'y, Fla. Dep't of Corr.*, 536 Fed.Appx. 966 (11th Cir. Sept. 30, 2011). (Pet. App. *). The district court's ruling denying habeas relief is unreported but available at *Farina v. Sec'y, Fla. Dep't of Corr.*, 2012 WL 1016723 (M.D.Fla. Mar. 26, 2012)(No. 6:06-CV-1768-ORL-36). (Pet. App. *). The Florida Supreme Court's opinion denying the state habeas petition is reported at *Farina v. State*, 937 So.2d 612 (Fla. 2006). (Pet. App. *).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit issued its decision on September 30, 2013. The State of Florida filed a petition for rehearing en banc. The Eleventh Circuit denied the petition on December 6, 2013. The State of Florida sought, and was granted, an extension of time to file the petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The federal habeas statute, as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Farina, at the second penalty phase, presented Reverend James Perry Davis to testify regarding his conversion to Christianity as mitigation. *Farina v. State*, 937 So.2d 612, 626-635 (Fla. 2006); App. A. The minister testified on direct examination that Anthony's conversion was sincere and genuine. (App. A at A13-A14; A18; T. Vol. 11 1823;1827). The minister also testified that living in an eight-by-ten cell for the rest of your life is punishment. (App. A at A24; T. Vol. 11 1832-1833). He explained that prison was a "bad place" and that the inmates do not eat steaks, as the press often portrays prisons as doing. (App. A at A25; T. Vol. 11 1833). The minister testified that there was no rehabilitation in prison "regeneration is the only thing that is going to work" and maybe with "a model Christian prison," we could "see the recidivism rate turn around." (App. A at A24; T. Vol. 11 1833). He testified that both brothers, Anthony and Jeffery, could serve a useful function of ministering to other inmates in a way that normal ministers could not. (App. A at A25-26; T. Vol. 11 1834).

The prosecutor then cross-examined the minister, including having him read two verses from the Book of Romans. *Farina,* 937 So.2d at 626-628 (recounting the prosecutor's cross-examination at the resentencing); (App. A at A27-A34). The prosecutor had the minister read Romans 13:1-3:

> A: Everyone must submit himself to the governor of authorities for there is no authority except for which God has established. The authorities that exist have been established by God. Consequently, he who rebels against the authority is

> rebelling against what God has instituted. And those who do so will bring [judgment] on themselves.
>
> Q: The next verse deals with the prosecutor; does it not? What does it say?
>
> A: For the rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear that the one in authority and do what is right and you will ... he will commend you.
>
> Q: And the next verse?
>
> A: Where he is God's servant to do your good, but if you do wrong, be afraid for he does not bear the sword for nothing. He is God's servant and agent to wrath, to bring punishment to the wrongdoer.
>
> Q: And the next?
>
> A: Therefore, it is necessary to submit to the authorities not only because of the possible punishment, but also because of your conscience....
>
> Q: Is there anything in Scripture that you find that says the laws and the government should excuse crimes because someone is repentant?
>
> A: Specifically the law and government, no.

(App. A at A32-A33); *Farina,* 937 So.2d at 628. The prosecutor asked the minister if there was anything in Christianity that was inconsistent with the fact that "these men face the death penalty for the murder of a seventeen-year-old-girl" to which the minister responded: "No." (App. A at A38; T. Vol. 11

1845); *Farina*, 937 So.2d at 628. Anthony Farina's attorney, Mr. Hathaway, then asked the minister, in his redirect, if there was anything in the Bible saying that the brothers should not get a life sentence to which the minister responded: "No." (App. A at A38; T. Vol. 11 1845).

In closing argument, the prosecutor stated: "They have brought this judgment upon themselves by their choices . . ." *Farina*, 937 So.2d at 634. Defense counsel did not object.

A. The Florida Supreme Court's Decision

In his state habeas petition filed in the Florida Supreme Court, Farina raised a claim of ineffective assistance of appellate counsel for not raising the issue of the prosecutor's Biblical references as fundamental error in the direct appeal. The Florida Supreme Court rejected the claim of ineffectiveness of appellate counsel. App. B; *Farina v. State*, 937 So.2d 612, 626-34 (Fla. 2006)(*Farina III*). The Florida Supreme Court cited to, and quoted from this Court's opinion in *Jones v. Barnes*, 463 U.S. 745, 751-53 (1983). *Farina*, 937 So.2d at 634. The Florida Supreme Court found that the prosecutor's conduct was not fundamental error for three reasons: 1) the minister's earlier testimony; 2) the prosecutor's freedom on cross-examination; and 3) the prosecutor's conduct in light of the entire record. *Farina*, 937 So.2d at 631. The Florida Supreme Court held that, because "there was no fundamental error, appellate counsel was not ineffective for not raising a claim of fundamental error." *Id.* at 634.

The Florida Supreme Court also addressed the claim in the alternative, assuming the error was

fundamental, but still concluded that appellate counsel was not ineffective. *Farina*, 937 So.2d at 634. The Florida Supreme Court noted that appellate counsel filed an initial brief that raised ten issues and then filed a supplemental brief raising two additional issues after the Florida Supreme Court reduced the brother's sentence to life. The Florida Supreme Court observed that appellate counsel could have reasoned that the prosecutorial misconduct claim "was a weaker claim with less chance of success" given that it was unpreserved. *Id.* at 634.

B. The Federal District Court's Ruling

Farina then filed a federal habeas petition which included the claim of ineffectiveness of appellate counsel as claim 17. The federal district court denied habeas relief. App. C; *Farina v. Sec'y, Dep't. of Corr.*, 2012 WL 1016723, *43-*49 (M.D.Fla. March 26, 2012). The district court noted that an ordained minister from Stetson Baptist Church testified on behalf of Farina and his brother that "both had genuinely found and were committed to Christianity." *Farina*, 2012 WL 1016723 at *45. The prosecutor then cross-examined the minister but defense counsel did not object to the prosecutor's cross-examination and, as the district court explained, under Florida law, to be considered on appeal, "this claim had to amount to fundamental error." *Id.* at *47. The district court rejected the claim, concluding that the Eleventh Circuit's case of *Shere v. Sec'y, Fla. Dep't of Corr.*, 537 F.3d 1304 (11th Cir. 2008), controlled. *Id.* at *48. The district court concluded that Farina "injected religion into the proceedings by calling this witness to establish a mitigation defense based in part on his sincerely held

religious beliefs." *Farina*, 2012 WL 1016723 at *48. The district court found that there was nothing inherently problematic with the prosecutor's cross-examination of the minister and that Farina made religion and his religious beliefs an issue by calling this witness. The district court also found that the "prosecutor did not mention or argue religion in his closing argument" unlike the "mini-sermon about religion" that was the prosecutor's closing argument in *Romine v. Head*, 253 F.3d 1349 (11th Cir. 2001). *Farina*, 2012 WL 1016723 at *48-*49. The district court concluded that appellate counsel was not ineffective for not raising the issue. *Id.* at *49.

C. The Eleventh Circuit Panel's Decision

On appeal to the Eleventh Circuit, Farina argued that his appellate counsel was ineffective for not raising the claim as fundamental error. A panel of the Eleventh Circuit consisting of Judge Barkett, Judge Martin, and Judge Jordan found appellate counsel was ineffective and granted habeas relief. App. D; *Farina v. Sec'y, Fla. Dep't. of Corr.*, 536 Fed.Appx. 966 (11th Cir. Sept. 30, 2013). The panel concluded that Florida Supreme Court made several unreasonable determinations of fact and therefore, reviewed the claim *de novo* rather than under the Antiterrorism and Effective Death Penalty Act (AEDPA) standard. *Id.* at 979. The panel explicitly relied on *Romine v. Head*, 253 F.3d 1349 (11th Cir. 2001), and implicitly relied on *Sandoval v. Calderon*, 241 F.3d 765, 775-77 (9th Cir. 2000). *Id.* at 980-81, 983-84. The panel refused to follow *Shere v. Sec'y, Fla. Dep't. of Corr.*, 537 F.3d 1304 (11th Cir. 2008), which is an AEDPA case directly on point, because it applied AEDPA deference rather than conducting *de*

novo review. *Farina*, 536 Fed.Appx. at 981-82. The panel held that the prosecutor's cross-examination of the minister was fundamental error. *Id.* at 981 (concluding the prosecutor's use of "religious exhortations" constituted "fundamental error"). The panel concluded that appellate counsel was ineffective for not raising the claim as fundamental error. *Id.* at 985. The panel vacated the death sentence and remanded for a new penalty phase.

The State filed a petition for rehearing en banc in the Eleventh Circuit arguing that the panel had improperly reviewed the claim *de novo* rather than properly applying the AEDPA standard of review. App. E. The Eleventh Circuit denied the petition. App. F.

The State of Florida now petitions this Court to review the panel's grant of habeas relief and summarily reverse.

REASONS FOR GRANTING THE PETITION

This Court is called upon once again to enforce the habeas statute because a panel of a Court of Appeals refused to follow the Congressional mandate regarding federal review of state court convictions.[1] As this Court recently explained, the AEDPA recognizes "a foundational principle of our federal system" which is that state courts are "adequate forums for the vindication of federal rights." *Burt v. Titlow*, 134 S.Ct. 10, 15 (2013). Recognizing the duty and ability of state courts to correct constitutional wrongs, the "AEDPA erects a formidable barrier to federal habeas relief" requiring the petitioner to show that the state court's ruling was "so lacking in justification that there was an error beyond any possibility for fairminded disagreement." *Titlow*, 134 S.Ct. at 15-16. Federal habeas courts should not "lightly conclude that a State's criminal justice system has experienced the extreme malfunction for which federal habeas relief is the remedy." *Id.* at 16.

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[1] *Young v. Conway*, 715 F.3d 79, 87 & n.1 (2d Cir. 2013)(noting the federal appellate courts' failure to adhere to the AEDPA "has triggered reversal or vacatur in at least nineteen recent cases" citing cases); *Garrus v. Sec'y, Penn. Dep't. of Corr.*, 694 F.3d 394, 412-14 & n.1 (3d Cir. 2012)(Hardiman, J., dissenting)(en banc)(noting that in the twelve years since the enactment of the AEDPA, the Supreme Court has granted certiorari in forty-six cases involved the AEDPA and observing that "approximately seventy-four percent have been reversed" by the Supreme Court and "[r]emarkably, twenty-two of those cases—almost fifty percent—were reversed without dissent" citing cases in the footnote); *Hill v. Humphrey*, 662 F.3d 1335, 1343 (11th Cir. 2011)(en banc)(observing that in "2010–11 alone, the Supreme Court has reversed circuit appellate courts in ten decisions for not adhering to AEDPA's requirements" citing cases).

Yet the panel in this case did just that by ignoring that formidable barrier. The panel's analysis illustrated "a lack of deference to the state court's determination and an improper intervention in state criminal processes, contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system." *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011). This Court should summarily reverse the panel's decision for its blatant failure to follow the habeas statute. *Overstreet v. Wilson*, 686 F.3d 404, 410-11 (7th Cir. 2012)(Wood, J., dissenting)(noting the "number of cases in just the last three years in which the Supreme Court has overturned a federal court of appeals for erroneously granting" habeas relief "is legion" and also noting that the "the Court has often chosen to handle these cases on a summary basis, with per curiam opinions" citing cases); *Prost v. Anderson*, 636 F.3d 578, 598, n.15 (10th Cir. 2011)(observing that since 2010, the Supreme Court has reversed federal appellate court for not following the AEDPA often "summarily and unanimously.")[2]

The panel improperly reviewed a state conviction *de novo* rather than properly reviewing the conviction under the highly-deferential AEDPA standard of review. The panel found that the state supreme court, in an original proceeding, made numerous unreasonable factual determinations and, based on that conclusion, the panel refused to apply

[2] The panel's decision was an unpublished opinion but this Court reverses unpublished opinions for not conforming to the AEPDA. *See Felkner v. Jackson*, 131 S.Ct. 1305 (2011)(per curiam)(reversing summarily three-paragraph unpublished memorandum opinion for not adhering to the AEDPA standard). Not publishing an opinion should not be employed as a means of sidestepping the AEDPA.

the AEDPA standard of review. The panel improperly used one provision of the habeas statute to avoid another provision. The panel invoked § 2254(d)(2), which allows a federal habeas court to correct findings of fact when the state court made an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding" to evade § 2254(d)(1), which requires a federal habeas court to defer to a state court merits ruling unless it is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The factual determinations that the panel identified were not factual determinations at all; rather, those determinations were legal reasoning. This Court should explain that § 2254(d)(2) may not be used to evade § 2254(d)(1).

And, even if viewed as factual determinations rather than legal reasoning, the state court's factual findings certainly were not unreasonable as required by the statute and this Court's decision in *Wood v. Allen*, 558 U.S. 290 (2010). As this Court has explained twice, a state court's factual determinations are not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood*, 558 U.S. at 301; *Titlow*, 134 S.Ct. 10, 15-16 (2013)(quoting *Wood* and determining that the record "readily supports the Michigan Court of Appeals' factual finding"). The record in this case readily supports the Florida Supreme Court. The panel should not have invoked § 2254(d)(2) at all.

Furthermore, the panel's decision conflicts with this Court's decisions in *Johnson v. Williams*, 133 S.Ct. 1088 (2013); *Early v. Packer*, 537 U.S. 3

(2002); *Wood v. Allen*, 558 U.S. 290 (2010); and *Parker v. Matthews*, 132 S.Ct. 2148 (2012). The panel reviewed the claim *de novo* because the state court did not address one aspect of the claim, contrary to *Williams*; the panel found perfectly reasonable factual determinations to be unreasonable, contrary to both *Packer* and *Wood*; and the panel relied on circuit precedent rather than this Court's precedent, contrary to *Matthews.* The decision should be summarily reversed.

I. The State Court's Decision was Entitled to AEDPA Deference

The Florida Supreme Court's decision is entitled to AEDPA deference because the Florida Supreme Court addressed the merits of the claim of ineffectiveness of appellate counsel in great detail. The Florida Supreme Court addressed the core of the claim which was based on the prosecutor's cross-examination and closing argument, discussing those two aspects of the claim at length. *Farina v. State*, 937 So.2d 612, 626-634 (Fla. 2006). The Florida Supreme Court's discussion consumes nearly ten pages of the Southern Reporter and its opinion contains paragraph after paragraph discussing their own precedent, as well as Eleventh Circuit precedent. *See Farina*, 937 So.2d at 630; 633-34. The Florida Supreme Court found that the prosecutor's conduct was not fundamental error and held that because "there was no fundamental error, appellate counsel was not ineffective for not raising a claim of fundamental error." *Id.* at 634. The Florida Supreme Court also addressed the claim in the alternative,

assuming the error was fundamental, but still concluded that appellate counsel was not ineffective. *Farina*, 937 So.2d at 634. All of this is clearly a merits determination. *Johnson v. Williams*, 133 S.Ct. 1088 (2013)(reversing the Ninth Circuit for reviewing a claim *de novo* rather than under § 2254(d)(1) where the state court "devoted several pages" to the claim but only under state law). Indeed, if the Florida Supreme Court's decision in this case is not entitled to AEDPA deference, then nearly no state court decision ever would be.

The panel improperly used the Florida Supreme Court's refusal to address the jury selection aspect of the claim as an excuse to review the entire claim *de novo*. But a state court does not have to address every aspect of a claim to be entitled AEDPA deference. *Harrington v. Richter*, 131 S.Ct. 770, 784 (2011)(noting a § 2254(d) applies when a "claim" has been adjudicated even if the state court does not address each and every component of the claim); *Johnson v. Williams*, 133 S.Ct. 1088, 1094 (2013)(holding that the *Richter* presumption applies when a state-court opinion addresses "some but not all" of the claims); *Brumfield v. Cain*, - F.3d -, -, 2014 WL 67089, *3 (5th Cir. 2014)(explaining the presumption that the state court adjudicated the claim on the merits applies whether the state court addresses "all, some, or none" of the claim citing *Williams*, 133 S.Ct. at 1094). As this Court explained in *Williams*, where the state court addressed the claim but only under state law, and the Ninth Circuit concluded that the state court had "overlooked or disregarded" the constitutional aspect of the claim, it is not "the uniform practice of busy state courts to discuss separately every single claim

to which a defendant makes even a passing reference" and they are not required to do so to be entitled to AEDPA deference. *Williams,* 133 S.Ct. at 1095. This Court explained that a state court "may not regard a fleeting reference" as a separate claim and observed that federal courts of appeals refuse to address arguments made in passing without proper development and state court are entitled to do so as well. *Williams,* 133 S.Ct. at 1095 (citing numerous cases). This Court's logic in *Williams* applies with even greater force to this case because the Florida Supreme Court addressed most of the claim. Here, unlike *Williams*, there can be no argument that the state court overlooked the claim of ineffective assistance of appellate counsel all together or even major subparts of it. The Florida Supreme Court explained exactly why they were not addressing that one part of the claim. The panel's decision is flatly contrary to this Court's decision in *Williams*. Because the Florida Supreme Court's decision was an adjudication on the merits, §2254(d)(1) applies and requires that the Florida Supreme Court's decision be contrary to, or an unreasonable application of, this Court's precedent, which it was not.

II. Factual Determinations and § 2254(d)(2)

The panel applied § 2254(d)(2) instead of §2254(d)(1) because it found that the state court had made four unreasonable determinations of fact: 1) Farina had failed to allege specific objectionable errors regarding the jury selection portion of his claim; 2) except for minister's testimony, there was no other evidence about religion during the proceedings; 3) the finding that the minister's

testimony on direct examination, not the prosecutor's cross-examination, first introduced religion into the proceedings; and 4) the prosecutor's questions were related to minister's testimony on direct examination. None of the four "factual determinations" are factual determinations at all. All four determinations were either policies or legal conclusions.

Refusing to address a matter that is raised solely in footnotes and not fully developed is standard appellate practice in both state and federal appellate courts, including in this Court. *Decker v. Northwest Environmental Defense Center*, 133 S.Ct. 1326, 1338 (2013)(Roberts, C.J., concurring)(refusing to reconsider existing precedent where the issue was raised in a footnote without supporting argument); *Lee v. Kemna*, 534 U.S. 362, 376, n.8 (2002)(deeming arguments raised in two footnotes to be waived). Additionally, the footnote did not identify what was problematic about the prosecutor's prototypical juror questioning. *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Morgan v. Illinois*, 504 U.S. 719, 728 (1992)(holding that due process entitles a defendant to question jurors regarding their views on capital punishment). The refusal to address this aspect of the claim was a policy determination, not a factual determination.

The panel also found the Florida Supreme Court was factually mistaken about whether, except for the minister's testimony, there was no other evidence about religion during the proceedings. The prior reference to religion identified by the panel were various victim impact statements, which the panel openly admitted were proper. *Farina*, 536 Fed.Appx. at 978; *Payne v. Tennessee*, 501 U.S. 808

(1991)(permitting victim impact testimony). A state court reading a transcript in accordance with *Payne* is not a determination of fact.

The panel additionally found the Florida Supreme Court was factually mistaken about whether the prosecutor's questions were related to the minister's testimony on direct examination. When a defendant presents a minister as a mitigation witness, any cross-examination regarding the Bible is related to the direct examination. Whether presenting conversion to Christianity as mitigation opens the door to cross-examination regarding the Christian view of punishment is a purely legal question, not a historical fact.

A panel may not pretend that its disagreements with a state court's opinion regarding the proper legal analysis is a factual determination. It is not. The panel improperly applied § 2254(d)(2) to an opinion that did not make factual determinations rather than properly applying §2254(d)(1).

III. Any Factual Determinations were Reasonable

Even if viewed as factual determinations rather than legal analysis, none of the four factual determinations made by the Florida Supreme Court, pointed to by the panel, was unreasonable. Even if viewed as incorrect factual determinations, §2254(d)(2) still does not apply because the Florida Supreme Court's factual determinations were not unreasonable. As this Court has observed, "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance."

Wood v. Allen, 558 U.S. 290, 301 (2010)(concluding, under §2254(d)(2), the state court's finding was not an unreasonable determination of the facts).

The Florida Supreme Court concluded that "it was Davis's testimony on direct examination, not the prosecutor, that first introduced religion into the proceedings." *Farina*, 937 So.2d at 631. This is a perfectly reasonable reading of the transcript. The Reverend James Perry Davis testified to more than just Farina's personal conversion. While the minister did testify that both Anthony's and Jeffrey's conversions were sincere and genuine, he testified to much more than that on direct. (App. A at A13-A14; A18; T. Vol. 11 1823;1827). The minister testified on direct that living in an eight-by-ten cell for the rest of your life is punishment. (App. A at A24; T. Vol. 11 1832-1833). He explained that prison was a "bad place" and that the inmates do not eat steaks, as the press often falsely portrays them as doing. (App. A at A25; T. Vol. 11 1833). The minister also testified, in the Florida Supreme Court's words, as to the "importance of 'regeneration' rather than punishment, as a solution for crime." *Farina*, 937 So.2d at 632. Specifically, the minister testified on direct that there was no rehabilitation in prison "regeneration is the only thing that is going to work" and maybe with "a model Christian prison" we could "see the recidivism rate turn around." (App. A at A24; T. Vol. 11 1833). He testified that both brothers could serve a useful function of ministering to other inmates in a way that normal ministers could not. (App. A at A25-A26; T. Vol. 11 1834). On cross-examination, the prosecutor asked the minister if there was anything in Christianity that was inconsistent with the fact that "these men face the

death penalty for the murder of a seventeen-year-old-girl" to which the minister responded: "No." (App. A at A38; T. Vol. 11 1845); *Farina*, 937 So.2d at 628. Anthony Farina's attorney, Mr. Hathaway, then asked the minister, in his redirect, if there was anything in the Bible saying that the brothers should not get a life sentence to which the minister responded: "No." (App. A at A38; T. Vol. 11 1845). The Florida Supreme Court's determination that the prosecutor's questions during cross-examination were related to the minister's testimony was not unreasonable.

The panel's reading of the state court's decision in this case "strains credulity." *Early v. Packer*, 537 U.S. 3, 9 (2002)(reversing where the federal appellate court had concluded the state court had not considered certain facts despite the fact the state court had taken the trouble to recite those exact facts because such a conclusion "strains credulity"). The panel opinion is contrary to both *Wood* and *Packer*. The panel ignored the deference due under §2254(d)(2) to a state court's factual findings. So, § 2254(d)(2) does not apply at all. Instead, § 2254(d)(1) applies and requires that the Florida Supreme Court's decision in this case be contrary to, or an unreasonable application of, Supreme Court precedent. The AEDPA standard of review governs.

IV. Improper Reliance on Circuit Court precedent

Under the AEDPA, the only relevant caselaw is this Court's caselaw. The panel improperly relied on circuit court precedent rather than limiting its analysis to this Court's precedent as required by the AEDPA. The panel explicitly relied on *Romine v.*

Head, 253 F.3d 1349 (11th Cir. 2001), and implicitly relied on *Sandoval v. Calderon*, 241 F.3d 765, 775-80 (9th Cir. 2000). The panel's reasoning tracks the Ninth Circuit's reasoning in *Sandoval. Compare Sandoval*, 241 F.3d at 776-77 with *Farina*, 536 Fed.Appx. at 983-84.

In *Parker v. Matthews*, 132 S.Ct. 2148 (2012), this Court summarily reversed the Sixth Circuit for relying on its own precedents rather than this Court's precedent in an AEDPA case. This Court explained that circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court" under 28 U.S.C. § 2254(d)(1), and therefore, circuit precedent "cannot form the basis for habeas relief under AEDPA." *Matthews*, 132 S.Ct. at 2155 (quoting *Renico v. Lett*, 559 U.S. 766, 778-79 (2010)). This Court observed that it was "plain and repetitive error" for the Sixth Circuit to rely on its own precedents in granting habeas relief. *Id.* at 2255-56.

As in *Matthews*, it was "plain" error for the panel to rely on Eleventh Circuit and Ninth Circuit precedent rather than limiting its analysis to this Court's precedents, as required by the AEDPA. The panel made the same mistake the panel in *Matthews* did, even though *Matthews* had been decided before the panel issued its opinion. And, like the panel in *Matthews*, the panel should be summarily reversed.

V. This Court's View of Rebuttal of Mitigation

Because the AEDPA applies to this case, the only relevant caselaw is this Court's views on the subject

of the prosecutor's right to rebut mitigation. In this Court's words, "just as the defendant has the right to introduce any sort of relevant mitigating evidence, the State is entitled to rebut that evidence with proof of its own." *Dawson v. Delaware*, 503 U.S. 159, 167 (1992); see also *Payne v. Tennessee*, 501 U.S. 808, 809 (1991)(observing that the State has a legitimate interest in counteracting the "virtually" unlimited mitigating evidence a defendant may introduce).

The panel would have it that a defendant may present mitigation based on religion but the prosecutor is powerless to counter such mitigation and that it is plain and structural error for the prosecutor to attempt to do so. The panel seemed to think that the prosecutor was limited to asking the minister if Farina's religious conversion was genuine, which is an extraordinarily cramped view of proper cross-examination. The panel is simply incorrect: a prosecutor may rebut religious mitigation with religion. By presenting a minister to testify to as to the defendant's conversion, a defendant is necessarily using Christianity as mitigation which entitles a prosecution to cross-examine that minister on the subject of religion. A defendant, who presents his conversion to Christianity and ability to convert other inmates to Christianity as mitigation, invites cross-examination regarding Christianity's view of being law-abiding and the death penalty. Such a mitigation case is inviting a theological debate. *See* H. Lyssette Chavez & Monica K. Miller, *Religious References in Death Sentence Phases of Trials: Two Psychological Theories That Suggest Judicial Rulings and Assumptions May Affect Jurors*, 13 LEWIS & CLARK L. REV. 1037, 1041-44 (2009)(discussing the typical biblical arguments made by prosecutors and

the typical biblical rejoinders made by defense counsel and noting the various jurisdictions take opposing views on the propriety of biblical arguments). A prosecutor may cross-examination a minister presented as a mitigation witness with Scripture. There was no error at all, much less structural error.

There is no Supreme Court case hinting, much less holding, that a prosecutor may not rebut religious mitigation via cross-examination and closing argument. Indeed, the closest cases from this Court take the opposite view regarding cross-examination. And there certainly is no Supreme Court case holding that a prosecutor doing so is unforfeitable structural error or that appellate counsel is ineffective for failing to raise such a claim as fundamental error. Because there is no clearly established law regarding the issue, the panel was simply wrong to have granted habeas relief. *Howes v. Fields*, 132 S.Ct. 1181, 1185 (2012)(explaining that if this Court's decision do not clearly establish a rule of law, the rule is not a permissible basis for federal habeas under the AEDPA); *Premo v. Moore*, 131 S.Ct. 733, 743 (2011)(explaining that "novelty alone," because it renders the relevant rule less than "clearly established," provides a reason to reject a claim under the AEDPA). Granting the writ was improper.

VI. Fundamental Error is a Matter of State Law

The panel concluded, contrary to the Florida Supreme Court, that the prosecutor's cross-examination was fundamental error. *Farina*, 536 Fed.Appx. at 981 (concluding that the prosecutor's "religious exhortations" constituted "fundamental

error."). The panel repeatedly acknowledged that the Florida Supreme Court had made this determination as a matter of state law. *Farina*, 536 Fed.Appx. at 974 (describing the Florida Supreme Court's decision as stating because appellate counsel cannot be ineffective "under Florida law" for failing to raise an unpreserved error and "[c]iting to Florida case law, the Florida Supreme Court noted that the fundamental error doctrine should be used 'very guardedly'"). Florida's concept of fundamental error is a combination of plain error review, which Florida technically does not have, and structural error. It allows a Florida appellate court to review an unpreserved claim, like plain error review, but also requires that the claim amount to a denial of due process that is not subject to harmless error analysis, like structural error.

But fundamental error is solely a matter of state law. In *Swarthout v. Cooke*, 131 S.Ct. 859, 861 (2011), this Court summarily reversed a circuit court for granting the writ based on state law matters. This Court reiterated that "federal habeas corpus relief does not lie for errors of state law" *Cooke*, 131 S.Ct. at 861 (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991), and *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). This Court observed that "[n]o opinion of ours" supported converting California's "some evidence" rule into a substantive federal requirement. *Cooke*, 131 S.Ct. at 862. This Court also criticized the panel for concluding the state courts had unreasonably determined the facts in light of the evidence under § 2254(d)(2), and then reviewing the state courts' decisions on the merits, finding that conclusion to be "questionable."

No opinion of this Court supports turning

Florida's fundamental error doctrine into a substantive federal constitutional requirement and federal habeas courts are not entitled to foist plain error review on state courts in the absence of a constitutional basis. Federal habeas courts may not decide issues of fundamental error because such issues are matters of state law.

While federal habeas courts are entitled to review ineffectiveness claims premised on matters of state law, they are not entitled to disagree with a state court regarding the underlying state law. *Shaw v. Wilson*, 721 F.3d 908, 914-15 (7th Cir. 2013)(explaining that although claims of ineffective assistance of counsel can be premised on state-law issues, federal courts reviewing such claims must defer to state-court precedent concerning the questions of state law underlying the ineffectiveness claim); *Paredes v. Quarterman*, 574 F.3d 281, 291 (5th Cir. 2009)(concluding that when the state court determines that the underlying state law issue lacks merit, a petitioner cannot establish either prong of *Strickland v. Washington*, 466 U.S. 668 (1984)); *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984)(explaining that while the issue of ineffective assistance of counsel based on the failure of counsel to raise a state law claim is one of constitutional dimension, when the underlying claim is clearly a question of state law, the federal court must defer to the state's construction of its own law), *superseded by statute on other grounds*. *Strickland* does not negate the habeas statute's limitation of the writ to violations "of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A federal habeas court must accept the underlying state law and perform any *Strickland* analysis with that state

law as a given. The Florida Supreme Court determined that the prosecutor's conduct was not fundamental error which ends the matter and necessarily renders the claim of ineffective assistance of appellate counsel meritless. *Farina*, 937 So.2d at 632; *Paredes*, 574 F.3d at 291.

Furthermore, this Court has observed that "anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." *Puckett v. United States*, 556 U.S. 129, 134 (2009). This Court takes the view that even structural errors can be forfeited by the failure to object. *United States v. Gagnon*, 470 U.S. 522, 528 (1985)(rejecting a challenge to the right to be present at all stages of criminal trial because there was no objection to the absence); *Levine v. United States*, 362 U.S. 610, 619 (1960)(rejecting a Due Process Clause challenge to the right to a public trial because there was no objection to the closure). The panel's view of unpreserved error is contrary to this Court's view. The panel, even under *de novo* review, was not entitled to find the prosecutor's religious references to be fundamental error, as a matter of Florida law, when the Florida Supreme Court said it was not.

VII. Ineffective Assistance of Appellate Counsel

The panel concluded that appellate counsel was ineffective for not raising the religious references as fundamental error in the direct appeal of the resentencing. A claim of ineffective assistance of

appellate counsel is governed by the same test that governs claims of ineffective assistance of trial counsel, that of *Strickland v. Washington*, 466 U.S. 668 (1984). *See Smith v. Robbins*, 528 U.S. 259, 285, 289 (2000)(stating that the proper test for evaluating a claim that appellate counsel was ineffective is that enunciated in *Strickland* citing *Smith v. Murray*, 477 U.S. 527, 535-536 (1986)). *Strickland* requires a showing of both deficient performance and prejudice. *Premo v. Moore*, 131 S.Ct. 733, 739 (2011). Regarding deficient performance, the question is whether the appellate attorney's "representation amounted to incompetence under prevailing professional norms," not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 131 S.Ct. 770, 788 (2011). Surmounting *Strickland*'s high standard "is never an easy task" even under *de novo* review. *Id.* This Court has observed, while it is possible to bring a *Strickland* claim based on appellate counsel's failure to raise a particular claim, it is difficult to demonstrate that appellate counsel was incompetent. *Robbins*, 528 U.S. at 288. But claims of ineffective assistance of appellate counsel for not raising a claim of fundamental error are particularly problematic because such claims, by definition, function "as a way to escape rules of waiver and forfeiture and raise issues not presented at trial," and "so the *Strickland* standard must be applied with scrupulous care" when dealing with such claims. *Cf. Richter*, 131 S.Ct. at 788.

Furthermore, in an AEDPA case, which this case is, the normal deference is that is due is doubled. *Harrington v. Richter*, 131 S.Ct. 770, 788 (2011)(citing *Knowles v. Mirzayance*, 556 U.S. 111,

123 (2009)) A habeas court defers twice – once to appellate counsel's decision not to raise the issue and yet again to the State court's decision finding no ineffectiveness. *Strickland*, 466 U.S. at 689 (stating that judicial scrutiny of counsel's performance "must be highly deferential."). In an AEDPA case, the question is no longer whether appellate counsel's conduct of omitting the claim was reasonable but becomes whether there is any reasonable argument that it was reasonable. *Richter*, 131 S.Ct. at 788.

There are many reasonable arguments that appellate counsel's conduct of omitting a claim of fundamental error was reasonable. The Florida Supreme Court's decision rejecting this claim of ineffective assistance of appellate counsel was not an unreasonable application of *Strickland* or *Robbins*.

A. No deficient performance

In the appellate context, a showing of deficient performance requires that Farina establish that every reasonable appellate attorney would have raised the issue of the religious references on appeal despite the fact there was no objection and the fact that defense counsel presented a minister as a mitigation witness.

As the Florida Supreme Court noted, appellate counsel filed an initial brief that raised ten issues and then filed a supplemental brief raising two additional issues after the Florida Supreme Court reduced the brother's sentence to life. The Florida Supreme Court observed that appellate counsel could have reasoned that the prosecutorial misconduct claim "was a weaker claim with less chance of success" given that it was unpreserved. *Farina*, 937

So.2d at 634. The Florida Supreme Court's reasoning far from being contrary to, or an unreasonable application of, this Court's precedent, cites to, quotes from, and tracks the reasoning of, this Court in *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). As the *Barnes* Court observed, experienced appellate counsel "since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Barnes*, 463 U.S. at 751-52. The Florida Supreme Court finding that appellate counsel's performance was not deficient was not contrary to, or an unreasonable application of, *Barnes*.

Even applying *de novo* review, there was no deficient performance in omitting this issue. The first hurdle appellate counsel faced was that the issue was not preserved for appeal. As the panel repeatedly acknowledged, defense counsel did not object to the prosecutor's religious references. *Farina*, 536 Fed.Appx. at 973, 974, 976, 979.[3] So, appellate counsel would first have to convince the appellate court that this was fundamental error that was not required to be preserved. The Florida Supreme Court found it was not fundamental error noting the cross-examination regarding Romans was minimal,

[3] Defense counsels who present ministers as mitigation witnesses do not object to the prosecutors' cross-examination regarding the Bible because they correctly think that they have invited a theological debate by presenting the minister in the first place. *Shere v. Sec'y, Fla. Dep't. of Corr.*, 537 F.3d 1304 (11th Cir. 2008)(noting the defense counsel did not object to the prosecutor's cross-examination of the pastor presented as a mitigation witness about the Bible). And appellate attorneys think likewise and figure that appellate judges will as well (as they should).

consisting of eight pages out of 1244 pages, in a resentencing which included 35 other witnesses and lasted five days. *Farina*, 937 So.2d at 632. Moreover, the prosecutor did not make any explicit religious references in his closing argument. *Cf. United States v. Young*, 470 U.S. 1, 12 (1985)(explaining that a prosecutor's improper behavior must be examined within the context of the trial, including defense counsel's conduct, to determine whether it amounted to prejudicial error).

Even if appellate counsel convinced the appellate court that the religious reference were fundamental error, appellate counsel faced yet another hurdle. Appellate counsel would then have to convince the appellate court that the fundamental error was not affirmatively waived. During the prosecutor's cross-examination of the minister, the prosecutor handed the minister a Bible. (App. A at A30-A31). Defense counsel objected on relevancy grounds. (App. A at A31). The prosecutor stated that he would "link it up" and that it would "relate directly to this witness' testimony." The trial court told the prosecutor to "connect it up" and told defense counsel that if it was "not properly connected up, go ahead and renew your objection." (App. A at A31); *Farina*, 536 Fed.Appx. at 972. The prosecutor, during his cross-examination of the minister, then asked the minister if there was anything in Christianity that was inconsistent with the fact that "these men face the death penalty for the murder of a seventeen-year-old-girl" to which the minister responded: "No." (App. A at A38; T. Vol. 11 1845); *Farina*, 937 So.2d at 628. Defense counsel, in his re-direct, then asked the minister if there was anything in the Bible saying that the brothers should not get a life sentence to which the minister

responded: "No." (App. A at A38; T. Vol. 11 1845). Under Florida law, such conduct would amount to a waiver of the error even if viewed as fundamental error. *Armstrong v. State*, 579 So.2d 734, 735 (Fla.1991)(holding that fundamental error can be affirmatively waived); *Universal Ins. Co. of North America v. Warfel*, 82 So.3d 47, 65 (Fla. 2012) (explaining that "fundamental error is waived under the invited error doctrine because a party may not make or invite error at trial and then take advantage of the error on appeal."). It would be impossible for appellate counsel to argue, in light of the earlier objection and defense counsel's later counter-question, that defense counsel somehow missed the testimony or that this was any other than defense counsel choosing to respond rather than object. Appellate counsel was faced not merely with unpreserved error but with affirmatively waived error. Appellate counsel's advocacy is not sub-par for not raising an issue of fundamental error that was affirmatively waived.

Appellate counsel not raising a claim that was not likely to be viewed as fundamental error given the record and, even if viewed as fundamental error, would be viewed was waived is not outside the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 690. There was no deficient performance under either AEDPA or *de novo* review.

B. No prejudice

In the appellate context, a showing of prejudice requires that Farina establish that there was a reasonable probability that he would have prevailed on appeal if the issue of the religious references had

been raised. *Robbins*, 528 U.S. at 285. The panel repeatedly insisted that there was a reasonable probability that Florida Supreme Court would have granted relief if the issue of the prosecutor's religious references had been raised in the direct appeal. *Farina*, 536 Fed.Appx. at 983,985. Such insistence is impossible to reconcile with the Florida Supreme Court's denial of the state habeas petition. The Florida Supreme Court concluded that there was no fundamental error which means that they would not have reversed and remanded for third penalty phase had the issue been raised in the direct appeal. The Florida Supreme Court would have rejected the claim in the direct appeal, just like they did in the original habeas proceeding. There was no prejudice under either AEDPA or *de novo* review. Appellate counsel was not ineffective.[4]

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[4] The panel also employed the wrong remedy for a claim of ineffective assistance of appellate counsel. The proper remedy for a claim of ineffective assistance of appellate counsel is a new direct appeal in which the one claim that was omitted may be raised, not a new penalty phase. *Mapes v. Tate*, 388 F.3d 187, 194-95 (6th Cir. 2004); *Shaw v. Wilson*, 721 F.3d 908, 910 (7th Cir. 2013); *United States v. Nagib*, 44 F.3d 619, 623 (7th Cir. 1995)(stating the proper remedy for a claim of ineffective assistance of appellate counsel is a new appeal citing *Page v. United States*, 884 F.2d 300, 302 (7th Cir. 1989)). This Court has explained that the remedy for a violation of the Sixth Amendment right-to-counsel "must neutralize the taint of a constitutional violation," "while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." *Lafler v. Cooper*, 132 S.Ct. 1376, 1388-89 (2012). The panel's unexplained over-remedy of a new penalty phase grants Farina a "windfall" in violation of *Lafler*.

VIII. Importance of the Issue

The panel sidestepping the AEDPA by characterizing its differences with the Florida Supreme Court's legal reasoning as unreasonable factual determinations undermines the Congressional intent, expressed in the habeas statute, of deferring to state courts. Following the panel's lead, habeas petitioners will attempt to characterize their differences with the state court's legal reasoning as unreasonable factual determinations to avoid the strict constraints of the habeas statute. *Richter*, 131 S.Ct. at 786 (observing of the AEDPA's difficult standard that "it was meant to be" difficult to meet). Indeed, the capital defense bar is already relying on *Farina* to argue that the AEDPA should be ignored in other cases. *See Bates v. Sec'y, Fla. Dep't of Corr.*, case no. 13-11882-P (IB at 20 filed December 16, 2013)(arguing that the Florida Supreme Court's application of a procedural bar was an unreasonable fact even though the claim was addressed alternatively on the merits). The State expects this trend to continue and expand to other circuits unless this Court ends it now. This Court should grant the petition to establish that the AEDPA may not be sidestepped in this manner.

Of paramount importance is that capital prosecutors need to know whether they may cross-examine mitigation witnesses in future cases. This Court said that prosecutors may; the panel said that they may not. Because an integral part of the panel's reasoning was that the prosecutor's cross-examination of the minister was fundamental error, the panel, in effect, held it is both plain error and unwaivable structural error for prosecutors to cross-examine mitigation witnesses who testify regarding

religion about religion. It is not error at all for a prosecutor to cross-examine mitigation witnesses about religion who testify about religion during the direct examination, much less plain or structural error. This Court should grant the petition to clarify that question once and for all.

CONCLUSION

The decision granting habeas relief should be summarily reversed.

Respectfully submitted,

PAMELA JO BONDI

Attorney General of Florida
Carolyn M. Snurkowski*
Associate Deputy Attorney General
*Counsel of Record
Carolyn.Snurkowski@myfloridalegal.com
Charmaine M. Millsaps
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Telephone: (850) 414-3300

COUNSEL FOR PETITIONER