Filing # 13405855 Electronically Filed 05/07/2014 05:36:47 PM

RECEIVED, 5/7/2014 17:38:40, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1233
LOWER TRIBUNAL NO. 2000-CF-368-A

NEIL KURT SALAZAR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court, Nineteenth Judicial Circuit, in and for Okeechobee County, Florida

Honorable Judge Sherwood Bauer, Jr.
Judge of the Circuit Court, Felony Division

PETITION FOR HABEAS CORPUS

RICK A. SICHTA, ESQ.
Fla. Bar No. 0669903
301 W. Bay St. Suite 14124
Jacksonville, FL 32202
Phone: 904-329-7246
rick@sichtalaw.com
Attorney for Appellant

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT

The Florida Supreme Court (FSC) has original jurisdiction over this Petition for Habeas Corpus, Mr. Salazar was sentenced to the death penalty, and the instant Petition accompanies Petitioner/Appellant's Initial Brief from the lower tribunal's order on Appellant/Petitioner's denial of his 3.851 Motion for Post-Conviction Relief. Fla. R. App. P. 9.142(b).

THE FACTS UPON WHICH PETITIONER RELIES

On July 19, 2000, Neil Kurt Salazar and codefendant Julius Atari Hatcher were indicted for first degree murder of Evelyn Jean Nutter, attempted first degree murder of Ronze Cummings, burglary of a dwelling while armed, and grand theft of a motor vehicle. (1 R 14.) The crimes took place in Okeechobee County on or about June 26 and 27, 2000. (1 R 15.) Shirleen Baker was also charged in the case.

Jury selection

Jury selection began in March 6, 2006. During voir dire, Ms. W indicated that she was generally in favor of the death penalty with very few exceptions. (8 R 658-59.) However, she also agreed that she could follow the law even if it was different than her personal opinion. (8 R 659.) She also stated that she was young Ronze's[1] teacher – he was in her reading group and she met with him three times a week. (8 R 661.) She also admitted she had the child in her class during the same

[1] One of the children of victim Ronze Cummings.

time the crimes were committed, although she did not derive any preconceived notions of what happened by the knowledge she gained from the incident. (8 R 661.) Despite this relationship, she "believed" she could still be fair and impartial and listen to the evidence in this case. (8 R 661.) However, when asked whether her position as young Ronze's teacher caused her to have any "special bias or sympathy" she answered, "Yes, sir, for the child." (8 R 661.)

Concerning her views on capital punishment on a jury questionnaire, she marked it was appropriate with very few exceptions. (8 R 657.) Ms. W agreed she would not have a hard time imposing the death penalty if she was convinced Salazar was guilty of the crimes. (8 R 663.) Defense counsel then asked her if she would recommend the death penalty "no matter what the mitigation was or what the Judge told you," and she replied, "well, it again would be completely within the evidence and what I see and understand." (8 R 664.) Because of the apparent ambiguity of Ms. W's response, defense counsel again asked her if she was convinced Salazar was guilty of the crimes, was she "more likely than not" to vote for death. Ms. W replied, "again, it would depend entirely on the evidence presented." (8 R 664.) No follow-up questions were asked of Ms. W as to this issue.

Defense counsel later went back to questioning Ms. W, and discovered that she discussed the crimes amongst other teachers at school. (6 R 665.) Ms. W also

informed the defense that counselors also came to the school to talk with the child. (6 R 665.)

After this line of questioning, Defense counsel objected to Ms. W for cause. (8 R 666.) In finding her answers and demeanor "all consistent with where she should not be struck for cause," the challenge was denied by the trial court. (8 R 666-67.)

Defense counsel later asked the venire whether they would pass judgment if Mr. Salazar did not take the stand in his own defense:

> Defense: Okay. You've been asked to deliberate, you've heard the instructions and you go back and you and your fellow jurors start to banter, start to talk, start to argue about the evidence, and you just for whatever reason, you guys are right there in the middle, you just can't – can't get past that. You're truly an undecided voice in the jury room. Are you going to reflect in any fashion about, you know, "I could have probably made up my mind if he had just gotten on the stand and told me something?"

(11 R 1049-50.) After this question, defense counsel again focused his attention on Ms. W, asking her whether she would require Mr. Salazar to take the stand in his own defense. (11 R 1050.) Ms. W replied, "[N]o, sir, I trust the attorneys would do a good job." (11 R 1050.) Again, apparently concerned by the ambiguity of her answer, counsel asked Ms. W whether she would hold it against Salazar in "any circumstance," and whether she could think of a reason why "any person wouldn't take the stand in their own defense." (11 R 1050.) Ms. W replied that she had "no

idea why" a defendant would not take the stand. (11 R 1050.)

After defense counsel exhausted his peremptory challenges and was provided an additional peremptory challenge, he requested another peremptory challenge, stating that he was forced to use a peremptory challenge on Ms. W where she should have been originally struck for cause. (9 R 1102.) Counsel stated if provided an additional peremptory challenge, he would exercise it on Ms. G. (9 R 1101.) Counsel alleged that the cause challenge should have been granted because of Ms. W's "extreme feelings on the death penalty." (9 R 1101.)

The trial court acknowledged that Ms. W "had stated that the child of the victim of the alleged attempted-first-degree murder was in her class three times a week for a reading group during the year," but determined she had no "preconceptions and could be fair and impartial," passing the question to the state. (9 R 1101-1102.) The state objected to the defense being allowed another peremptory challenge, arguing that the court had already granted an additional peremptory challenge, and stated they believed the court was correct in denying the cause challenge initially to Ms. W. (9 R 1101.)

The trial court then denied defense counsel's request for this additional peremptory challenge, but did not provide any rationale for its ruling. (9 R 1102.) Ms. G ultimately served on the jury. Id.

Trial proceedings

The state's theory was that Shirleen Baker drove appellant and Julius Hatcher to the home of Evelyn Nutter and Ronze Cummings. Under the State's theory, Mr. Salazar had Hatcher bind Nutter and Ronze Cummings with duct tape and put plastic bags over their heads. He then had Hatcher shoot them. Cummings survived but Nutter did not.

The state called Deputies Chapman and Gonzalez who responded to the scene. (13 R 1318, 1345.) They testified that when they saw Cummings he had blood on his shirt, a plastic bag wrapped around his neck, and tape around his wrists. (13 R 1338.) He told them that "his" Nutter had been shot and killed and that they shot him too. (13 R 1321-24.) He indicated it was three or four Jamaicans and a man named Neil, whom he had worked with. (13 R 1344-45, 1332.) He did not give Neil's last name, nor was he ever able to provide it later during the investigation. (13 R 1335.) A paramedic treating Cummings in the ambulance heard him tell the deputies that he knew the guy who shot him, and that he was from Fort Lauderdale and had stolen his wife's car. (13 R 1356.)

A crime scene officer testified to the condition in which Ms. Nutter was found dead. (14 R 1388.) The medical examiner testified as to Ms. Nutter's condition and cause of death. (15 R 1595.)

Ronze Cummings testified he and Mr. Salazar had worked together at

Smurfeit Recycling in Fort Lauderdale and that Salazar, a woman, and a child lived with him for a while in 2000, until he asked them to move out. (14 R 1457, 1461-62.) He testified that Mr. Salazar showed up on the night in question with a machine gun and a man he later learned was Julius Hatcher. (14 R 1465-66.) He described the alleged events that transpired at his house. (14 R 1473-84.) Cummings said he knew Mr. Salazar's full name at the time, but he chose not to tell the last name to the police. (14 R 1487.) He gave Det. Brock only the first name at the hospital and again when interviewed at the station after spending five days in the hospital. (14 R 1487-88, 1509-10.) He did not tell them that when Mr. Salazar came to live with him, Fred Cummings had come with him. (14 R 1513.) He did not mention Fred because he thought Fred might be involved in the shooting. (14 R 1514.) Cummings had four felony convictions. (14 R 1490.) He made numerous inconsistent statements during his trial testimony. (15 R 1544-45, 1511, 1558.) For instance, he testified that he could see what was going on through the bag on his head, and the bag did not obscure his vision and his eyes were not taped (14 R 1478-79; 15 R 1559), but in the transcript of his statement to Det. Brock he said there was tape across his eyes. (15 R 1560.)

Julius Hatcher testified as to his version of events in question, claiming that Mr. Salazar threatened him in various ways, that Shirleen Baker drove he and Mr. Salazar to Okeechobee (16 R 1653), that he shot the victims, but that he acted

under the direction of Mr. Salazar. (16 R 1660.) Hatcher admitted that he was good at spinning yarns. (16 R 1701.) After a mistrial in his case, he made a deal with the state under which he would get a jury of six and a waiver of the death penalty. (16 R 1698-99.)

Det. Brock testified that he spoke with Cummings in the ambulance around 1 a.m.; Cummings looked like he was in shock and said that Neil did it. (17 R 1804-05, 1875.) At the hospital he repeated the name Neil. (17 R 1805-06.) After his release from the hospital on June 30, he made another statement saying Neil just stood there and gave orders. (17 R 1806-09.) Brock had this information before talking to Hatcher. (17 R 1811.) He had a photo lineup that he thought contained a photo of Mr. Salazar, but Cummings did not identify Salazar in any of the photos. (17 R 1815.) Cummings provided Brock a video with Mr. Salazar in it, which was played for the jury. (17 R 1815-16.) Brock interviewed Hatcher, Fred Cummings, and Shirleen Baker. (17 R 1825.) Brock testified that someone seated in the living room recliner could not have seen the porch light being unscrewed, which contradicts the testimony of Cummings. (17 R 1875.) Cummings told him that both men were armed when they entered the house. (17 R 1876.) Cummings also said there were three or four males at the house, and then changed it to three males. (17 R 1876.) Cummings never changed it to two males and a female. (17 R 1876.) Brock got the name Neil from the statement at the hospital. (17 R 1877.)

In closing arguments, the state argued that in order for the jury to acquit Mr. Salazar, they would have to believe that Ronze Commings and Julius Hatcher were lying in all aspects of their prior statements and testimony at trial. (18 R 1978-1979, 1982-88.) The state acknowledged that but for Julius Hatcher's testimony in Mr. Salazar's case, Mr. Salazar would have probably walked. (18 R 1969.)

Penalty phase proceedings

The Court conducted Mr. Salazar's penalty phase on March 17, 2006. (17 R 2120.) The defense called two mitigation witnesses. Mr. Salazar's sister, Michelle Lambert Smith, testified that he was a good brother who cared for her during the time period they lived together in Miami. (17 R 2130-43.) Mr. Salazar's other sister, Arleen Lambert Smith, testified that Mr. Salazar attended different schools in Trinidad, one of which was vocational, where he learned woodworking. She testified that he was athletic as a youth and played soccer. (17 R 2148-2157.) The jury recommended death by a vote of 12 – 0. (17 R 2224.)

Spencer hearing and sentencing

On May 5, 2006, the Court conducted a Spencer hearing, where the state, but not the defense, presented additional evidence. The Court entered its sentencing order on May 30, 2006, finding four aggravating factors [2] (20 R 2325-31) (4 R

[2] (1) Defendant was previously convicted of another capital felony or of a felony involving use or threat of violence to the person (some weight); (2) Capital felony was committed while the Defendant was engaged in the commission of or an

121) and six mitigating factors: (1) Mr. Salazar was not the actual shooter (some weight); (2) Mr. Salazar comes from a broken home and was devastated by his parents' divorce (little weight); (3) Mr. Salazar was raised in an impoverished environment in a third world country (minimal weight); (4) Mr. Salazar is capable of, and has, good relationships with family members (minimal weight); (5) Mr. Salazar was a good student, attended school regularly, and obtained a vocational degree in wood working (little weight); and (6) Mr. Salazar was well-behaved at trial and the court proceedings (minimal weight). (20 R 2331-36.) The trial court followed the recommendation of the jury and imposed death. (20 R 2325-2336.)

Mr. Salazar filed a direct appeal to the Florida Supreme Court, raising 5 claims.[3] Salazar v. State, 991 So. 2d 364, 370-71 (Fla. 2008). The judgment and sentence were affirmed on appeal. Id. at 368-70.

Certiorari review was denied. Salazar v. State, 129 S.Ct. 1347 (2009).

On February 8, 2010, Salazar filed his initial Rule 3.851 motion (4 PCR

---

attempt to commit . . . any burglary (some weight); (3) HAC (great weight); (4) the capital felony was a homicide and committed in CCP manner (great weight).

[3] (1) whether the trial court erred in denying Salazar's motion for a mistrial based on improper prosecutorial comments during guilt-phase final arguments; (2) whether the trial court erred in allowing the State to present improper self-bolstering witness testimony; (3) whether the trial court erred in finding the cold, calculated, and premeditated (CCP) aggravator; (4) whether the trial court erred in allowing the State to argue during penalty phase closing arguments that the victims were terrorized; and (5) whether Florida's death penalty statute is unconstitutional under Ring v. Arizona, 536 U.S. 584, 609 (2002). Additionally, the FSC independently determined: (6) whether sufficient evidence supports Salazar's convictions; and (7) whether Salazar's death sentence is proportionate.

595-687) contemporaneously with a Motion for Determination of Mental Retardation. (3 PCR 592-594.) The trial court denied 3.851 relief on June 11, 2013, following evidentiary hearing. (11 PCR 1962.)

This state habeas corpus petition and accompanying appeal of the trial court's order denying 3.851 relief timely follows:

ARGUMENT

CLAIM ONE

APPELLATE COUNSEL FOR MR. SALAZAR WAS INEFFECTIVE IN FAILING TO PRESENT ON DIRECT APPEAL THE CLAIM THAT THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S CAUSE CHALLENGE ON MS. W, A PROSPECTIVE JUROR WHO HAD A RELATIONSHIP WITH THE VICTIM'S CHILD AND CONCEDED BIAS AND SYMPATHY FOR THIS CHILD, AND WHO BELIEVED THE DEATH PENALTY WAS WARRANTED IF THE EVIDENCE OF GUILT AGAINST A DEFENDANT WAS STRONG, IN VIOLATION OF MR. SALAZAR'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLA. CONSTITUTION

I. *Applicable Law:*

A. Denying a cause challenge

A court errs when it forces a party to exhaust his peremptory challenges on person who should have been struck for cause. Leon v. State, 396 So. 2d 203, 205 (Fla. 3rd DCA 1981). See also Matarranz v. State, 133 So. 3d 473 (Fla. 2013). When a juror should have been removed for cause but was not, a due process

violation occurs. Hill v. State, 477 So. 2d 553, 556 (Fla. 1985).

The question of the competency of a challenged juror is "one of mixed law and fact to be determined by the trial judge in his or her discretion. This decision will not be disturbed unless error is manifest." Singer v. State, 109 So. 2d 7, 22 (Fla. 1959). In Singer, this Court articulated the applicable rule to evaluate whether a trial court's denial of a cause challenge for cause constitutes reversible error:

> [I]f there is basis for any reasonable doubt 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, he should be excused on motion of the party, or by the court on its own motion.

Id. at 23-24. This Court has also held that if error is to be committed, it should be in favor of absolute impartiality and purity of the jurors, which is interpreted to mean that the mind of the proposed juror should not contain any element of prejudice for or against either party in a cause to be tried before him. Johnson v. Reynolds, 121 So. 793, 796 (Fla. 1929).

Although a juror's assurances of impartiality may suggest to a court that the denial of a challenge for cause may be appropriate, such assurances are neither determinative nor definitive. See Murphy v. Florida, 421 U.S. 794, 800 (1975). See also Overton v. State, 801 So. 2d 877, 892 (Fla. 2001).

B. Direct appeal counsel deficient performance and prejudice

An appellant may raise a claim of ineffective assistance of appellate counsel

in a petition for writ of habeas corpus. Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000).

A court must grant habeas relief based on appellate counsel's ineffectiveness if (1) counsel's omission or overt act fell measurably below the standard of competent counsel and (2) counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Freeman, 761 So. 2d at 1069; see also Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986).

II. ***The present case- prospective juror Ms. W:***

In the present case, despite Ms. W's responses that she "believed" she could be impartial, her answers in voir dire concerning her views on capital punishment, response concerning a defendant testifying, her unique relationship with the **victim's own child**, and her **admission** she would have bias and/or sympathy for this child, underscored any logic for the trial court to deny Salazar's repeated cause challenges.

Not only did Ms. W teach victim Ronze Cummings' child three times a week for a year, she did so during the time of the instant crimes and was familiar with the family on a professional level. (8 R 660.) Additionally, there was at least one counselor consoling the child during this time, and while it was occurring, Ms. W was talking about the crimes with her follow colleagues in the teachers' lounge.

Not surprisingly, Ms. W **admitted** she had special bias or sympathy for the child. (8 R 661.) This admission came *after* her statement she "believed" she could be fair and impartial:

> Defense: Understanding you taught Ronze, the child, do you feel that you can still be fair and impartial and listen to all the evidence?
>
> Ms. W: **I believe I could**.
>
> Defense: Okay. And you wouldn't –**you don't have any special bias or sympathy just by virtue of what the child has had to go through?**
>
> Ms. W: **Yes, sir, for the child**. He was in my reading group, not in my particular classroom per se. And we split into reading groups and he was in my group.
>
> Defense: **Okay. How often during the course of a week would you see the child**?
>
> Ms. W: **Three times**.
>
> Defense: **Okay. So – and that was over the whole—the course of the whole year, would he stay in your reading group for—**
>
> Ms. W: **Three times a week, yes, sir.**

(8 R 661- 662.) Ms. W admitted she had bias and/or sympathy in this case for the child of the victim that Salazar was accused of attempting to kill with premeditation. Yet, despite the juror's concession of partiality, the lower court failed to grant defense counsel's cause challenge.

Ms. W also believed the death penalty was appropriate with very few

exceptions. (8 R 657.) Because of these beliefs, she stated she would not have a hard time recommending the death penalty **if she was convinced Salazar committed the crimes**:

> Defense: **And let me go to your feelings on the death penalty. On Question 18 you checked "B" which says "generally appropriate with very few exceptions**."
>
> Ms. W: Yes, sir.
>
> Defense: And you had put that you agree with it as needed.
>
> Ms. W: Yes, sir.
>
> Defense: The way it works here in Florida, and I think Mr. Seymour went into it a little bit, we have the first part of the trial called the guilt phase, the jury there is determining by a unanimous vote has the State proven beyond a reasonable doubt that Mr. Salazar is guilty an din particular of first-degree murder. If the jury reaches that decision, we then go into a second part of the trial that's called the penalty phase. At that second part the State would be presenting and arguing to you what we call aggravating factors. Reason why this case is worse than other murder cases, reasons why Mr. Salazar as a person is more deserving of death. They would also presented mitigating factors, reasons why it's not a worse murder than other cases, or reasons why individually Mr. Salazar is not deserving of the death penalty. Would you be open to both those arguments if we get to the second part of the trial?
>
> Ms. W: Yes, sir, I would.
>
> Defense: In other words, I think you can appreciate this, we don't want someone as a juror who is going to say, Well, even if I convict someone of first-degree murder, I would never give the death penalty" and also we don't want

someone who would say "If I convict someone of first-degree murder, I'm always going to give them the death penalty." Do you agree with that?

Ms. W: Yes, sir, I do.

Defense: In other words, we want someone who even if they find – reach a decision that the person is guilty of first-degree murder, they will still given the second part of the trial, give both sides a fair opportunity and decide is this the type of case that is deserving of the death penalty. Will you do that?

Ms. W: Yes, sir.

Defense: Okay. And your – and there's absolutely nothing wrong with your opinion, **your opinion was "B," "generally appropriate with very few exceptions**." That actually is not what the law says, the law says it's only in the more aggravated cases that the death penalty is appropriate, where the aggravators outweigh it. Can you agree to follow the law even if that's different from your personal opinions when you came in today?

Ms. W: Yes, sir.

…

Defense: Mr. Albright talked to you about the death penalty and I think you – everyone would agree it's a hard decision for anyone to have to make, no matter what their personal views are. But you have indicated that personally you would, by virtue of just of this intricate scientific questionnaire which is neither one, but that you feel that there are few exceptions to where you would impose the death penalty more times that not; is that a fair statement?

Ms. W: As you said, that questionnaire is not very – not very open. It would depend on – totality of the circumstances.

Defense: Okay. Well, let me ask you this. If you sat as a juror and

you heard the guilt phase of the trial and in the guilt phase of the trial you're instructed on the elements of the crime, first-degree premeditated murder, you're instructed on certain affirmative defenses that may be available and what's called excusable homicide, certain circumstances where the law excuses a homicide, and you hear the evidence and as the Judge instructs you, you must find the evidence beyond and to the exclusion of any and all reasonable doubt before you can vote for guilty.

Now you've done that and you now are moving on to the penalty phase, and understanding your personal opinions on the death penalty, would the Defense, would Mr. Smith, myself, Mr. Salazar, would we have an uphill battle to convince you not to vote death based on your personal opinion?

Ms. W: I would look at all the evidence presented and look at it in a very fair judgment, I wouldn't just jump into something. **I think when I answered that question that way, it has to do with the fact a lot of times you will read about murders where there is really not good solid evidence, but yet a person is still found guilty and I would have a hard time with that**.

Defense: Okay. So – but if you were – **you wouldn't have a hard time imposing death if you were convinced that he was guilty?**

Ms. W: **No, sir**.

Defense: **No matter what the mitigation was or what the Judge told you?**

Ms. W: **Well, it again would be completely within the evidence and what I see and understand.**

Defense: **I'm – maybe both of us are saying the same thing, I'm having a real hard time understanding. You're telling**

me if you're convinced that he's guilty, that more likely than not you're going to vote for death; is that what you said a minute ago?

Ms. W: **Again, it would depend entirely on the evidence presented**.

Defense: I don't have any further questions, Your Honor.

(8 R 657- 559, 662-664.) Ms. W's subsequent responses make it abundantly clear if there were *weak* evidence that Salazar committed the crime but was convicted, she would have a hard time recommending death. Conversely, if there were *strong* evidence of guilt, she would not have a hard time recommending death. Of course, this "eye for an eye" mentality is not the law and precisely the reason the defense's cause challenge should have been granted - Ms. W's beliefs in capital punishment circumvent the fact that regardless of the strength of guilt, a juror must follow the law and consider mitigation before determining whether the death penalty is the appropriate punishment.

Ms. W's statements as to whether she would hold it against Salazar if he did not testify also created great cause for concern, as she could not think of a reason a defendant would *not* testify. (11 R 1050.) However, she said would "trust the attorneys would do a good job," and not require Salazar to testify in order to prove his innocence. (11 R 1050.)

III. ***Ms. W's personal experiences and responses raised sufficient doubt as to her ability to be impartial to Salazar:***

Ms. W's unique experiences with the victim's child and her implied "eye for

an eye" view on capital punishment demonstrate her biases that could not be altered or undone over the course of voir dire - necessarily invoking this Court's "commitment to juror impartiality," where jurors should not only be impartial, but "beyond even the suspicion of partiality. See O'Connor v. State, 9 Fla. 215, 222 (Fla. 1860). See also Mantarraz v. State, 2013 LEXIS 2014 (Fla. 2013). The goal sought of the jury selection process is:

> A jury composed of person whose minds are free of any preconceived opinions of the guilt or innocence of an accused, persons who can in fact give to an accused the full benefit of the presumption of innocence, persons who can because of freedom from knowledge of the cause decide it solely on the evidence submitted and the law announce at the trial.

Singer, 109 So. 2d at 23. One cannot think of anything more suspicious or more contrary goal of impartiality more than a prospective juror who was repeatedly interacted with and witnessed the victim's own son live through a personal nightmare, after having his father shot in the face twice and his father's girlfriend murdered.[4] This is especially so given the fact she saw this child three times a week for a year, witnessed firsthand the counselors brought into the school to console the child, and had conversations about these crimes and Salazar's case

[4] It is unclear from the record whether this child was the child that witnessed the murder and attempted murder of his father; whether it was the son out in the orange groves during the murder, or some other child. Because the child that witnessed the crimes was very young, it is doubtful Ms. W would have had him in her class at this time.

with other teachers in the lounge.

The Sixth and Fourteenth Amendments to the Constitution guarantee a criminal defendant the right to be tried by impartial and unbiased jurors. Morgan v. Illinois, 504 U.S. 719 (1992). However, in this case Ms. W candidly admitted she **would have bias and sympathy** for the child of one of the victims. (8 R 661.) Clearly, this Court, the lower Florida appellate courts, as well as Florida R. Crim Pro. 3.330, required Ms. W not serve because she was not "indifferent to the action," necessitating her excusal for cause because there was reasonable doubt as to her ability to render an impartial verdict. See Somerville v. Ahuja, 902 So. 2d 930, 935 (Fla. 5th DCA 2005).

Even if this was a close call, Ms. W should *still* have been excused. Id. See also Mitchell v. State, 862 So. 2d 908 (Fla. 4th DCA 2003) (Because impartiality of the finders of fact is an absolute prerequisite to the system of justice, the appellate court has adhered to the proposition that close cases involving challenges to the impartiality of potential jurors should be resolved in favor of the excusing the juror rather than leaving doubt as to impartiality); Wolf v. Brigano, 232 F. 3d 499 (6th Cir. 2000) (holding two juror were biased and should have been excused for cause due to their "close and ongoing" relationships with the victim's parents, coupled with their knowledge of the case obtained from the victim's parents).

Furthermore, even *if* Ms. W did not readily admit actual bias or sympathy in

this case, her bias can be implied or inferred because of her special relationship to the victim's child. See generally United States v. Rhodes, 177 F. 3d 963, 965 (11th Cir. 1999) (affirming the denial of a new trial based on the perceived bias of a venire member who was the cousin of a witness for the government). Where a juror is impliedly biased because of some special relationship to a party, disqualification of that juror is mandatory. Id. at 965. "Inferable" or "inferred" bias exists "when a juror discloses a fact that bespeaks a risk of partiality sufficiently significant to warrant granting the trial judge discretion to excuse the juror for cause, but not so great as to make mandatory a presumption of bias." See United States v. Greer, 285 F. 3d 158, 171 (2nd Cir. 2002). Thus, even if Ms. W failed to admit her bias, her special relationship with the victim's child should still have warranted her excusal for cause.

When one also considers Ms. W's personal bias on imposing the death penalty solely if the evidence of guilt was strong, the prospective juror is even more unfit to serve in Salazar's case. To be sure, Ms. W was not simply misunderstanding the law concerning capital punishment – she wholeheartedly did not agree with it so much as that she would recommend death completely based on whether there was strong evidence the defendant committed the murder.

Whatever "evidence" Ms. W needed before she pulled her trigger on the machinery of death, her answer was ambiguous at best, and did nothing to

circumvent her personal belief that a person should be sentenced to death if the evidence of guilt is strong. Although it is presumably clear Ms. W was referring to "evidence" presented in the guilt phase, it is what Ms. W did not say that is equally important. Specifically, she did *not* say after the above statement, "however, I could consider mitigation and follow the law and the judge's instructions before imposing death."

Analogous to the issue here concerning a juror's belief on capital punishment, this Court in Hill v. State was faced with a prospective juror's similar strong feelings and bias in favor of imposing the death penalty – that he would be inclined towards the death penalty if there simply were a conviction:

> "Defense: Do you feel like from under the facts that you know now, do you feel like this might be an appropriate case [to impose the death penalty]?
>
> Juror: I don't feel I have really been given any more facts that I have before coming into the courtroom.
>
> Defense: You formed an opinion before though?
>
> Juror: Yes, sir.
>
> Defense: Have you discarded that opinion?
>
> Juror: Not necessarily.
>
> Defense: Do you feel that in all cases of premeditated murder that the death penalty should be applied?
>
> Juror: It's a hard question to answer.

Defense: Yes, sir, sure is.

Juror: I'm not saying in all cases, **[it's] dependent upon the evidence**.

Defense: **Are you still inclined towards the death penalty in this case if in fact there is a conviction?**

Juror: **Yes, sir.**

Defense: **That's the presumption that you came into this Court with***?*

Juror: **Yes, sir.**

477 So. 2d at 555-56 (emphasis added). This Court found that Hill's due process rights were violated because he was forced to use a peremptory challenge on a juror who should have been removed for cause. Id. at 556. This court also held that "a juror is not impartial when one side must overcome a preconceived opinion in order to prevail." Id. at 556.

This Court is "keenly aware" that unique biases and experiences cannot be like the ones exhibited by Ms. W and by the juror in Hill and cannot be erased by some artfully crafted questions during the course of voir dire. In Mantarraz v. State, 2013 LEXIS 2014, 133 So. 3d 473 (Fla. 2013), this Court recognized the interplay between trial courts and counsel regularly finding themselves addressing prospective jurors who maintain fixed opinions and firmly held beliefs based on personal life experiences that are immutable. Id. at 27.

The Mantarraz court distinguished "firmly held personal beliefs" with

misunderstandings of the law and the judicial process. Id. at 27. In Mantarraz, a juror's personal experiences caused her to hold a grudge against Mantarraz in that he was being charged with burglary. Id. at 4. Eventually this juror succumbed to many questions by the lower court and the attorneys, and stated she "could have an open mind and put all my feelings aside." Id. at 8.

This court held that the lower court, citing Hill, "simply failed to apply *Singer's* rule of law, which provides that if there is a reasonable basis to doubt a juror's impartiality, then that juror should be excused." Id. at 36; see also Hill, 477 So. 2d at 555-556. Critically, this Court explained that evaluating a juror's bias does not simply rest on the jurors assurances that s/he can be fair and impartial, but it is rather the totality of the responses that are used to evaluate a juror's impartiality, or lack thereof.

Similarly, in Johnson v. Reynolds, this Court recognized these realities of human nature and reversed the lower court's decision not to remove a juror for cause who acknowledged personal bias but appeared to reject that belief over the course of voir dire. See Reynolds, 121 So. at 796. The prospective juror was concerned about his ability to render a fair and impartial verdict because of his "friendly relations" with the plaintiff's attorney, and that it "would embarrass him to render a verdict against the plaintiffs." Although the prospective juror later conceded he could judge the case based on the evidence, this Court held the

concession was insufficient to justify a conclusion that the juror was free of bias and prejudice and thus competent to serve. Id.

In Overton v. State, this Court addressed a denial of a cause challenge against a prospective juror who manifested particular biases. 801 So. 2d 877, 889-95 (Fla. 2001). In Overton, Juror Russell "always believed" that individuals do not take the stand are hiding something. Id. at 891-92. Russell however said he could "shut that [belief] out" if he was selected to serve on the jury. Id. at 892. This Court found that the totality of this juror's responses rendered his subsequent assurance insufficient to negate his bias, and he should have been removed for cause. Id. at 893.

In Hamilton v. State, this Court determined that the defendant was deprived of his constitutional right to a fair trial when the lower court erred in retaining a juror that stated she would require evidence by the defendant to convince her he was not guilty, but eventually stating she could based her verdict on the evidence presented and law instructed. 547 So. 2d at 633 (Fla. 1989). This Court found that because the juror's initial responses raised doubt as to whether she could be unbiased, she did not exhibit the "requisite impartial state of mind necessary to render a fair verdict, and thus should have been dismissed from the jury pool." Id. at 633.

Thus, it is apparent that despite Ms. W's "belief" would discount her prior

relationship with the victim's child and could be impartial to Salazar, as well as discount her fixed opinion that she would most likely recommend death every time evidence of guilt was strong, it would be difficult if not impossible to conclude that she stood free of bias or prejudice, when she voluntarily and candidly asserted its very existence in her mind. See Johnson v. Reynolds, 97 Fla. 591, 121 So. 793, 796 (Fla. 1929). At a minimum, a reasonable doubt existed as to whether Ms. W possessed the state of mind necessary to render an impartial recommendation as to punishment, necessitating an excusal for cause. See Thomas v. State, 403 So. 2d 371 (Fla. 1981).

IV. *The error was not harmless:*

In the present case, as in Hill and Mantarraz, the trial court failed to apply Singer's rule of law and excuse prospective juror W because there was a reasonable basis to doubt her impartiality. See Mantarraz, 2013 LEXIS 2014 at 36; Hill, 477 So. 2d at 555-556. The true test of the fixedness of Ms. W's opinion "is not whether the opinion will readily yield to the evidence," as the accused is not required to present evidence of innocence. See Singer, 109 So. 2d at 24.

If a juror, like here with Ms. W, takes an additional step of admitting concern that he or she may be biased (as Ms. W did concerning the victim's child and her views on capital punishment), "an expression of such sentiment must necessarily inform a court's analysis of juror partiality." Id. Despite this Court's

precedent, the lower court discounted Ms. W's personal experiences and bias in refusing to excuse her for cause, somehow determining she had "no preconceptions and could be fair an impartial." (9 R 1102.)

However, not only did prospective juror W admit she *would* have sympathy and bias for the victim's child, but she most likely recommend the death penalty simply if Salazar's guilt of the murder was strong. These unique experiences and biases concerning capital punishment support the conclusion that Salazar's right to a fair and impartial jury was "thus compromised by the failure of the trial court to excuse her for cause." See Mantarraz, 2013 LEXIS 2014 at 37.

This is especially so considering there was absolutely no follow-up questions clarifying Ms. W's believes on capital punishment, and what exactly the "evidence" was, being evidence in the guilt or the penalty phase, was necessary for her to overcome her belief that under most circumstances she would recommend death.

Had this claim been alleged on direct appeal, Salazar's conviction and sentences would have been reversed, as the refusal to grant counsel's cause challenge was not harmless. The "most basic guarantees of the American justice system" such as due process and the presumption of innocence, rely upon impartial jurors. See Mantarraz, 2013 LEXIS 2014 at 42. The lower court's refusal to excuse Ms. W abridged Salazar's right to peremptory challenges by reducing the number

of those challenges available to him. Indeed, the juror defense counsel would have exercised a peremptory challenge on, Juror "G," served on Salazar's jury.

Thus, because defense counsel properly exhausted his peremptory challenges and sought additional challenges which were denied, reversible error occurred. See Hill, 477 So. 2d at 556. Because of direct appellate counsel's failure to raise this claim on direct appeal, Salazar was prohibited from demonstrating his due process rights were violated upon the trial court's failure to remove Ms. W for cause. See Smith v. Wainwright, 484 So. 2d 31 (Fla. 4th DCA 1986) (appellate counsel is deficient where counsel fails to raise a meritorious issues). Prejudice has thereby also been established.

Because of the lower court's error in not excusing Ms. W for cause, Salazar's due process rights under the Fifth and Fourteenth Amendments were violated, as he was denied a fair and impartial trial by a jury of his peers.

Salazar's convictions and sentences must thereby be reversed.

CLAIM TWO

APPELLATE COUNSEL FOR MR. SALAZAR WAS INEFFECTIVE IN FAILING TO PRESENT ON DIRECT APPEAL CLAIMS OF FUNDAMENTAL ERROR BASED ON NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT, IN VIOLATION OF MR. SALAZAR'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

During the prosecutor's closing argument in the guilt phase, he improperly shifted the burden of proof to Mr. Salazar by insinuating that Salazar needed to prove that the prosecutor's witnesses were lying in order to be found not guilty.

These comments, un-objected to at trial, constitute prosecutorial misconduct resulting in fundamental error. Appellate counsel was ineffective for failing to raise these improper comments on direct appeal. Davis was prejudiced by appellate counsel's failure because this Court would have reversed had the issues been raised.

I. *Applicable law:*

A. Ineffective assistance of appellate counsel for failure to raise instances of fundamental error

An appellant may raise a claim of ineffective assistance of appellate counsel in a petition for writ of habeas corpus. Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000).

A court must grant habeas relief based on appellate counsel's ineffectiveness if (1) counsel's omission or overt act fell measurably below the standard of competent counsel and (2) counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Freeman, 761 So. 2d at 1069; see also Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986).

Appellate counsel may be ineffective in failing to raise instances of

fundamental error, Smith v. Wainwright, 484 So. 2d 31, 31(Fla. 4th DCA 1986) (citing Strickland v. Washington, 466 U.S. 668 (1984)), which may be raised for the first time on direct appeal, Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987).

B. Prosecutorial misconduct may rise to the level of fundamental error

The United States Supreme Court ("USSC") recognizes that prosecutorial misconduct can rise to a level of invasiveness that warrants new proceedings. In Greer v. Miller, 483 U.S. 756, 765 (1987) the Supreme Court stated:

> This Court has recognized that prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process. To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial.

Id., citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); United States v. Bagley, 473 U.S. 667, 676 (1985). In Darden v. Wainwright, 477 U.S. 168, 181 (1986), the USSC set forth the Standard of Review to use in assessing the impact of prosecutorial misconduct:

> It is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

Id. citing Darden v. Wainwright, 699 F. 2d 1031, 1036 (11th Cir. 1983); Donnelly, 416 U.S. 637 (1974) (internal citations omitted).

II. ***The prosecutor in Salazar's trial committed prosecutorial misconduct by making multiple improper statements that resulted in fundamental error:***

In Mr. Salazar's case, the instances of prosecutorial conduct against below constitute fundamental error because they were so prejudicial that they tainted the jury's verdict. Mendoza v. State, 964 So. 2d at 133 (citing Fennie v. State, 855 So.2d 597, 609 (Fla.2003)).

A. Improper prosecutorial comments in guilt phase closing argument

1. *Improper burden shifting*

The prosecutor distorted the State's burden of proof by asserting that jurors would have to disbelieve testimony of their two main witnesses to acquit Salazar:

> STATE: Could you, the 12 of you as jurors have listened to all of this testimonial evidence, seen the physical evidence, seen the photos, put it all together and reached the conclusion that Neil Salazar is not guilty? Could it be done? Well, let's walk through, what would you have to do to do that?
>
> First, the most obvious thing is let's look at Ronze Cummings. You would have to find that Ronze Cummings lied to you. You'd have to find that minutes after that crime, that he lied to Deputy Chapman, that he lied to T.J. Brock, that he lied to the EMS workers that were working on him, that he lied to everyone there. You'd have to find that he lied a couple days later when he's laying in a hospital, tubes coming out of them, bullets have been removed from his head, and he's giving a sworn statement to Detective Brock.

> You'd have to find that he was lying a week later when he's finally release from the hospital, his wife is dead, he's driven back to Okeechobee for another sworn statement, he lied then. Because every one of those he said "Neil did it."
>
> You'd have to go further and you'd have to find that he was lying during the testimony that he gave in the previous trials, that he was lying in all of the depositions that he gave to all these lawyers, those stacks of sworn statements from the beginning all the way through those, you'd have to find that he was lying. You'd have to find that when he took that stand and you looked at him and you looked in his eyes and he told you this horrible crime that occurred to him and to his wife and to his child, that he lied to you about all of that.
>
> …
>
> You'd have to find that a man who went through all of that would lie to you about the person responsible for killing his wife, killing the mother of his children and trying to kill him. But I suppose you could force yourself to try to do that. If you did all that, could you find him not guilty? Well, what else would you have to do?

(18 R 1982-1985.) The prosecutor then made the same inference for its only other witness tying Salazar to this crime, Julius Hatcher, the co-Defendant who admitted he, not Salazar, was the one that shot and killed the victim, and shot Mr. Cummings twice in the head:

> STATE: Let's look at Julius Hatcher. Julius Hatcher said that man is guilty of murder also for what he did. So you got to discount him, too, you've got to find that Julius Hatcher was lying.

….

> Now you got a third problem. What about the fact that Ronze's testimony and Julius's testimony are identical? They both said exactly what happened, duct tape, bags, dragged into separate rooms, they both say that man walked into the house with a machine gun and said to Hatcher "if you don't' do what I say, I'm going to leave you here, too." So you would have to think that not only Ronze lying after all he had been through, not only is Julius lying because apparently he was smart enough to see into the future and build this lie in, but what are the odds, what are the probabilities that two men who didn't know each other, or at least hadn't seen each other since they were three years old, who by all the testimony of Ronze, of Julius and of law enforcement had absolutely no contact with each other prior to giving their statements, came up with the exact same lie? I suppose you could force yourself to try to believe that.

(18 1985-1988.) The prosecutor compounded this error by asking the jury if the defense's cross-examination of these two state witnesses made them wonder if Salazar's defense was that the state's case was a fantasy, as if the murder did not even occur:

> STATE: You know, some of the cross-examination of Ronze Cummings and particularly Julius Hatcher make you wonder is the Defense contending that this didn't happen, that this is all some kind of a, you know, fantasy here. We know that's not true. And we know that Julius Hatcher is involved because he said so...

(18 R 1978-1979.)

Florida courts have found reversible error for a prosecutor to make similar arguments that shift the burden of proof in a case. The Florida Supreme Court has explained that:

> [t]he standard for a criminal conviction is not which side is more believable, but whether, taking all the evidence into consideration, the State has proven every essential element of the crime beyond a reasonable doubt. For that reason, it is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict the defendant for some reason other that the State has proved its case beyond a reasonable doubt.

Gore v. State, 719 So. 2d 1197, 1200 (Fla. 1998). Similarly, this Court has explained:

> It is well settled that due process requires the state to prove every element of a crime beyond a reasonable doubt, and that a defendant has no obligation to present witnesses. Accordingly, the state cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence.

Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991). When arguing to the jury, the State may not make comments that mislead the jury as to the burden of proof. Id.

In the present case, in arguing that in order to acquit Salazar the jury would have to disbelieve the only two state witnesses connecting Salazar to the crime, the prosecutor improperly distorted their burden of proof. These comments implied Salazar had a burden to prove that these state witnesses were lying in order to establish his innocence – but a defendant has no such burden.

The test for reasonable doubt is not simply which side is more believable. All of the state's witnesses could be telling the truth and the State would still have the burden of proving beyond a reasonable doubt all of the elements of the crime. By implying that a Defendant had the burden of disproving the State's witnesses, the prosecutor's repeated and exhausting statements impermissibly shifted the burden of proof. See Hayes v. State, 660 So. 2d 257, 265 (Fla. 1995) ("The prosecutor's questions and statements in the instant case may have led the jury to believe that Hayes had an obligation to test the evidence found at the scene of the murder and to prove that the hair and blood samples did not match his own. Clearly, Hayes had no such obligation."); Atkins v. State, 878 so. 2d 460, 461 (Fla. 3d DCA 2004); Clewis v. State, 605 So. 2d 974, 975 (Fla. 3d DCA 1992) (citing United States v. Stanfield, 521 F. 2d 1122, 1125 (9th Cir 1975)).

The almost identical comments made here were found to constitute reversible error in Mitchell v. State, 118 So. 3d 295 (Fla. 3d DCA 2013). During the rebuttal portion of the closing argument, the prosecutor made the following arguments:

> STATE: What the defense is asking you do is to believe that every single witness in this case is a liar, because that's what would have to happen for this man over here to be not guilty. Even single person has to be a liar except him.

Id., at 296-297. After an objection from defense counsel and an instruction from the court to rephrase the argument because it was "confusing the burden," the

prosecutor continued with the same theme:

> "STATE: You would have to take the evidence that Doctor Carro gave you, find that she is wrong. You would have then also take what Gary Pitterman said and that what he said didn't happen at all, because you can't have both what the Defendant said and what Mr. Pitterman said."

Id. at 296. Later in the rebuttal, the prosecutor returned to this theme and argued "[i]n order to believe the defendant not guilty you would have to suspend all the evidence on its ear." The defense objected and the court overruled the objection. The prosecutor pressed the point and told the jury "[i] would cause you to have to ignore everything that you've heard." Defense counsel again objected, and the court again overruled. Id.

In reversing Mitchell's conviction, the Third DCA found the prosecutor erred in framing the argument in a manner that improperly shifted the burden of proof by implying that the Defendant had the burden to establish that the State's witnesses were lying, crossing the line of permissible argument into an erroneous statement of the government's burden of proof. Id. at 297; see also Clewis v. State, 605 So. 2d 974, 975 (Fla. 3d DCA 1992) (holding that the prosecutor distorted the State's burden of proof by shifting that burden to the defense in asserting that jurors would have to disbelieve testimony of the State's witnesses to acquit).

Similarly, in Paul v. State, 980 So. 2d 1282 (Fla. 4th DCA 2008), the prosecutor's sole proof that the Defendant was guilt of the charges charged was the

testimony of one witness. In its closing, the prosecutor's short improper burden-shifting comments resulted in reversible error:

> STATE: [T]he State has the burden of proving all these elements beyond a reasonable doubt. And if [the defense attorney] wants to present theories of how she believes this case should play out, there's got to be some level of proof form that Mr. Laboy was lying."

Paul, 980 So. 2d at 1283. The defense objected to this comment, whereby the trial court overruled the object and explained its belief that it was fair comment on the evidence. The 4th DCA reversed in holding that the prosecutor's comment improperly shifted the burden to the defendant because it insinuated the defendant needed to prove that the prosecutor's witness was lying in order to be found not guilty. Id. at 1283.

Likewise, in Atkins v. State the sole evidence against the defendant was the victim's identification. 878 So. 2d 460 (Fla. 3d DCA 460). In closing argument, the defense argued to the jury that the Defendant was not claiming the victim was lying, but that the victim was mistaken, reiterating the discrepancy between the victim's description and the Defendant's physical appearance. In response, the prosecutor in Atkins argued:

> "Their…argument is that the person arrested is not the same person that is here today because [the victim] is not a liar.
>
> We're not saying that [what the victim] said is not true, he must be mistaken and he said he's not a liar. He would have to be a liar, he would absolutely have to be a liar."

Id. The defense moved for a mistrial, which was denied. In finding the trial court abused its discretion in denying the motion for mistrial, the Atkins court found the prosecutor's comment improperly shifted the burden of proof to the Defendant by implying the jury could ignore Defendant's argument that acquittal was proper if it believed the victim's identification was a mistake because the defendant did not prove the victim was lying. Id. at 461. But see, Rivera v. State, 840 So. 2d 284 (Fla. 5th DCA 2003) (prosecutor's comment that jury had to believe victim was a liar to acquit Defendant considered fair argument when viewed in context), *cause dismissed*, 875 So. 2d 1240, 2003 Fla. LEXIS 2178, SC03-2074 (Fla. Dec. 4, 2003).

B. Fundamental error- the state admitted at trial that without witness Hatcher, Salazar "would walk," demonstrating the critical importance of the jury's determination of Hatcher and Cummings' credibility

In the present case, the fundamental error analysis is uniquely simple question to determine – the prosecutor conceded during closing argument that without witness Mr. Hatcher's testimony, Salazar "would walk, " stressing the importance of the jury's determination of their two main witnesses credibility:

> STATE: You may not like the deal, you may or may not like the concept that the State would give the shooter in this case some consideration, give him his life; not give him his freedom, give him his life. You may not like that. Nobody is happy about that. Nobody is happy about having to make any

> accommodation. But this is the real world, **and if Hatcher is not available as a witness, the person who did this act, who directed this act, who had it done and who not only took the life of one person, tried to take the life of another person, and for all practical purposes has taken the life of Hatcher by putting him in a position where he's committed an offense that will put him in prison, I'm sure, for the rest of his life, *would walk. He could have walked out of here***. So we made this case a little bit better by bringing the other person who made a statement real early saying that Neil was the one directing everything.

(18 R 1969.) Undoubtedly, the importance to the state in having witness Hatcher and witness/victim Cummings be found credible by the jury is undeniable. Their testimony were the only pieces of evidence connecting Salazar directly to these crimes. Not only did the comments shift the burden from the state to prove the case beyond a reasonable doubt, but they also put in the jurors' minds that the burden was on Salazar to prove his innocence only if he could prove these two witnesses were lying.

Where a case boils down to the credibility of two witnesses (one of which was the co-Defendant and the other one of the victims that did not provide Mr. Salazar's name as a suspect in the shooting when he made the call to 911) that the jury is told have to be lying in order for them to acquit, fundamental error occurs. Indeed, this is the essence of fundamental error – error that "reaches down into the

validity of the trial itself to the extend that a verdict of guilty could not have been obtained without the assistance of the alleged error." See State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991).

Fundamental error has been found in improper comments by prosecutor in closing argument. See Barnes v. State, 743 So. 2d 1105, 1109 (Fla. 4th DCA 1999) (funding fundamental error and reversing where the prosecutor denigrate defense counsel by stating that his witness was a "hire gun" and "mercenary"); Jacques v. State, 883 So. 2d 902, 906 (Fla. 4th DCA 2004) ("We conclude that in this case, in which the sole issue was the credibility of the witnesses, the trial court's improper commenting on the credibility of a witness constitutes fundamental error."); Grant v. State, 194 So. 2d 612, 613 (Fla. 1967) (finding a contemporaneous objection unnecessary to reverse after the State asked in its closing argument, "Do you want to give this man less than first-degree murder and the electric chair and have him get out and come back and kill somebody else, maybe you?"); Pait v. State, 112 So. 2d 380 (Fla. 1959) (despite lack of objection, comments of prosecutor that although the defendant had a right to appeal the jury's decision, the State was unable to do so, and that prosecutor and his staff considered the death penalty appropriate were reversible error); Rosso v. State, 505 So. 2d 611 (Fla. 3d DCA 1987) (finding fundamental error based on improper comments regarding defendant's use of the insanity defense in both opening statement and closing

argument despite objections only to opening remarks).

In the instant case, where the guilt of innocence of Mr. Salazar hinged on the credibility of Hatcher and Cummings, and the state knew it, the state impermissibly shifted the burden of proof where it implied that Mr. Salazar had to prove that Hatcher and Cummings were lying.

III. ***Deficient performance and prejudice:***

Mr. Salazar's appellate counsel provided deficient representation in failing to raise the above claims of fundamentally erroneous prosecutorial misconduct on direct appeal. Pittman v. State, 90 So. 3d 794, 819 (Fla. 2011), reh'g denied (June 7, 2012) (Appellate counsel fails to provide proper representation by not raising issues of prosecutorial misconduct on appeal where a prosecutor's statements were not objected to by trial counsel and the prosecutor's statements constitute fundamental error); Smith v. Wainwright, 484 So. 2d 31 (Fla. 4th DCA 1986) (Appellate counsel is deficient where counsel fails to raise a meritorious issue.)

As demonstrated above, the prosecutor made improper remarks throughout Mr. Salazar's closing arguments and these statements resulted in fundamental error. Thus prejudice is established, as it has always been the state's burden to establish every element of its case and, these burden-shifting arguments have repeatedly been deemed improper by Florida courts.

The errors cannot be harmless. The cumulative effect of these errors denied

Mr. Salazar his fundamental rights under the United States Constitution the Florida Constitution. Brooks v. State, 762 So. 2d 879 (Fla. 2000) (finding cumulative effect of prosecutor's improper remarks in closing argument was fundamental in nature); DeFreitas v. State, 701 So. 2d 593 (Fla. 4th DCA 1997) (finding cumulative effect of prosecutor's improper remarks in closing argument was fundamental in nature).

The effect of the errors at his trial individually and cumulatively created an unreliable guilt phase verdict and death sentence, resulting in a conviction(s) and death sentence were violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United Sates Constitution.

CONCLUSION

Based on the reasons specified above, Mr. Salazar requests that this court grant his petition for writ of habeas corpus and reverse that Mr. Salazar's convictions and sentences for new trial.

Respectfully submitted,
THE SICHTA FIRM, LLC.,
/s/ Rick Sichta

RICK SICHTA, ESQUIRE
Fla. Bar No.: 0669903
301 W. Bay St. Suite 14124
Jacksonville, FL 32202
Phone: 904-329-7246
Email: rick@sichtalaw.com
Attorney for Appellant

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been delivered via email to the Office of the Attorney General at capapp@myfloridalegal.com and Leslie.Campbell@myfloridalegal.com on this 7th day of May, 2014.

/s/ Rick Sichta_____

A T T O R N E Y

CERTIFICATE OF COMPLIANCE AND AS TO FONT

I **HEREBY CERTIFY** that this brief is submitted by Appellant, using Times New Roman, 14-point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure Rule 9.210(a)(2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

/s/ Rick Sichta_____

A T T O R N E Y