IN THE SUPREME COURT OF FLORIDA

CASE NO. SC:11-1617

RAFAEL MATARRANZ,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

Prospective juror Ms. Ceballos' home was burglarized on Christmas day when she was eight years old. She described her feelings about the crime. **"The burglars "stole everything … it is not easy for me … knowing all my presents are gone and everything that my parents work so hard for is now gone … everything that my parents worked extremely hard for is now not there and now they have to work harder again to move forward."** (T. 162). She candidly admitted that the burglary would cause her to lean in favor of the state because Mr. Matarranz was charged with burglary, and trial was set for the holiday season. In response to questions by the trial judge, the prosecutor and defense counsel, Ms. Ceballos continuously acknowledged leaning in favor of the state. Even after being chastised by the prosecutor not to be biased and not to equivocate, she at best equivocated about her ability to be fair.

The trial judge initially intended to excuse Ms. Ceballos for cause. However, the judge ultimately denied the cause challenge following Ms. Ceballos' eventual disclaimer of her bias, even while observing she was "embarrassed" by her initial responses. (T. 394-5). The Third District Court of Appeal endorsed the trial judge's view that Ms. Ceballos' eventual disclaimer was dispositive, notwithstanding her strong and repeated avowals of bias in favor of the state. This view is in direct

conflict with over fifty years of precedent from this Court, and decisions by the Fourth District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with burglary and murder.[1] His defense at trial was misidentification. The sole issue is whether the trial judge committed manifest error in failing to exclude a prospective juror for cause where the record establishes that there was a reasonable doubt as to Ms. Ceballos' ability to be a fair and impartial juror.

At the outset of voir dire, the trial judge asked the venire persons if there was anyone on the panel who believed "based solely on the charges themselves" that she "could not be fair." Ms. Ceballos raised her hand. (T. 44-45). In response to the judge's question, "Which of the charges makes you think at this stage that you might not be able to be a fair juror?" Ms. Ceballos answered: "Burglary." (T. 44-45).

The trial judge later explored this experience with her. She explained that, as a child, she had been the victim of a Christmas-time burglary, and her cousin the victim of fraud. Both experiences had had a lasting impact on her and her family, and had caused her to hold a "grudge" against people charged with those crimes. Because

[1]Petitioner, Rafael Matarranz, was the appellant in the District Court of Appeal and the defendant in the Circuit Court. Respondent, State of Florida, was the appellee in the District Court of Appeal and prosecution in the Circuit Court. The symbols "R." and "T." refer to portions of the record on appeal and transcripts of the lower court proceedings, respectively.

the burglary had occurred at Christmas, she felt especially predisposed against a burglary defendant going to trial near Christmas-time:

> THE COURT: Ms. Ceballos, I wanted to follow-up with you.
> You had answered a question about the fact that this is a burglary case and it had to do with whether or not you thought you could be a fair juror in this case.
> Tell me what you were thinking.
>
> JUROR CEBALLOS: It is just from past experiences.
>
> I have been the victim of burglaries like my house when I was younger and also I wrote down that my cousin was a victim of fraud and like trying to cash fake checks and it wasn't really his fault and everything that happened with that and how it affected my family. That still affected me and **I hold a grudge** on that and he was pretty much fleeing from whoever that guy was taking checks on and my cousin was the unfortunate one from whoever that guy was taking checks on and my cousin was the unfortunate one that happened to cash it and that stayed on his record and it is something that I hold against him. How it affected me, my parents and my whole family.
>
> **I don't think that I could be fair against him because I hold that grudge**.
>
> THE COURT: The grudge that you hold is against someone who violates the law?
>
> PROSPECTIVE JUROR: Right.
>
> THE COURT: But the law holds a grudge on people who violate the law once a person is convicted of violating the law, if a person is convicted and it is in my division, it is my job to sentence the victim but I hear what you are saying, but I want to make sure that you understand that this trial would not be about whether or not it is okay to have a grudge against people who commit crimes.
> The question is going to be was a crime committed and if it was committed whether Mr. Matarranz is the one that committed it; you understand that?

> PROSPECTIVE JUROR: Yes.
>
> * * *
>
> THE COURT: So, you don't hold a grudge against people who are accused of something that they didn't do?
>
> PROSPECTIVE JUROR: No.
>
> **It is just - I don't know how it affected like - I don't know - it is something that just stays there.**
>
> **I know how it affected us and how everything happened. It was during the holiday season and it was just crazy and it just makes me sad about it and it brings back bad memories.**

(T. 156-8).

The trial judge then asked specifically whether the facts that this case was about burglary and would be tried during the holidays would cause Ms. Ceballos to be biased against this defendant. Pointing at Mr. Matarranz, Ms. Ceballos said "yeah." Significantly, this exchange, in which she emphatically restates her bias, was wholly omitted from the Third District's account of voir dire:

> THE COURT: And I thank you and when you have the bad memories come back since you are approaching the holidays and this is going to be a burglary case, when you look over at these two tables which way does your judgment go, if you feel like you have one?
>
> PROSPECTIVE JUROR: **Towards him.**
>
> THE COURT: And you are indicating towards the defense table?
>
> PROSPECTIVE JUROR: **Yeah.**

(T. 156-8).

The prosecutor attempted to rehabilitate Ms. Ceballos from her emphatically-stated bias against the defendant. Despite these attempts, Ms. Ceballos continued to avow the bias, and was at best equivocal about it:

> PROSECUTOR: You have not heard any evidence yet with regard to Mr. Matarranz, right?
>
> PROSPECTIVE JUROR: Yes.
>
> PROSECUTOR: Are you able to listen to the testimony and the evidence in this case with an open mind?
>
> PROSPECTIVE JUROR: I could have an open mind about it, but it is still– **knowing myself I think I would lean more towards the State of Florida** just because I don't think that it is right for someone to come in and take something that someone worked so hard for and take their life away from that person.

(T. 158).

The prosecutor then instructed Ms. Ceballos that the law did not permit her to be biased, and asked if she could follow the law. Ms. Ceballos was equivocal, but continued to assert her bias:

> PROSECUTOR: Can you follow the judge's law and the law in the State of Florida and say I know that I favor the defendant, because he looks like a family member or I favor the State because I want to be a State Attorney when I grow up. The question is, can you follow the law and not say I'm going to be more for the defendant or more for the State and just sit here and listen to the evidence and make the State prove our case beyond a reasonable doubt, because that is what we have to do?
>
> PROSPECTIVE JUROR: Yes.

PROSECUTOR: So my question is, can you do that even though you may feel more sympathetic particular [sic] towards one side or the other.
Can you put aside your feelings and sit here with an open mind and see whether or not the State of Florida at the end of the case has proved the charges of murder in the first degree against the defendant, can you do that honestly?

PROSPECTIVE JUROR: Yes, **I think I could**.

Just like you say maybe I would lean a little more to one side, but I would have to hear everything before I can actually make a decision.

(T. 159).

Faced with Ms. Ceballos' persistent avowals of bias, the prosecutor exhorted her to stop being biased and to stop equivocating about it: "You can't lean. . .You can't say I think." Ms. Ceballos appeared to capitulate:

PROSECUTOR: **You can't lean.**

That is what you are saying when you say I think you are going to make the State nervous and you are going to [make defense counsel] nervous. **You can't say I think.**
My question, can you put aside your feelings for the State or the feelings for the defendant, put them aside if you are selected as a juror and listen to the evidence that comes forward on the case and make a determination at the conclusion of all the evidence as to whether [*5] or not the State of Florida has proved these two charges against the defendant.

Can you do that, honestly?

PROSPECTIVE JUROR: Yes

(T. 159).

Confused by Ms. Ceballos' abrupt about-face, defense counsel asked her to explore the feelings that remained from her being a crime victim, and the impact of those feelings on her ability to be fair to the defendant. In response to this question, Ms. Ceballos recurred to her bias:

> DEFENSE COUNSEL: I'm confused. I'm sorry. I'm very simple. You started telling [Y]our [H]onor that you couldn't do what you just told the prosecutor that you are going to do.
>
> PROSPECTIVE JUROR: I can put it aside **but, it is just that with my past experiences** - I have an old mind in all things and I know that I can do it.
>
> **It is just that I rather not, just because** — I mean, put it aside, but I can have an open mind and put all my feelings aside.
>
> * * *
>
> DEFENSE COUNSEL: Are those feelings going to make it easier for the State to secure a conviction against Mr. Matarranz, if you sit as a juror in this case?
>
> PROSPECTIVE JUROR: I would have to hear — like I would have to hear the whole thing.
>
> DEFENSE COUNSEL: These feelings that you have right know that you are leaning towards the State because of you prior experiences, would you explain those prior experiences, please.
>
> PROSPECTIVE JUROR: No prior experiences, just like I explained to the judge, I had a cousin.

(T. 161-2).

Defense counsel then asked her specifically about the burglary and whether or how it would affect her ability to be fair in this case. Her account of the event, made

in the present tense, reveals that she was traumatized by that event, and that learning that this was a burglary case during the Christmas season actually caused her to relive the trauma. When defense asked whether this would bias her against Mr. Matarranz, Ms. Ceballos – having been instructed by the prosecutor not to lean – still equivocated.

> DEFENSE COUNSEL: Tell me about the burglary?
>
> PROSPECTIVE JUROR: The burglary was when I was younger, someone broke into my house it was on Christmas day, they stole everything and they–**it is not easy for me like, an eight year old come into my house, knowing all my presents are gone and everything that my parents work so hard for is now gone.**
>
> DEFENSE COUNSEL: And it still brings back bad memories as you think about it know.
>
> PROSPECTIVE JUROR: Sometimes. It has gotten easier. There have been moments that I don't even think about it, **but sometimes when something comes up I think a lot of it.**
>
> DEFENSE COUNSEL: Did you start thinking about it as soon as your honor told you that one of the charges were burglary?
>
> Prospective Juror: **Yes.**
>
> DEFENSE COUNSEL: Can you tell me what you started thinking about as soon as you heard that it was a burglary?
>
> PROSPECTIVE JUROR: **Just me walking in my house and knowing that everything that my parents worked extremely hard for is now not there and now they have to work harder again to move on forward then that.**

* * *

> DEFENSE COUNSEL: Do you think those experiences that you have and those experiences that you are remembering today, do you think that they are going to affect you as you deliberate and make the decision whether or not Mr. Matarranz is guilty of the charge of burglary and the charge of murder.
>
> PROSPECTIVE JUROR: No, 'cause I would have to hear it. I don't think so.

(T. 163-4).

Immediately after this colloquy, the trial judge sua sponte offered to grant a stipulated cause challenge, but the prosecutor refused. (T. 164).

The following day, the prosecutor asked the venire members whether they would hold it against the defendant if he did not testify or present evidence or have a burden of proof. Ms. Ceballos said she would not. (T. 258-9). Then defense counsel returned to the issue of Ms. Ceballos' bias, as repeatedly acknowledged the day before. This time Ms. Ceballos disavowed her bias. As the trial judge would later observe, this disavowal appeared to proceed from her being "embarrassed" by her previous day's responses:

> DEFENSE COUNSEL: As we are sitting here today, have you been thinking about what we talked about yesterday?
>
> PROSPECTIVE JUROR: And I talked about it and I have a more opened [sic] mind about it and I gave a thought and I have opened [sic] mind and that anything that happened to me in the past has nothing to do with this case.

(T. 352).

Defense counsel moved to strike Ms. Ceballos for cause, arguing that her subsequent disclaimer did not extinguish the reasonable doubt that arose from her repeated expressions of bias just the day before:

> We move to strike Ms. Ceballos for cause yesterday. She essentially said that she would hold a grudge against people who violate the law and people who steal and this was based upon her previous victimized – the fact that she was previously the victim of a burglary.
> She has a grudge toward the defendant. She leans towards the State and I think she even said multiple times, originally she said she had a problem with the charges when your honor asked her if she could be fair and impartial, she said to both, even though today she kind of backtracked a little bit, she said she now has a more open mind. It is clear that this is a woman or a juror who could not be fair and impartial beyond a reasonable doubt that being the standard we move to strike her for cause.

(T. 394).

The trial judge acknowledged having intended to strike Ms. Ceballos based on her responses from the previous day. The trial judge further observed that Ms. Ceballos' subsequent disclaimer appeared to be the product of her embarrassment from the day before. Nevertheless, the trial judge relied upon the subsequent disclaimer in denying the challenge for cause:

> THE COURT: Having only heard testimony from yesterday, I would have been inclined to grant it, but her testimony from yesterday includes the fact that there had been this burglary when she was eight years old, that was emotional for her ... and today based on her demeanor, **I believe from her reflection, I think she was embarrassed and she said that she thought about it last night and she said that she felt that she had more of an opened [sic] mind today and that she could be fair and she realized that that burglary that happened to her had nothing to do with this case.**

(T. 394-5).

Defense counsel exhausted his peremptory challenges, sought, without avail, additional ones to be used against identified veniremembers, and renewed his objection before the jury was sworn in. (T. 547, 664).

On direct appeal, the Third District Court of Appeal affirmed the trial judge's denial of the cause challenge to Ms. Ceballos. It found her eventual disclaimer was dispositive, despite the trial judge's record observation that the disclaimer proceeded from her embarrassment, and that she had repeatedly avowed a bias just the day before. It also found that her responses regarding the state's burden of proof were not disqualifying. Defendant filed a timely notice to invoke jurisdiction, on the basis that this decision was in conflict with long-settled case law from this Court and the Fourth District Court of Appeal. This Court accepted jurisdiction.

SUMMARY OF ARGUMENT

When Ms. Ceballos was eight years old, burglars broke into her home on Christmas Day and stole all the presents, the fruits of her parents' hard work. She volunteered that this event would cause her to lean towards the state in a case involving burglary, particularly at a trial during the Christmas season. She restated her bias, at best with equivocation, in response to questions from the trial judge, defense counsel and the prosecutor, even after the latter admonished her not to be

biased and not to equivocate. So marked was the bias that the trial judge *sua sponte* offered to grant a stipulated cause challenge, but the prosecutor refused. (T. 165).

The following day, Ms. Ceballos disclaimed her bias. The trial judge observed that the disclaimer proceeded from Ms. Ceballos' embarrassment over her previous day's confessions of bias. The trial judge also acknowledged that, prior to the disclaimer, she would have granted the challenge for cause. The trial judge nevertheless determined the eventual disclaimer to be dispositive and denied the defense challenge for cause. (T. 394-5).

The Third District Court of Appeal affirmed the trial judge's action, without reference or adherence to the reasonable doubt standard of juror qualification set forth in this Court's opinions in ***Singer v. State***, 109 So.2d 7 (Fla. 1959) and ***Hamilton v. State,*** 547 So.2d 630 (Fla. 1989). In those cases, this Court held that a juror must be excused for cause if there is any reasonable doubt about her being biased against the defendant. Furthermore, a juror's eventual disclaimer is not necessarily dispositive, particularly, as in this case, when it comes after repeated and emphatic professions of bias. Instead, the Third District determined that Ms. Ceballos' subsequent disclaimer of bias was dispositive. It relied upon the trial judge's superior vantage point for observing her demeanor, even though the trial judge observed shame in her demeanor as she made her disclaimer. It also relied upon Ms. Ceballos' ability to accept the state's exclusive burden of proof, which was uncontested and irrelevant to the

question of her bias. The Third District's decision is thus in conflict with this Court's opinions in ***Singer*** and ***Hamilton***, as well as with numerous opinions from the Fourth District Court of Appeal, as set forth *infra*.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING A CAUSE CHALLENGE TO MS. CEBALLOS ON THE BASIS OF HER EVENTUAL DISCLAIMER OF A PREVOUSLY CONCEDED BIAS WHERE THE PROSECUTOR HAD CHASTISED THE JUROR FOR HER BIAS, AND THE EVENTUAL DISCLAIMER, AS OBSERVED BY THE TRIAL COURT, RESULTED FROM HER EMBARRASSMENT.

1. Ms. Ceballo's initial responses to questions from the court, prosecutor, and defense counsel created a reasonable doubt about her ability to be fair.

The Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 16 of the Florida Constitution guarantee a defendant the right to an impartial jury. This Court noted in ***Singer v. State***, 109 So. 2d 7, 15 (Fla. 1959):

> As long as the Constitution of this State guarantees an accused trial by "an impartial jury" the people of this State through their government in all its branches at all levels and all the institutions fostered or permitted under it are solemnly bound to do that which is necessary to preserve such a trial to every accused, whether he be guilty or innocent.
>
> As this Court recognized in ***Singer,*** a challenge for cause must be granted if there is a basis **for any reasonable doubt** as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial.

Singer v. State, 109 So. 2d, at 23-24 (emphasis supplied); *See also* ***Hill v. State***, 477 So. 2d 553, 556 (Fla. 1985) (providing that if "any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial

re*commendation as to punishment, the juror must be excused for cause"); ***Bryant v. State, 656 So. 2d 426, 428 (Fla. 1995). Close cases involving challenges to the impartiality of potential jurors must be resolved in favor of excusing the juror. *See* ***Sydleman v. Benson,*** 463 So. 2d 533 (Fla. 4th DCA 1985).

"[A] juror is not impartial when one side must overcome a preconceived opinion in order to prevail." ***Hill v. State***, 477 So. 2d 553, 556 (Fla. 1985); ***Hamilton v. State***, 547 So. 2d 630, 635 (Fla. 1989). The law in Florida recognizes that when a potential juror has been the victim of a crime similar to the crime charged and the juror expresses any doubt as to whether she can put aside her feelings as a victim, that juror must be stricken for cause. *See* ***Croce v. State***, 60 So. 3d 582 (Fla. 4th DCA 2011) *(*juror should have been stricken for cause where she stated in great detail her concerns about serving as a juror, emanating from the fact that she was previously a victim of a crime despite subsequent rehabilitation); ***Crawford v. State***, 805 So. 2d 997 (Fla. 2d DCA 2001) (error to deny cause challenge of prospective juror who had been held up at gunpoint twice, in murder with firearm case), ***Gill v. State***, 683 So. 2d 158 (Fla. 3d DCA 1996) (error to deny cause challenge of prospective jurors who were home burglary victims in a home burglary trial); ***Wilkins v. State***, 607 So. 2d 500 (Fla. 3d DCA 1992) (juror's statement that he was uncertain whether he would be influenced by fact that his five-year-old niece was sexually attacked a year earlier,

and that the perpetrator was never prosecuted, created a reasonable doubt as to whether juror could render fair and impartial verdict).

The standard of review for reviewing a trial judge's decision to deny a challenge for cause is whether the judge abused his or her discretion. ***Singer v. State,*** 109 So. 2d 7 (Fla. 1959); *accord,* ***Hill v. State,*** 477 So. 2d 553 (Fla. 1985); ***Leon v. State,*** 396 So. 2d 203, 205 (Fla. 3d DCA 1981). However, a trial court's discretion to decide a juror's competency for cause is limited by the Sixth Amendment of the United States Constitution and Article I, Section 16 of the Florida Constitution, which provides a criminal defendant the right to an impartial jury. The rejection of a challenge to juror competence "**should be reversed where manifest error is shown.**" ***Hall v. State,*** 682 So. 2d 208, 209 (Fla. 3d DCA 1996); *accord,* ***Singer v. State,*** 109 So. 2d at 22; ***Hill v. State,*** 477 So. 2d at 556.

This court has recognized "manifest error" is tantamount to an abuse of discretion. *See* ***Johnson v. State***, 969 So. 2d 938, 946 (Fla. 2007); ***Kimbrough v. State***, 700 So. 2d 634, 638-39 (Fla. 1997) [2] A trial court's failure to excuse a juror for cause is manifest error and an abuse of discretion when a juror responses to

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[2] Review of a determination of a mixed question of law and fact for "manifest error," is functionally equivalent to review of a matter within the trial court's discretion for "abuse of discretion." Indeed, the two formulations have sometimes been combined in a manner reflecting their functional identity. ***Whitehall Boca v. Department of Health and Rehabilitative Services***, 456 So. 2d 928, 932 (Fla. 1st DCA 1984)("[a]ppellants have failed to show manifest error amounting to an abuse of discretion").

questions create a reasonable doubt as to whether the juror possesses the requisite state of mind necessary to render an impartial decision. ***Peters v. State***, 874 So. 2d 677 (Fla. Dist. Ct. App. 4th Dist. 2004)(While the decision to accept or dismiss a putative juror is considered an exercise in discretion, we view the seating of a juror as to whom there is a reasonable doubt concerning impartiality an abuse of discretion and thus "manifest error".)

The record establishes that as soon as Ms. Ceballos heard that this case involved a burglary, she recalled the trauma of the Christmas day burglary that happened when she was eight years old. (T. 162). At the outset of voir dire, she volunteered that because the defendant was on trial for burglary, she could not be fair. (T. 44-45). Later that same day, during individual questioning by the trial judge, prosecutor and defense counsel, Ms. Ceballos repeatedly admitted that she would lean in favor of the state and hold a grudge against the defendant. (T. 155-164).

First, when the trial judge asked her why the burglary charge affected her, she related that she had been the victim of burglaries and that her cousin had been the victim of a fraud; in regard to the latter she stated: "I hold a grudge … I don't think that I could be fair against him [the defendant] because I hold that grudge." The judge then tried to impress upon her a distinction between holding "grudges" against persons who are "convicted of violating the law" as opposed to persons "accused of

something that they didn’t do.” While stating she saw the distinction, Ms. Ceballos spontaneously voiced how deeply the Christmas burglary continued to affect her.

> THE COURT: The grudge that you hold is against someone who violates the law?
>
> PROSPECTIVE JUROR: Right.
>
> THE COURT: But the law holds a grudge on people who violate the law once a person is convicted of violating the law, if a person is convicted and it is in my division, it is my job to sentence the victim but I hear what you are saying, but I want to make sure that you understand that this trial would not be about whether or not it is okay to have a grudge against people who commit crimes.
>
> The question is going to be was a crime committed and if it was committed whether Mr. Matarranz is the one that committed it; you understand that?
>
> PROSPECTIVE JUROR: Yes.
>
> * * *
>
> THE COURT: So, you don't hold a grudge against people who are accused of something that they didn't do?
>
> PROSPECTIVE JUROR: No.
>
> **It is just - I don't know how it affected like - I don't know - it is something that just stays there.**
>
> **I know how it affected us and how everything happened. It was during the holiday season and it was just crazy and it just makes me sad about it and it brings back bad memories.**

(T. 156-8). Right after this, in response to the trial judge’s question, Ms. Ceballos, pointed to the defendant in the courtroom and admitted that she held a grudge against

him because he was charged with a burglary. The Third District omitted the following exchange in which she emphatically reasserts her bias against the defendant:

> The Court: And I thank you and when you have the bad memories come back since you are approaching the holidays and this is going to be a burglary case, when you look over at these two tables which way does your **judgment** go, if you feel like you have one?
>
> Prospective Juror: **Towards him.**
>
> The Court: And you are indicating towards the defense table?
>
> Positive Juror: **Yeah.**

(T. 158).

The prosecutor tried to "rehabilitate" Ms. Ceballos from her conceded bias, but was unsuccessful. Once again, and for at least the fourth time, Ms. Ceballos divulged that she would lean toward the state:

> PROSECUTOR: You have not heard any evidence yet with regard to Mr. Matarranz, right?
>
> PROSPECTIVE JUROR: Yes.
>
> PROSECUTOR: Are you able to listen to the testimony and the evidence in this case with an open mind?
>
> PROSPECTIVE JUROR: I could have an open mind about it, but **it is still– knowing myself I think I would lean more towards the State of Florida just because I don't think that it is right for someone to come in and take something that someone worked so hard for and take their life away from that person.**

(T. 158).

The prosecutor next instructed Ms. Ceballos that the law disallowed statements of favoritism toward one side, and asked if she could follow the law and not state a bias for one side. (T. 159-60) Ms. Ceballos both equivocated and again asserted she would lean toward the state.

> PROSECUTOR: Can you follow the judge's law and the law in the State of Florida and say I know that I favor the defendant, because he looks like a family member or I favor the State because I want to be a State Attorney when I grow up. The question is, can you follow the law **and not say I'm going to be more for the defendant or more for the State** and just sit here and listen to the evidence and make the State prove our case beyond a reasonable doubt, because that is what we have to do?
>
> PROSPECTIVE JUROR: Yes.
>
> PROSECUTOR: So my question is, can you do that even though you may feel more sympathetic particular [sic] towards one side or the other.
> Can you put aside your feelings and sit here with an open mind and see whether or not the State of Florida at the end of the case has proved the charges of murder in the first degree against the defendant, can you do that honestly?
>
> PROSPECTIVE JUROR: Yes, **I think** I could.
> **Just like you say maybe I would lean a little more to one side,** but I would have to hear everything before I can actually make a decision.

(T. 159).

Faced with Ms. Ceballos' persistence in her bias, the prosecutor exhorted her to stop being biased and to stop equivocating: "You can't lean … You can't say I think." It was only after she was so admonished that Ms. Ceballos stated that she would set it aside:

PROSECUTOR: **You can't lean.**
That is what you are saying when you say I think you are going to make the State nervous and you are going to [make defense counsel] nervous. **You can't say I think.**
My question, can you put aside your feelings for the State or the feelings for the defendant, put them aside if you are selected as a juror and listen to the evidence that comes forward on the case and make a determination at the conclusion of all the evidence as to whether or not the State of Florida has proved these two charges against the defendant.
Can you do that, honestly?

PROSPECTIVE JUROR: Yes.

(T. 159-60).

This lack of equivocation was fleeting. When defense counsel questioned her about the apparent change in her position, she was tentative and reluctant to set aside her bias:

DEFENSE COUNSEL: I'm confused. I'm sorry. I'm very simple. You started telling [Y]our [H]onor that you couldn't do what you just told the prosecutor that you are going to do.

PROSPECTIVE JUROR: I can put it aside **but, it is just that with my past experiences** - I have an old mind in all things and I know that I can do it.

It is just that I rather not, just because — I mean, put it aside, but I can have an open mind and put all my feelings aside.

* * *

DEFENSE COUNSEL: Are those feelings going to make it easier for the State to secure a conviction against Mr. Matarranz, if you sit as a juror in this case?

PROSPECTIVE JUROR: I would have to hear — like I would have to hear the whole thing.

(T. 162).

Defense counsel then asked Ms. Ceballos to describe the Christmas burglary and explain how it related to the defendant's burglary charge. As if reliving it, she described the childhood burglary in the present tense, revealing wounds that had not healed. Learning that this was a burglary case had re-opened the wounds. Even after the prosecutor's sharp warning to her "You can't lean," she remained equivocal about whether the experience would affect her deliberations:

> Defense Counsel: Tell me about the burglary?
>
> Prospective Juror: **The burglary was when I was younger, someone broke into my house it was on Christmas day, they stole everything and they–it is not easy for me like, an eight year old come into my house, knowing all my presents are gone and everything that my parents work so hard for is now gone.**
>
> Defense Counsel: And it still brings back bad memories as you think about it know.
>
> Prospective Juror: Sometimes. It has gotten easier. **There have been moments that I don't even think about it, but sometimes when something comes up I think a lot of it.**
>
> Defense Counsel: **Did you start thinking about it as soon as your honor told you that one of the charges were burglary?**
>
> Prospective Juror: **Yes.**
>
> Defense Counsel: **Can you tell me what you started thinking about as soon as you heard that it was a burglary?**
>
> Prospective Juror: **Just me walking in my house and knowing that everything that my parents worked extremely hard for is now not**

> **there and now they have to work harder again to move on forward then that.**

(T. 162-63).

Having already been sharply warned by the prosecutor that to "lean" was unacceptable, Ms. Ceballos next equivocated when asked by defense counsel whether her experience would affect her deliberations, stating "I don't think so." (T. 164).

Right after these responses, the trial judge *sua sponte* offered to remove Ms. Ceballos for cause if the parties agreed; the state declined. (T. 164).

The record of Ms. Ceballos' initial responses abundantly evidences reasonable doubt about her ability to be fair. She repeatedly volunteered admissions that she would lean toward the state and hold a grudge against the defendant. These responses prevented her from qualifying as a fair juror, to which Mr. Matarranz was constitutionally entitled. Ms. Ceballos may have proven to be a qualified juror in a trial on charges other than burglary, during a season other than Christmas. But her answers manifestly disqualified her from sitting on the defendant's burglary trial held close to Christmas.

The next day, after Ms. Ceballos had time to process these exchanges, including the prosecutor's exhortations against bias or equivocation, Ms. Ceballos disavowed her bias without equivocation. (T. 352). The trial court conceded that previous to this disclaimer it would have granted the cause challenge, and expressed her observation that Ms. Ceballos' disclaimer emanated from shame. Nevertheless,

the trial judge relied on the fact that Ms. Ceballos was "embarrassed" in denying the cause challenge, stating:

> **[h]aving only heard testimony from yesterday, I would have been inclined to grant it**, but her testimony from yesterday includes the fact that there had been this burglary when she was eight years old, that was emotional for her...and **today based on her demeanor, I believe from her reflection, I think she was embarrassed and she said that she thought about it last night and she said that she felt that she had more of an opened [sic] mind today and that she could be fair and she realized that that burglary that happened to her had nothing to do with this case.**

(T. 394-5).

The judge's reliance upon an eventual embarrassed disclaimer in light of this prospective juror's numerous assertions of a hard-core bias in favor of the state on the preceding day, was manifest error.[3]

2. Ms. Ceballos' eventual disclaimer was made only after she went home and became embarrassed by her previous admissions of bias. A disclaimer under these circumstances does not extinguish reasonable doubt.

Over fifty years ago in ***Singer v. State,*** 109 So.2d 7, 24 (Fla. 1959), this Court observed:

> It is difficult for any person to admit that he is incapable of being able to judge fairly and impartially. We think Mr. Shaw on voir dire

[3]***Peters v. State***, 874 So. 2d 677 (Fla. Dist. Ct. App. 4th Dist. 2004)(While the decision to accept or dismiss a putative juror is considered an exercise in discretion, we view the seating of a juror as to whom there is a reasonable doubt concerning impartiality an abuse of discretion and thus "manifest error".); ***Salgado v. State***, 829 So. 2d 342, 344 (Fla. 3d DCA 2002) (finding manifest error in denial of cause challenge to prospective juror who equivocated on issue of judging police officer's credibility)..

> examination did as much as be could be honestly express that he was of such a state of mind, consciously or subconsciously, that he was not sure he could render a verdict without being influenced by the opinion he had formed from what he had read and heard about the case and because of knowing decedent's family.
>
> * * *
>
> Nor do we feel that his subsequent statements, in response to questions from the trial judge, that he was competent to serve as a juror were sufficient to overcome the effect of what he had previously said as to his state of mind.

In reaching this conclusion, this Court cited to several older Florida cases which recognized that a juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence, if it appears from other evidence that he is not possessed of a state of mind which will enable him to do so. *See* ***Andrews v. State***, 21 Fla. 598 (1885) ("The fact that [a juror] states that if taken upon the jury he would give a verdict according to the evidence is not of itself sufficient to overcome the effect of what he has said as to the fixed character of his opinion."); ***Olive v. State***, 15 So. 925 (Fla. 1894)("[The] statement of a juror that he can readily render a verdict according to the evidence, notwithstanding an opinion entertained, will not alone render him competent if it otherwise appears that his formed opinion is of such a fixed and settled nature as not readily to yield to the evidence.")

Singer also relied upon ***Johnson v. Reynolds***, 97 Fla. 591, 121 So. 793, 796, (Fla.1929), in which this Court recognized that "If there is a doubt as to the juror's sense of fairness or his mental integrity, he should be excused." In *Johnson* this Court quoted from ***Temples v. C. of Ga. Ry. Co.***, 15 Ga.App. 115, 82 S.E. 777 (1914):

> "If error is to be committed, let it be in favor of the absolute impartiality and purity of the juror which we interpret to mean that the mind of the proposed juror should contain no element of **prejudice for or against either party in a cause to be tried before him."**

As the ***Johnson*** Court observed, a subsequent disclaimer of a previously avowed bias does not suffice to extinguish a reasonable doubt about a juror's capacity to be fair:

> **It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?**

Johnson , 121 So. at 796.

Since ***Singer,*** this Court has continued to recognize that a juror's eventual disclaimer of bias is not dispositive.

In ***Overton v. State,*** 801 So. 2d 877, 892 (Fla. 2001)**,** juror Russell expressed an "abiding adherence to the notion . . . that defendants should testify if they have nothing to hide." He subsequently disclaimed this belief with an assurance that he

would be able to follow the law concerning the defendant's right to not testify at trial. This Court concluded that his disclaimer "did not sufficiently negate" his initial statements which "placed in doubt his ability to be an impartial juror." despite the tortured attempt at rehabilitation. ***Overton***, 801 So. 2d at 893.

In reaching its conclusion, this Court relied heavily on its decision in ***Hamilton v. State***, 547 So.2d 630 (Fla.1989), which involved a juror who indicated that she had extreme difficulty with the presumption of innocence and a defendant's right to remain silent. Hamilton's challenge for cause was denied. ***Hamilton***, 547 So. 2d at 632. In reversing and ordering a new trial, the Court observed that "[a]lthough the juror in this case stated in response to questions from the bench that she could hear the case with an open mind, her other responses raised doubt as to whether she could be unbiased." *Id*. at 633.

Numerous district court decisions have followed ***Singer*** and ***Hamilto****n*, *supra*. In ***Williams v. State***, 638 So. 2d 976 (Fla. 4th DCA1994), a juror initially indicated that he would favor the testimony of law enforcement. After further questioning, he stated he would give the defendant a fair trial. Then-Judge Pariente**,** citing to ***Johnson v. Reynolds***, 97 Fla. 591, 121 So. 793, 796, (1929)**,** stated:

> A juror's subsequent statements that he or she could be fair should not necessarily control the decision to excuse a juror for cause, when the juror has expressed genuine reservations about his or her preconceived opinions or attitudes. See, e.g., Graham v. State, 470 So. 2d 97 (Fla. 1st DCA 1985). Reasonable doubt has been found where a juror admitted she "probably" would be prejudiced, even though she then

> asserted she "probably" could follow the judge's instructions. Imbimbo v. State, 555 So. 2d 954 (Fla. 4th DCA 1990).
>
> * * *
>
> **The juror here expressed initial unprompted doubts about his own ability to be unbiased in judging this case. These doubts were not removed by the court's subsequent questioning.** This juror should have been dismissed. The failure to excuse the juror for cause constituted reversible error.

Williams, *supra*, 638 So. 2d at 979.

In ***Huber v. State***, 669 So.2d 1079, 1082 (Fla. 4th DCA 1996), defendant moved to challenge a juror for cause because the juror indicated that he believed the police do not arrest innocent people. The trial judge concluded that since the juror eventually stated he would follow the law and presume defendant innocent, it was not necessary to strike the juror for cause. In reversing**,** the Fourth District held:

> Even though [the] prospective juror . . . eventually said he would be able to follow the law and require the state to prove its case beyond a reasonable doubt, his original expression of doubt about his ability to presume the defendant innocent because he believes that police don't arrest innocent people is a basis for reasonable doubt that he might not be able to render an impartial verdict. This was not overcome by his subsequent capitulation and agreement that he would follow the law as given to him by the trial court, and it was error to not dismiss [him] for cause.

Similarly, in ***Montozzi v. State***, 633 So. 2d 563 (Fla. 4th DCA. 1994), the Fourth District recognized that even though it is normally left to the discretion of a trial judge whether to grant a challenge for cause, reversal is warranted if the juror's

initial responses establish a reasonable doubt about her ability to be fair even if the state and court are able to get the juror to say that she will be fair:

> Efforts at rehabilitating a prospective juror should always be considered in light of what the juror had freely said before the salvage efforts began. **The quite acceptable prosecutorial search for jurors who will be fair to the state sometimes seems to end up as a search for jurors who will convict, rather than jurors who will simply be fair. Few jurors would resolutely continue to admit that they have a bias after having a prosecutor and a trial judge so cloak them in a duty to try to be fair. Some answers by prospective jurors should simply be deemed alone disqualifying, no matter how earnestly counsel and the trial judge seek to save them.** In this case, the bell earlier rung by this juror was sounded again even while she was being "rehabilitated."[4]

Montozzi, 633 So. 2d at 565

In this case, the answers Ms. Ceballos gave on the first day "should simply be deemed alone disqualifying, no matter how earnestly counsel and the trial judge … [sought] to save them." ***Montozzi***, 633 So. 2d at 565. This is not a case in which Ms. Ceballos had a misconception of the law that could be rectified by questions or instructions by the trial judge or prosecutor. This is a case in which the prospective juror had exposed an old deep wound that still hurt during Christmas season when

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[4]*See also* ***Lowe v. State***, 718 So.2d 920 (Fla. 4th DCA 1998)(a juror's single statement that he could be fair after leading questions did not change the fact that the juror's initial responses established a reasonable doubt as to the juror's ability to be fair and impartial juror.); ***Gibson v. State***, 534 So.2d 1231 (Fla. 3d DCA 1988)(one of the potential jurors stated during voir dire, "I feel if they are innocent, they can tell their side of the story to the judge." *Id*. at 1232. Although the juror ultimately indicated that if she had a reasonable doubt she would find the defendant not guilty, the Court concluded that her answers gave reasonable doubt as to whether she could render an impartial verdict.)

reminded of her burglary. She said again and again that the wound made her lean toward the state. Despite her subsequent disclaimer, nothing the trial judge or prosecutor said could have altered her emotional response to that trauma. Her initial, unprompted and untutored responses "should simply be deemed alone disqualifying" since they created a reasonable doubt as to her ability to be a fair and impartial juror. ***Montozzi*** 633 So. 2d at 565.

3. The Third District's decision ignores well-settled precedent from this Court and decisions from the Fourth District Court of Appeal.

The trial court, while acknowledging that Ms. Ceballos' responses on the first day sufficed to disqualify her, erroneously believed that her subsequent embarrassed disclaimer sufficed to rehabilitate her. The Third District endorsed the trial court's erroneous reliance upon that disclaimer as dispositive, without any reference or adherence to the reasonable doubt standard of juror qualification set forth in this Court's seminal decisions in ***Singer v. State***, 109 So.2d 7 (Fla. 1959) and ***Hamilton v. State***, 547 So.2d 630 (Fla. 1989).

In those cases, this Court held that a juror must be excused for cause if there is any reasonable doubt about her being biased against the defendant. Furthermore, a juror's eventual disclaimer is not necessarily dispositive, particularly, as in this case, where it emerges only after repeated and emphatic professions of bias. Instead, the Third District determined that Ms. Ceballos' subsequent disclaimer of bias was

dispositive. It relied upon the trial judge's superior vantage point for observing her demeanor. Although deference is accorded a trial judge's vantage to observe demeanor, here the trial judge observed shame in Ms. Ceballos' demeanor as she made her eventual disclaimer.[5] Her embarrassed disclaimer arose after she was admonished the previous day for expressing bias and equivocation. No juror should be forced to feel embarrassed by her honest responses that this was not the right case for her to serve.

The Third District also relied heavily upon Ms. Ceballos' ability to accept the state's exclusive burden of proof and a defendant's right not to testify. However, these matters were uncontested and wholly irrelevant to the question of Ms. Ceballos' bias.

The Third District's decision is thus in conflict with this Court's opinions in ***Singer*** and ***Hamilton***, as well as with numerous opinions from the Fourth District Court of Appeal, as set forth *infra.* Since a reasonable doubt existed as to Juror Ceballos ability to be a fair and impartial juror, the trial judge committed manifest error in denying defendant's attempt to challenge this juror for cause and, therefore, a new trial is warranted. [6]

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[5]***Mendoza v. State***, 700 So. 2d 670, 675 (Fla. 1997) ("A trial court has latitude in ruling upon a challenge for cause because the court has a better vantage point from which to evaluate prospective jurors' answers than does this Court in our review of the cold record.").

[6]Defense counsel exhausted his peremptory challenges, sought, without avail, additional ones to be used against identified veniremembers, and renewed his objection before the jury was sworn in. (T. 547, 664). Therefore ,this issue was

CONCLUSION

Based upon the foregoing, this honorable Court is respectfully requested to quash the opinion of the Third District Court of Appeal and grant Mr. Matarranz a new trial.

Respectfully submitted,

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preserved. ***Trotter v. State***, 576 So.2d 691 (Fla. 1990); ***Busby v. State***, 894 So. 2d 88 (Fla. 2004).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, on this ____ day of June, 2012.

____
ROBERT KALTER
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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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ROBERT KALTER
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