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IN THE SUPREME COURT OF FLORIDA

NEIL KURT SALAZAR,

Petitioner,

vs. Case No. SC14-887

STATE OF FLORIDA,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PROCEDURAL HISTORY

On July 19, 2000, Salazar and co-defendant, Julius Hatcher ("Hatcher"), were indicted for first-degree murder of Evelyn Jean Nutter ("Nutter"), attempted first-degree murder of Ronze Cummings ("Cummings"), burglary of a dwelling while armed, and grand theft of a motor vehicle. The instant crimes took place on or about June 26 and 27, 2000. (R.1 14-17) On August 8, 2001, Salazar was arrested and formally charged. (R.1 23-24) Opening statements commenced on March 6, 2006 and on March 9th, the jury returned guilty verdicts with special interrogatories, convicting Salazar of first-degree murder while carrying, displaying, or using a firearm under both the premeditated and felony murder theories; of attempted first-degree murder while carrying, displaying, or using a firearm; burglary during which an assault was committed; and theft of a motor vehicle (R.4 609-11; R.13 23-24).

Following the penalty phase, the jury unanimously recommended a sentence of death (R.4 612). The *Spencer*[1] hearing was conducted on May 5, 2006 where the State presented evidence in an attempt to rebut claimed mitigation of good behavior. (R.20 2239-69) Upon the trial court's consideration, on May 30, 2006,

[1] *Spencer v. State*, 615 So.2d 688 (Fla.1993).

Salazar was sentenced to death for Nutter's murder (R.4 658-63). The judgment and sentencing documents for the non-capital cases were entered on June 12, 2006 and showed Salazar received life sentences for the attempted first degree murder of Cummings and for the burglary. The court imposed a five year term for the theft conviction. The non-capital sentences were to run concurrently with each other, but consecutively to the death sentence (R.4 664-74). On June 22, 2006, Salazar appealed raising seven issues.[2] (R.4 675). On July 10, 2008, this Court affirmed. *Salazar v. State*, 991 364 (Fl. 2008).

Subsequently, Salazar petitioned the United States Supreme Court for certiorari review. On February 23, 2009, certiorari review was denied. *Salazar v. Florida*, 129 S.Ct. 1347 (2009).

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[2] Salazar raised: (1) Whether the Court erred in denying the Defense motion for mistrial during the State's final argument when the State told jurors that it had made a deal with Hatcher so that Appellant would not "walk" lest there be another attempt on Ronze Cummings' life; (2) Whether the Court erred in letting the State present Det. Brock's testimony that he was "trying to find the truth" in his investigation; (3) Whether the Court erred in finding the cold calculated and premeditated (CCP) circumstance; (4) Whether the Court erred in allowing Appellee to Argue to the Jury that Cummings and Hatcher were terrorized during the burglary; (5) Whether the Court erred in overruling Appellant's objection to the jury instruction on the cold calculated and premeditated (CCP) circumstance on the ground that it failed to require that the State prove that Appellant intended to kill before the crime began; and (6) Whether Florida's death penalty statute is constitutional.

During his collateral litigation, Salazar filed on or about February 8, 2010, a motion for post-conviction relief pursuant to Rule 3.851 Fla.R.Crim.P. and requested leave to amend. The State, on April 12, 2010, responded. Salazar was given leave to amend and such amendment was filed on September 1, 2010. The State's response followed.

The court granted an evidentiary hearing on Claims III, IV(b) - (c), V, and VII of the first amended motion for relief. Due to problems with witness scheduling, the evidentiary hearing was held in three phases, consisting of a video hearing in Stuart on March 24, 2011, a hearing in Okeechobee on March 28 – 30, 2011, and a video hearing in Stuart on August 31, 2011. The first two hearing dates of 2011 addressed all issues and Salazar presented the following witnesses: Sadie Francis, mother of one of Salazar's children; Russell Akins, guilt phase counsel; Jeff Smith, penalty phase counsel; Jackie Ray Carmichael, defense private investigator; Juan Pineda, Capital Collateral Counsel's investigator; Dr. Gayle McGarrity, cultural anthropologist; Arlene Lambert, Salazar's sister; Barry Witlin, prior defense counsel; and Mark Harllee, Assistant Public Defender with the 19th Judicial Circuit. The State presented Sergeant Patricia Williams and Inspector Sydney James of the St. Vincent Police from St. Vincent and the Grenadines, and Donovan Leighton, formerly the legal attaché for the United States Embassy in

Barbados. The conclusion of the hearing was delayed when Salazar decided to proceed pro se and the court granted his motion to file a second amended motion for post-conviction relief based on newly discovered evidence.

Salazar filed that second motion on June 12, 2012 which the court summarily denied on August 21, 2012, but allowed newly appointed counsel to amend the legally insufficient newly discovered evidence claims. Salazar's counsel filed the third amended motion on September 24, 2012. The court held a case management hearing on it on November 15, 2012 when it summarily denied all the claims.

The last phase of the evidentiary hearing on the claims in the first amended motion was held on January 28 through February 1, 2013. During that hearing, Salazar presented mental health professionals, Drs. Harry Krop, Thomas Oakland, and Philip Harvey. The State called: Prior defense counsel, Barry Witlin and Elio Vasquez; Ritchie Fredrick and Kevin James Gray of the Department of Highway Safety and Motor Vehicles; Deputy Sheriff Ronnie White; Department of Corrections Sergeant Danielle Craig; court reporter, Margaret Douglas; State attorney Office Investigator, Edward Arens; and Dr. Greg Prichard. The court denied all the claims in a written order dated June 11, 2013. Salazar's appeal of the trial court's denial of his 3.851 claims are currently pending in *Salazar v. State*,

SC13-1233.

The instant Amended Petition for Writ of Habeas Corpus was filed on May 7, 2014.

REASONS FOR DENYING THE PETITION

On June 24, 2014, Salazar filed a petition for writ of habeas corpus alleging that his appellate counsel was ineffective on direct appeal for two reasons. First, Salazar claims that appellate counsel was ineffective for failing to argue on direct appeal that the trial court erred in denying defense counsel's cause challenge to prospective juror Ms. W. Petition, 12-29. Salazar goes on to allege that appellate counsel was also ineffective for failing to present on direct appeal claims of fundamental error with regard to different instances of alleged prosecutorial misconduct during the State's guilt phase closing argument. Petition, 29-43. While a petition for writ of habeas corpus is the appropriate vehicle to raise claims of ineffective assistance of appellate counsel; *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000); *Groover v. Singletary*, 656 So.2d 424, 425 (Fla. 1995), this Court will find that the issues are without merit since Salazar has failed to prove that appellate counsel's actions were both deficient and prejudicial as required under *Strickland v. Washington*, 466 U.S. 668 (1984). Relief must be denied.

SALAZAR WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL (Restated)

"The standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the *Strickland v. Washington* standard for claims of trial counsel ineffectiveness." *Valle v. Moore*, 837 So.2d 905, 907-08 (Fla. 2002) (citations omitted). Given that the *Strickland* standard applies, this Court stated recently:

> Thus, the Court must consider first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. ... "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." ... Nor is appellate counsel "necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue."... Additionally, this Court has stated that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object. See, e.g., *Ferguson v. Singletary*, 632 So.2d 53, 58 (Fla. 1993) (finding appellate counsel was not ineffective in failing to raise allegedly improper prosecutorial comments made during the penalty phase where trial counsel did not preserve the issues by objection).

Walls v. State, 926 So.2d 1156, 1175-76 (Fla. 2006) (citation omitted). *See Armstrong v. State*, 862 So.2d 705 (Fla. 2003).

In sum, appellate counsel cannot be deemed ineffective for failing to raise issues "that were not properly raised during the trial court proceedings," or that "do not present a question of fundamental error." *Valle*, 837 So.2d at 907-08 (citations omitted); *See Rodriguez v. State*, 919 So.2d 1252, 1282 (Fla. 2005). Further, appellate counsel is not ineffective for failing to raise non-meritorious claims on appeal. Id. at 907-08 (citations omitted). "If a legal issue would in all probability have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." *Armstrong*, 862 So.2d at 718. *See Jones v. Barnes*, 463 U.S. 745, 751-753 (1983); *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990). This Court has reiterated that "the core principle" in reviewing claims of ineffectiveness raised in a state habeas corpus petition is that "appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success." *Holland v. State*, 916 So.2d 750, 760 (Fla. 2005). With these principles in mind, it is clear that Salazar has not met his burden and all relief must be denied.

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL A CLAIM THAT THE TRIAL COURT ERRONEOUSLY DENIED SALAZAR'S CAUSE CHALLENGE AS TO PROSPECTIVE JUROR MS.

W. (RESTATED)

During jury selection, prospective juror Ms. W. was questioned at length with regard to her ability to serve as an impartial juror. On the law of principals, the following exchange occurred:

> MR. SEYMOUR: Same question as to principals, is that a fair concept, that a person who doesn't commit a crime but who is involved to the extent that the law requires, knows a crime is going to be committed and assists somebody else by encouraging , inciting , offering to help, whatever, that the law says they' re both guilty?
>
> ****
>
> M R. SEYMOUR: …Mrs. - - is it Widdifield?
>
> MS. WIDDIFIELD: Yes, sir.
>
> M R. SEYMOUR: Same question, any problem with that concept?
>
> MS. WIDDIFIELD: No, sir.
>
> M R. SEYMOUR: Any problem applying it if the Judge says "Here is the instruction," you decide if the evidence is sufficient to convict on that basis , any problem - - any problem convicting if the evidence is there?
>
> MS. WIDDIFIELD: No, sir.

(R Vol. 8, 597-598)

Ms. W. was also questioned about her ability to apply the burden of beyond

a reasonable doubt and her ability to find Salazar guilty despite the fact that the death penalty could be imposed. Mrs. W. responded in the following fashion:

> M R. SEYMOUR: Okay. If you'll pass that Mrs. Widdifield, same question, any problem bringing back a guilty verdict if we prove our case beyond a reasonable doubt?
> MS. WIDDIFIELD: No, sir, not beyond a reasonable doubt.
>
> MR. SEYMOUR: Okay. And that kind of begs the question , because when you say "beyond a reasonable doubt," and I emphasize the word "reasonable," you can set that doubt - - you're going to hear and you've already heard that reasonable doubt is defined in terms of the words. They're not going to define it in terms of the facts in this case, the Judge isn't going to say "Find these facts, then the State has proved it beyond a reasonable doubt. Find these facts, the State has failed to prove it." You're going to have to figure out where is reasonable doubt in this case. And if you don't want to convict, you - - more high tech - - you can set it way up here and if you want to convict, you can move it down here (indicating). We' re asking you to leave the burden where it stands. Is that a fair request?
>
> MS. WIDDIFIELD: Yes, sir.
>
> M R. SEYMOUR: And leaving the standard where it belongs, do you think you would have any problem bringing back a guilty verdict?
>
> MS. WIDDIFIELD: No, sir.
>
> M R. SEYMOUR: How about the death penalty, the fact that there could be a death sentence imposed in this case, would that make it harder for you to bring back a guilty verdict?
>
> MS. WIDDIFIELD: No, sir.
>
> M R. SEYMOUR: Let me explain something here. This trial is

going to be divided into two parts, the guilt phase, what we call the guilt phase, and the penalty phase, and if you find this Defendant to be guilty of first- degree murder, then there's a whole separate proceeding, much shorter one, but a proceeding that would concentrate on the facts of the case, and the Defendant and his background and so forth. And you would look into it and determine what we call aggravating and mitigating circumstances, we'll talk more about that later when we talk about the death penalty, but you' re going to learn in order to find him guilty, that has to be a unanimous verdict, everybody has to agree to it, all of you. In order to bring in a death sentence, that requires only seven out of 12, seven to five is a vote for death. Any thought that " If I really don't think this is a death case, I can kind of finagle the result here by not finding the man guilty of first- degree murder"?

MS. WIDDIFIELD: I think we would have to discuss it as a group.

M R. SEYMOUR: Okay. And what I'm asking you is can you take the first phase, say " I'm going to disregard any sympathy for this man, going to disregard the consequences to him which could result later in him getting death," and you being even outvoted for that, and just say "I'm going to look at the facts, I'm going to look at the law and whatever they call for, that' s my verdict in this case," can you do that?

MS. WIDDIFIELD: Yes, sir.

M R. SEYMOUR: Wouldn't bother you or trouble you to do that, whichever way it goes?

MS. WIDDIFIELD: No, sir.

(R Vol. 8, 601-604)

Mrs. W. was then questioned at length individually as to her feelings on the

death penalty as well as her ability to be impartial if selected to serve on the jury by both the State and Defense:

> MR. ALBRIGHT: And by the same token, is there anything about [the State's treatment of her friend's son who was involved in a crime] that would cause you to treat Mr. Salazar unfairly in this trial in this case?
>
> MS. WIDDIFIELD: No, sir.
>
> MR. ALBRIGHT: 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. WIDDIFIELD: Yes, sir.
>
> MR. ALBRIGHT: And you had put that you agree with it as needed.
>
> MS. WIDDIFIELD: Yes, sir.
>
> MR. ALBRIGHT: 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 and in 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. Reasons why this case is worse than other murder cases, reasons why Mr. Salazar as a person is more deserving of death. They would also present 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. WIDDIFIELD: Yes, sir, I would.

MR. ALBRI GHT: 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. WIDDIFIELD: Yes, sir, I do.

M R. ALBRIGHT: 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 give 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. WIDDIFIELD: Yes , sir.

M R. ALBRIGHT: 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. WIDDIFIELD: Yes, sir.

MR. ALBRIGHT: Thank you.

THE COURT: Thank you. Mr. Akins.

MR. AKINS: Mrs. - -

THE COURT: Oops, Miss Widdifield, Mr. Akins gets to ask some questions.

MS. WIDDIFIELD: I'm sorry.

MR. AKINS: Almost got away. You had said earlier also that you had heard something or read something about this case prior to coming in.

MS. WIDDIFIELD: Yes, sir, I - - I had a student in my classroom.

MR. AKINS: Okay. And was the I mean, I'm assuming you have a lot of students in your classroom, but was this someone that was talking about it or someone that was involved in it?

MS. WIDDIFIELD: No, sir, it was Ronze.

MR. AKINS: Okay. Were you familiar with the family?

MS. WIDDIFIELD: From a professional standpoint, but not individually.

MR. AKINS: Well, had you had parent/teacher meetings with them or---

MS. WIDDIFIELD: Just---

MR. AKINS: - - would you know them to see them?

MS. WIDDIFIELD: Now? No, sir.

MR. AKINS: Okay.

MS. WIDDIFIELD: Too many students ago.

MR. AKINS: Okay. At the time that you had Ronze as your student, was that the same - - did that coincide with the crimes that were alleged here today?

MS. WIDDIFIELD: Yes, sir.

MR. AKINS: Have you derived any preconceived notions of what happened by the knowledge that you gained?

MS. WIDDIFIELD: No, sir, I have not.

MR. AKINS: Okay. Understanding that you taught Ronze, the child, do you feel that you can still be fair and impartial and listen to all the evidence?

MS. WIDDIFIELD: I believe I could.

MR. AKINS: 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. WIDDIFIELD: 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.

MR. AKINS: Okay. How often during the course of a week would you see the child?

MS. WIDDIFIELD: Three times.

MR. AKINS: Okay. So - - and that was over the whole - - the course of the whole year, would he stay in your reading group for- -

MS. WIDDIFIELD: Three times a week, yes, sir .

MR. AKINS: 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 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 than not; is that a fair statement?

MS. WIDDIFIELD: As you said, that questionnaire is not very - - not very open. It would depend on - - totally on the circumstances.

MR. AKINS: 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. WIDDIFIELD: I would look at all the evidence as 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.

MR. AKINS: Okay. So - - but if you were - - you wouldn't have a hard time imposing death if you were convinced that he was guilty?

MS. WIDDIFIELD: No, sir.

MR. AKINS: No matter what the mitigation was or what the Judge told you?

MS. WIDDIFIELD: Well, it again would be completely within the evidence and what I see and understand.

MR. AKINS: I'm - - may be 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. WIDDIFIELD: Again, it would depend entirely on the evidence as presented.

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

THE COURT: Okay. Mr. Seymour or Mr. Albright.

MR. ALBRIGHT: No other questions.

THE COURT: Okay. Thank you.

MR. AKINS: One other question. Did young Ronze, did you have any conversations with him about what had happened?

MS. WIDDIFIELD: No, sir.

MR. AKINS: Okay. Now, I got a little problem with that , because you said earlier you found out about it through him or was it just because he was in your class?

MS. WIDDIFIELD: In our class and it was just - - yeah, just a matter of conversation.

MR. AKINS: With who?

MS. WIDDIFIELD: In the teachers' lounge.

MR. AKINS: So you - - you weren't involved in anything with him direct, where he was talking about it or you didn't overhear any conversations?

MS. WIDDIFIELD: No, sir, that was strictly with counselors.

MR. AKINS: Okay. Counselors meaning counselors that were talking with Ronze?

MS. WIDDIFIELD: That came in to the school, yes, sir.

MR. AKINS: And they talked with you because you were one of the teachers?

MS. WIDDIFIELD: No, no, no, sir, not the counselors.

MR. AKINS: So you didn't - - it was just other teachers you were around?

MS. WIDDIFIELD: Exactly.

MR. AKINS: I'm straight now, thank you.

(R. Vol. 8, 657-665).

Finally, Ms. W. was questioned about her thoughts on Salazar's right to remain silent:

MR. AKINS: 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 yourself 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 "?

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MR. AKINS: Miss Widdifield?

MS. WIDDIFIELD: No, sir, I trust the attorneys would do a good job.

MR. AKINS: Well, it's not just - - I mean in any circumstance that - - well, let me ask you this. Why do you think that a person, any person generically wouldn't take the stand in their own defense?

MS. WIDDIFIELD: I have no idea why they wouldn't.

MR. AKINS: Okay. Well, are you kind of a little bit nervous today with all of these people around talking?

MS. WIDDIFIELD: No, sir.

(R. Vol. 11, 1050).

Despite these exchanges which demonstrate that prospective juror Ms. W. was certainly well qualified to serve as a juror, Salazar contends that she should have been dismissed for cause. Accordingly, Salazar contends that appellate counsel was ineffective for failing to argue on direct appeal that the trial court erred in denying his cause challenge against Ms. W. Petition, 12-29. Salazar's argument is devoid of any merit and must be patently rejected.

At the outset, Appellee points out that appellate counsel cannot be deemed

ineffective for failing to raise the propriety of the trial court's denial of the cause challenge where this issue was waived by Salazar at trial. As reiterated by this Court in *Carratelli v. State*, 961 So. 2d 312, 318 (Fla. 2007):

> The preservation of a challenge to a potential juror requires more than one objection. When a trial court denies or grants a peremptory challenge, the objecting party must renew and reserve the objection before the jury is sworn. *See Zack v. State*, 911 So.2d 1190, 1204 (Fla. 2005). "By not renewing the objection prior to the jury being sworn, it is presumed that the objecting party abandoned any prior objection he or she may have had and was satisfied with the selected jury." *Id.*

This Court explained that such a requirement is necessary as it "gives the trial court one last chance to correct a potential error and avoid a possible reversal on appeal. It also allows counsel to reconsider the prior objection once a jury panel has been selected. Without such a requirement, the defendant 'could proceed to trial before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial.' [citations omitted]". *Carratelli*, 961 So.2d at 319; *see also Matarranz v. State*, 133 So. 3d 473, 482 (Fla. 2013)("*Carratelli* and related case law demonstrate that it is the objection/re-objection process—not the re-listing of specific, individual, and previously objected-to jurors—that is the decisive element in a juror-objection-preservation analysis.").

Prior to swearing in the jury in the case at bar, the trial court announced all their names "to make sure we're all in agreement…" (R. Vol. 11, 1105). When asked whether there was any objection to this jury, defense counsel agreed with the jury makeup, without qualification (R. Vol. 11, 1106). The panel was then sworn (R. Vol. 11, 1114). As Salazar's claim of alleged trial court error in its denial of Salazar's challenge of Ms. W. was unpreserved, it could not therein form the basis of a new trial. *Carratelli v. State*, 961 So. 2d 312, 319-20 (Fla. 2007)("Even where the reviewing court concludes that a juror who actually served on the jury should have been stricken, however, the court will not reverse for a new trial if the error has not been preserved. *See Singer v. State*, 109 So.2d 7 at 19 (Fla. 1959)(finding reasonable doubt as to one juror's impartiality, but refusing relief on this claim because it was not preserved for review)". Accordingly, appellate counsel cannot be deemed ineffective for failing to raise a claim for which relief could not be granted. *See Valle*, 837 So.2d at 907-08; *see also Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000)("However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion."); *Williamson v. Dugger*, 651 So. 2d 84, 86-87 (Fla. 1994).

Even assuming that Salazar's claim was properly preserved, he still cannot

demonstrate that appellate counsel was ineffective for failing to raise it where the claim was utterly devoid of merit. In *Busby v. State*, 894 So. 2d 88, 95 (Fla. 2004), this Court succinctly described the standard of review to be applied to such claims:

> "It is within a trial court's province to determine whether a challenge for cause is proper, and the trial court's determination of juror competency will not be overturned absent manifest error." *Fernandez v. State*, 730 So.2d 277, 281 (Fla.1999). The decision to deny a challenge for cause will be upheld on appeal if there is support in the record for the decision. *See Gore v. State*, 706 So.2d 1328, 1332 (Fla.1997); *see also 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."); *Smith v. State*, 699 So.2d 629, 635-36 (Fla.1997) ("In reviewing a claim of error such as this, we have recognized that the trial court has a unique vantage point in the determination of juror bias. The trial court is able to see the jurors' voir dire responses and make observations which simply cannot be discerned from an appellate record.").
>
> The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. *See Lusk v. State*, 446 So.2d 1038, 1041 (Fla.1984). A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *See Bryant v. State*, 656 So.2d 426, 428 (Fla. 1995); *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 recommendation as to punishment, the juror must be excused for cause").

Applying this standard, Salazar cannot demonstrate any error in the trial court's denial of his cause challenge against Ms. W.

To begin, there is no evidence to support Salazar's contention that her views on capital punishment disqualified her from jury service. Ms. W. was clear that she understood that the State had to prove Salazar guilty beyond a reasonable doubt and would hold the State to this standard (R. Vol. 8, 601-603). Ms. W. also assured that she would hold the State to this standard despite the fact that a death sentence may ultimately be imposed (R. Vol. 8, 603). She would not treat Salazar unfairly in the trial (R. Vol. 8, 657).

Ms. W. went on to agree that she checked the box on the jury questionnaire which indicated that she considered the death penalty "generally appropriate with very few exceptions" (R. Vol. 8, 657). She later explained, however, that the questionnaire was not very open and that her decision as to whether to apply the death penalty would actually "depend on ---totally on the circumstances" (R. Vol. 8, 662). This after being explained that aggravating and mitigating circumstances would be presented to the jury during the penalty phase portion of the trial, if indeed there was one (R. Vol. 8, 657-658).

The record is clear that Ms. W. assured the State that she would listen to both presentations[3] if a penalty phase hearing ensued (R. Vol. 8, 658). She would follow the law even if the law was different from her personal opinions (R. Vol. 8, 659). Ms. W. was also clear as to how she would decide the penalty:

> I would look at all the evidence as 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.

(R. Vol. 8, 663). Indeed, Ms. W. remained of this opinion despite defense counsel's numerous attempts to bait her into saying something to the contrary.[4]

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[3] To the extent that Salazar complains about a lack of follow up questions to clarify what Ms. W was referring to when she used the word "evidence" in explaining what she would have to consider before making a decision, Appellee again points out that habeas is not the proper vehicle to raise issues that should have been raised in a post conviction motion. *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000)("However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion.").

[4] MR. AKINS: Okay. So - - but if you were - - you wouldn't have a hard time imposing death if you were convinced that he was guilty?

MS. WIDDIFIELD: No, sir.

MR. AKINS: No matter what the mitigation was or what

In an attempt to demonstrate error where there is none, Salazar resorts to speculation in attempts to prove his contention that Ms. W. had an "eye for an eye" mentality wherein she would have recommended death regardless of the mitigation. Specifically, Salazar speculates that such is true where Ms. W. selected B in the questionnaire as to her feeling on the death penalty – that is "generally appropriate with very few exceptions" (R. Vol. 8, 657). Petition, 15. Further, Salazar surmises that because Ms. W. would have trouble sentencing someone to death based on weak evidence of guilt, then, inversely, Ms. W. would recommend a sentence of death where there is strong evidence of guilt. Petition, 19.

Salazar's leaps in logic cannot form the basis for relief. Although it is true that Ms. W. selected the choice which read "generally appropriate with very few

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> the Judge told you?
>
> MS. WIDDIFIELD: Well, it again would be completely within the evidence and what I see and understand.
>
> MR. AKINS: I'm - - may be 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. WIDDIFIELD: Again, it would depend entirely on the evidence as presented.

(R. Vol. 8, 663-664)

exceptions" as to her view on the death penalty, the selection does not equate to an automatic disqualification for jury service. Instead, the answer merely alerts the parties that a bias ***may*** exist thus affording them the ability to test that juror and ensure that the "juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court". *Spencer v. State*, 842 So. 2d 52, 65 (Fla. 2003); *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 852, 83 L. Ed. 2d 841 (1985)(reaffirming that the standard for juror exclusion is not a juror's view on the death penalty but "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'").

In an attempt to garner support for his position, Salazar compares Ms. W's testimony to the testimony of the jurors at issue in *Hill v. State*, 477 So.2d 553 (Fla. 1985), *Matarranz v. State*, 133 So.3d 473 (Fla. 2013), *Johnson v. Reynolds*, 121 So. 793 (Fla. 1929), *Overton v. State*, 801 So.2d 877 (Fla. 2001), and *Hamilton v. State*, 547 So.2d 630 (Fla. 1989). Salazar's reliance on these cases is misplaced as the facts in each of these cases are wholly distinguishable than the case at bar. What is more, the facts in *Overton* actually support Appellee's position.

To begin, in *Hill*, the juror at issue made it abundantly clear that he had kept up with media reports about Hill's case and had already formed an opinion on the guilt or innocence of the people charged. *Hill*, 477 So.2d at 554-555. Moreover, the juror was clear that he had already formed an opinion as to whether the death penalty should be imposed. *Id.* The juror also offered that, if there was a conviction, he was already inclined towards the death penalty. *Id.* In light of this testimony, this Court determined that said juror should have been excused for cause.

Likewise, the juror in *Matarranz* repeatedly expressed her reservations about being an impartial juror in light of the fact that Matarranz was charged with burglary. *Matarranz*, 133 So.3d at 477. The juror explained that because of her past experiences (having had her house burglarized as a child on Christmas and having a cousin who was the victim of a fraud), she held a grudge. *Id.* She admitted that although she could have an open mind, "-knowing myself I think I would lead 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." *Id.* at 478. She went on to make other statements expressing hesitance about being an impartial jury. *Id.* at 479.

When again questioned the next day, the juror explained that she thought

about it overnight and could now say she could follow the law and hold the State to their burden. *Id.* at 479-480. Notwithstanding the juror's newfound assurances, this Court opined that the juror should have been stricken for cause where "[a]ssurances of impartiality after a proposed juror has announced prejudice is questionable at best". *Id.* at 485. The totality of the juror's responses were deemed to have sufficiently placed in doubt her ability to be impartial. *Id.* at 488. Indeed, these were also the circumstances in *Hamilton* where, although she later relented, the juror originally "stated she had a preconceived opinion of Hamilton's guilt and that it would take evidence put forth by Hamilton to convince her he was not guilty" and in *Johnson* where the juror expressed his doubt to be impartial as a result of his friendship with the plaintiff before relenting. *Hamilton*, 547 So.2d at 632; *Johnson*, 121 So. at 597.

Although Salazar cites to *Overton* in support of his position, Overton actually directs that relief be denied where those facts resemble the ones at bar. In *Overton*, the juror in question originally noted that he favored the death penalty in cases where the defendant is found guilty of first-degree murder. However, after sitting through an explanation of Florida's sentencing scheme, the juror "expressed a 'great deference' to the trial court's instructions, and noted, on several occasions, that he would 'start from a clean slate,' follow the law, and abide by the sentencing

scheme which required him to consider aggravating and mitigating circumstances." *Overton v. State*, 801 So. 2d 877, 894 (Fla. 2001). This Court determined that the trial court did not err in denying Overton's cause challenge as to this juror citing *Castro v. State*, 644 So.2d 987 (Fla. 1994) and explaining:

> Our conclusion in that case was premised on the record evidence indicating that once these jurors were advised that they were responsible for weighing aggravating and mitigating factors, they all indicated that they would be able to follow the law. *See id.* In doing so, we noted:
>
> > Not surprisingly, the prospective jurors had no grounding in the intricacies of capital sentencing. Some of these jurors came to court with the reasonable misunderstanding that the presumed sentence for first-degree murder was death.
>
> *Id.* Our reasoning in *Castro* was based on an observation we find ever present in many death penalty cases. That is, the average juror summoned for prospective service in a case where the State is seeking the death penalty enters the courtroom without any true insight whatsoever into the elements or factors involved in capital sentencing proceedings. They are overwhelmingly unaware of the existence of the bifurcated process by which defendants may be tried and ultimately sentenced to the death penalty. They similarly do not possess the requisite familiarity with the necessary balancing scheme whereby aggravating and mitigating factors are weighed against each other in an effort to produce a proportionate sentence

Overton v. State, 801 So. 2d 877, 893-94 (Fla. 2001)

Here, Ms. W did not make any assertions that she was prejudiced against Salazar, or that she had any preconceived opinions about the case. Instead, she indicated that she considered the death penalty "generally appropriate with few exceptions". This was on a questionnaire filled about before the jurors get a quick glance of what the law is on Florida's sentencing scheme during voir dire examination. The record is clear, however, that, after she received a brief overview of Florida's sentencing scheme, Ms. W steadfastedly assured the parties that she would not make any decisions without first hearing the evidence and that she would follow the law in making those decisions.

Further, Salazar is not entitled to relief based on his conclusory allegation that "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". Petition, 19. To begin, this argument is unpreserved. Although at the time of counsel's cause challenge, he did not elucidate his basis, he later explained that challenge was based on juror W's alleged "extreme feelings on the death penalty" (R Vol. 11, 1101). This was the only basis counsel mentioned when he was seeking an additional preemptory. Accordingly, any concern that Salazar now raises with regard to Juror W's responses with regard to his right to remain silent are unpreserved.

That being said, the claim is also with merit. Although Salazar phrases this allegation as if Ms. W offered this statement in a vacuum, the context is enlightening. Ms. W did not sua sponte make this statement. Instead, the statement was in direct response to defense's question as to whether she could think of a reason why someone would not take the stand. She could not. This inability to think of a reason, however, does not negate her assurance that she would not hold a defendant's failure to testify against him (R. Vol. 11, 1050).

Likewise, there is no merit to Salazar's contention that Ms. W should have been excused for cause as a result of her "unique experiences with the victim's child". Petition, 19. In addition to also being unpreserved where, again, defense counsel did not raise this concern before the trial court, the issue is also without merit. It is without dispute that Ms. W taught a child of the victims' during the time of the crime. However, there is no evidence in the record that Ms. W had any sort of relationship with that child which would have justified her being stricken for cause. Instead, the record is replete with evidence that demonstrate that Ms. W was poised to be a fair and impartial juror.

Contrary to Salazar's suggestion, there was no special relationship between Ms. W and the victim's child which would have suggested an inferred bias. To be sure, Ms. W was clear in her explanation of her relationship, not to a party in the

case, but to a child of a party. He was in her reading group three times a week for one school year (R Vol. 8, 661). Her relationship with the child's family was professional, not individual (R. Vol. 8, 660). In fact, she would not recognize them if she saw them because it was "too many students ago" (R. Vol. 8, 660-661). She did not have any preconceived notions about the cause as a result of her interaction with the victim's child (R. Vol. 8, 661). She learned nothing of the case from the child. She believed she could be fair and impartial even though she had known the victims' child (R. Vol. 8, 661).

Despite the fact that Ms. W was clear about her ability to be impartial, Salazar attempts to show error by inflating the value of Ms. W's answer to defense's question as to whether she had "any special bias or sympathy just by virtue of what the child has had to go through" (R. Vol. 8, 661). Although Ms. W answer "Yes, sir, for the child.", the answer is not dispositive[5]. Assuming that Ms. W even understood the question[6], the fact that she sympathizes with the victim's

[5] In fact, the answer was at best ambiguous when read in conjunction with the question asked. As the question asked was in the form of a double negative, Juror W's answer could be read as an affirmation that she had no special bias for the child, i.e. "Yes, sir [I don't have any special bias] for the child…".

[6] Appellee questions whether Ms. W understood the question posed as the rest of her response was in the form of a non sequitor ("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.")(R Vol. 8, 661).

child does not direct excusal for cause. Indeed, as best explained by the Illinois State Supreme Court in 1886:

> [The juror] stated distinctly he did not 'know as there was any reason why' he could not 'try this case fairly and impartially.' It is true he did state if he had any sympathy it would be with the 'young man that lost his limb,' and that he 'would have no sympathy for the railroad.' That is simply an expression of kindly feeling common to all good people, and certainly the possession of so kindly a spirit would not disqualify a citizen otherwise competent from acting in the capacity of a juror. Notwithstanding any sympathy he might have, he stated he would not violate his 'oath under any circumstances,' and when asked whether he would 'endeavor to do justice between the two parties' he answered without hesitation that he would. The juror was competent, and there was not the slightest grounds for sustaining the challenge as to him for cause.

Chicago & W.I.R. Co. v. Bingenheimer, 116 Ill. 226, 232, 4 N.E. 840, 842 (1886)

The test is not whether a juror ***has*** certain feelings or views but whether a juror can set aside any specific feelings or views and render a decision based solely on the evidence. *Penn v. State*, 574 So. 2d 1079, 1081 (Fla. 1991)(affirming the trial court's denial of cause challenges against two jurors – one who indicated he strongly favored the death penalty and one who said she did not have sympathy for people with voluntary chemical dependencies where "they ultimately demonstrated their competency by stating that they would base their decisions on the evidence

and instructions"); *Lusk v. State*, 446 So.2d 1038, 1041 (Fla.), *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984)("The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court.").

At bar, Ms. W expressed that she had sympathy for the victims' child[7] - an understandable expression of general sympathy for any child under the circumstances. Nevertheless, Ms. W was clear that she believed she could be fair and impartial in listening to the evidence and rendering a verdict (R. Vol. 8, 661). Ms. W did not waiver from her statement that before making any decisions, she needed to weigh the evidence. There was no basis for a cause challenge to be sustained. In fact, contrary to Salazar's contention, the decision was not even a "close call". Petition, 21.

Even assuming that Salazar can somehow show that Ms. W should have been stricken for cause, he is still not entitled to relief where he cannot demonstrate prejudicial impact. As explained in *Busby v. State*, 894 So.2d 88, 96-97 (Fla. 2004):

[7] Although one of the victims' children was present at the time of the crime, the record suggests that it was not the same child with whom Ms. W was familiar.

> In the State of Florida, expenditure of a peremptory challenge to cure the trial court's improper denial of a cause challenge constitutes reversible error if a defendant exhausts all remaining peremptory challenges and can show that an objectionable juror has served on the jury. *See Trotter v. State*, 576 So.2d 691 (Fla.1991). As explained in *Trotter*, "This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted."

Although Salazar complains that he was prejudiced because Juror Gragg sat on the jury, he has failed to so much as even attempt to demonstrate, either below or on appeal, that Juror G was an objectionable juror. That is because Salazar cannot demonstrate that Juror G was objectionable. Indeed, although defense counsel spent little time interviewing Juror G, her answers were nothing other than assertions that she could be fair and impartial and would honor her duties as a juror (R. Vol. 8, 612-614, 809-813).

In sum, there is no evidence to support Salazar's contentions that prospective juror Ms. W. either harbored some type of "eye for an eye" mentality or would recommend death simply because a defendant was found guilty of the crime charged. Moreover, there is no evidence that Ms. W had either a special relationship with the victims' child or would allow the fact that she knew the victims' child at one time sway her decision in any way. Quite the contrary – the

record is replete with evidence to sustain the trial court's finding that

> [Ms. W's] answers and her demeanor certainly to the Court were all consistent with where she should not be struck for cause…she seemed to have confident in her decision. She did have the child in her class, but said she couldn't remember what he looked like now or wouldn't recognize him because it's been so long, been five years…she has no preconceptions, said she believed she could be fair and impartial, wouldn't affect her, these are words she used…

(R Vol. 8, 666)

Salazar's contentions are not borne out by the record but are based on nothing more than supposition and conjecture. Accordingly, Salazar has not demonstrated ineffectiveness on the part of appellate counsel. *Maharaj v. State*, 778 So.2d 944, 951 (Fla. 2000) ("Postconviction relief cannot be based on speculation or possibility.").

> **APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESENT ON DIRECT APPEAL CLAIMS OF FUNDAMENTAL ERROR DURING THE STATE'S CLOSING WHERE THE STATE DID NOT SHIFT THE BURDEN OF PROOF (RESTATED)**

During the State's closing argument, the State posited:

> 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 released 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?

***

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.

(R. Vol. 18, 1982-1988.)

In light of this argument, Salazar complains that appellate counsel was ineffective for failing to argue that portions of the State's closing argument "improperly shifted the burden of proof [] by insinuating that [he] needed to prove that the prosecutor's witnesses were lying in order to be found not guilty." Petition, 30. Although Salazar agrees that no objection to the argument was raised below, he maintains that he is entitled to relief where the State's argument amounted to fundamental error. Again, Salazar's position must be rejected where the State's argument, when read in context, was appropriate. As the argument did not amount to fundamental error, Salazar cannot demonstrate that appellate counsel

was ineffective. *Valle*, 837 So.2d at 907-08

To begin, Appellee submits that the instant claim is procedurally barred. On direct appeal, Salazar challenged the State's closing argument, albeit, on different grounds.[8] *Salazar v. State*, 991 So. 2d 364, 372 (Fla. 2008)("We conclude that while the prosecutor's comments were improper, they were not so prejudicial as to deny Salazar a fair trial."). Appellate counsel did not prevail in his attempt to demonstrate that the State's closing argument constituted reversible error making this claim nothing more than an expression of dissatisfaction with the fashion in which appellate counsel raised and argued the claim. The law is undisputed that counsel cannot be deemed ineffective for failing to prevail on a litigated issue. *Teffeteller v. Dugger*, 734 So.2d 1009, 1019 (Fla. 1999)(determining that counsel's failure to prevail on a motion does not constitute ineffectiveness); *Bush v. Wainwright*, 505 So.2d 409, 411 (Fla. 1987)("The fact that [counsel's] strategies resulted in a conviction augurs no ineffectiveness of counsel."); *Porter v. Crosby*, 840 So.2d 981, 984 (Fla. 2003)("[C]laims raised in a habeas petition which petitioner has raised in prior proceedings and which have been previously decided

[8] Indeed, on direct appeal, Salazar specifically took issue with the portion of the State's argument wherein the State argued that a deal was made with co-defendant Hatcher where without his testimony, Salazar "would walk. He could have walked out of here." (R Vol. 18, 1969)

on the merits in those proceedings are procedurally barred in the habeas petition."); *Zack v. State*, 911 So.2d 1190, 1207 (Fla. 2005) (finding habeas corpus may not be used for second appeal of questions which could have/were raised on appeal and claims of ineffective appellate counsel may not be used to circumvent this rule). Because claims of prosecutorial misconduct were raised and rejected on direct appeal, Salazar may not use his habeas petition to obtain a second appeal of the matter.

In addition to being procedurally barred, however, the issue is devoid of any merit. Generally, wide latitude is permitted in addressing a jury during closing argument. *Breedlove v. State*, 413 So.2d 1, 8 (Fla.), *cert. denied*, 459 U.S. 882 (1982). Logical inferences may be drawn and legitimate arguments advanced by prosecutors within the limits of their forensic talents to effectuate law enforcement. *Spencer v. State*, 133 So.2d 729 (Fla. 1961). In order to determine whether improper remarks constitute reversible error, they should be reviewed within the context of the closing argument as a whole and considered cumulatively within the context of the entire record. *Brooks v. State*, 762 So.2d 879 (Fla. 2000). In order to require a new trial, the improper comment must:

> either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so

> inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise.

Spencer v. State, 645 So.2d 377, 383 (Fla. 1994).

In order to preserve a claim of prosecutorial misconduct "the defense must make a specific contemporaneous objection at trial." *San Martin v. State*, 717 So.2d 462, 467 (Fla. 1998). Absent a contemporaneous objection, an appellate court will not review closing argument comments unless they constitute fundamental error. *Kilgore v. State*, 688 So.2d 895, 898 (Fla. 1996); *Wyatt v. State*, 641 So.2d 355, 360 (Fla. 1994). Where alleged misconduct is unpreserved, the conviction will not be overturned unless a prosecutor's comments are so prejudicial they vitiates the entire trial, *State v. Murray*, 443 So.2d 955, 956 (Fla. 1984) or "so prejudicial as to taint the jury's recommended sentence." *Peterka v. State*, 890 So.2d 219, 243-44 (Fla. 2004) (citations omitted). In the absence of fundamental error, appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue. *Peterka*, 890 So.2d at 243-44; *Schwab v. State*, 814 So. 2d 402, 414 (Fla. 2002).

At bar, Salazar cannot demonstrate error, let alone fundamental error. This court in *Gore v. State*, 719 So.2d 1197 (Fla. 1998), explained the types of comments that may constitute improper burden-shifting:

> The 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 than that the State has proved its case beyond a reasonable doubt. *See Northard v. State*, 675 So.2d 652, 653 (Fla. 4th DCA), review denied, 680 So.2d 424 (Fla.1996); *Clewis v. State*, 605 So.2d 974, 974 (Fla. 3d DCA 1992); *Bass v. State*, 547 So.2d 680, 682 (Fla. 1st DCA 1989). Here, the prosecutor's statement, "[i]f you believe he's lying to you, he's guilty," was nothing more than an exhortation to the jury to convict Gore if it found he did not tell the truth. Thus, it was a clearly impermissible argument. *See Bass*, 547 So.2d at 682; *cf. Craig v. State*, 510 So.2d 857, 865 (Fla. 1987).

Id. at 1200-01. In sum, the State cannot invite the jury "to convict the defendant for a specific reason other than the state's proof of the elements of the crime beyond a reasonable doubt…" *Rivera v. State*, 840 So. 2d 284, 288 (Fla. 5th DCA 2003) *cause dismissed*, 875 So. 2d 1240 (Fla. 2003).

In reviewing the context of the State's closing argument, it is clear that the State issued no such invitation. Instead, the argument was a proper response to the theme of Salazar's defense and arguments made by defense counsel. At trial, it was clear that Salazar's defense was that the victim, Ronze Cummings and co-defendant, Julius Hatcher were intentionally lying about what happened that night

and Salazar's role in the crime in order to cover up some type of drug business. This theme was clear not only during Cummings' cross-examination, but was confirmed during Salazar's closing argument (R Vol. 14-15, 1497-1567), (R Vol. 18, 1995-1996):

> Just like the drug dealer that gets ripped off, you don't call the police and say "I got ripped off." You don't do it. What are you going to say, "I had my dope here and they ripped it off?" No, Ronze Cummings put in motion the facts and circumstances that led to Evelyn Nutter's death with Fred Cummings, and Fred Cummings and Ronze Cummings have set this entire process in motion and he had plenty of opportunity and motive to do it.

Under these circumstances, *Rivera v. State*, 840 So.2d 284 (Fla. 5th DCA 2003), is instructive. In *Rivera*, the only issue of contention was the victim's identification of Rivera as the one who committed the burglary. During closing argument, the prosecutor told the jury that "[i]n order for you to find him not guilty, which you have the prerogative to do, but you're going to have to essentially be saying that [the victim's] identification sucks." *Rivera v. State*, 840 So. 2d 284, 286 (Fla. Dist. Ct. App. 2003) *cause dismissed*, 875 So. 2d 1240 (Fla. 2003). On appeal, Rivera argued that this statement amounted to an improper shift of the burden of proof. The Fifth District disagreed.

At the outset, the Fifth District made clear that they did not condone the

particular language used by the prosecutor, "[h]owever, it is the message, not the vernacular used by the messenger, that lies at the heart of the issue in this case." *Rivera*, 840 So. 2d at 286. In reviewing the context of the State's argument, the Fifth District determined that the argument did not amount to an impermissible shift of the burden of proof explaining:

> [w]hat each of these examples has in common, as the court in *Gore* aptly noted, is the prosecutor's invitation to convict the defendant for a specific reason other than the state's proof of the elements of the crime beyond a reasonable doubt, i.e., because the defendant failed to mount a defense by not testifying, presenting evidence to prove his or her innocence, or refuting an element of the crime. We conclude that the prosecutor's statement in the instant case can in no way be construed to be a comment on Rivera's failure to mount a defense by not testifying or presenting evidence. Rivera did present a defense and he did testify. His testimony and his defense were that, although a burglary did occur, the victim of that crime misidentified him as the person who committed it. The prosecutor simply commented on that defense and testimony by advising the jurors that they had the prerogative of finding Rivera not guilty if they believed, as Rivera argued, that the victim's identification was inaccurate and unworthy of belief. Therefore, the prosecutor's statement was not a burden-shifting comment that is improper under the case law that has addressed this issue.

Rivera, 840 So. 2d at 288.

Moreover, the Fifth District continued, had this comment been improper, it

would not have constituted reversible error where Rivera invited it. The Fifth District noted that, in his opening statement and throughout the course of the entire trial, Rivera made it clear that the only contested issue was the victim's identification. Misidentification was also the central theme of defense counsel's closing argument wherein Rivera exhorted the jurors that the victim's identification was unworthy of belief and that they must find the defendant not guilty. "Telling the jury that to find Rivera not guilty, which they had the prerogative to do, they would have to find the victim's identification unworthy of belief is nothing more than a restatement of Rivera's defense and closing argument. 'A defendant is not at liberty to complain about a prosecutor's comments in closing argument when the comment is an invited response.' *Bell v. State*, 758 So.2d 1266, 1266 (Fla. 5th DCA 2000) (citing *Parker v. State*, 641 So.2d 369 (Fla.1994))". *Rivera*, 840 So.2d at 288-289.

Despite Rivera's language, Salazar contends that reversal is warranted by *Mitchell v. State*, 118 So.3d 295 (Fla. 3d DCA 2013), *Paul v. State*, 980 So.2d 1282 (Fla. 4th DCA 2008) and *Atkins v. State*, 878 So.2d 460 (Fla. 3d DCA 2004). Reliance on these cases, however, is unwarranted. In addition to the fact that trial counsel objected to the comments in each of the cases, they are all distinguishable on their facts. In *Mitchell*, at issue was intent in how a dog suffered tragic injuries

at the hands of Mitchell. While eyewitnesses contended the injuries were intentional, Mitchell insisted he tripped over the dog. Mitchell did not dispute police witnesses' testimony with regard to the investigation conducted or the extent of the dog's injuries. However, the State argued in closing, "[w]hat 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". *Mitchell*, 118 So.3d at 297 (emphasis added). This, the Third District explained was error where "[g]iven the State's burden to prove its case beyond a reasonable doubt, the members of the jury could have believed the testimony of the police officer and the testimony of the veterinarians and still found Mitchell not guilty because they believed Mitchell's version of the events rather than Pitterman's". *Mitchell*, 118 So.3d at 297-298.

Likewise, *Paul* and *Atkins* are also distinguishable. In *Paul*, the State explicitly proposed to the jury that despite their burden, Paul was required to present evidence that the witness was lying. *Paul*, 980 So.2d at 1283. In *Atkins*, the State argued that the victim would have to be a liar in order for Atkins to be acquitted. The defense, however, was not "that the victim was lying, but that the victim was mistaken, reiterating the discrepancy between the victim's description and the defendant's physical appearance". *Atkins*, 878 So.2d at 461.

Here, the central theme of Salazar's defense was that the two eyewitnesses were lying about Salazar's involvement in the murder in order to cover up some sort of drug escapade. As in *Rivera*, the State's argument did not shift the burden of proof as the State in no way suggested that Salazar was under any duty to prove anything. Instead, the State merely agreed that if the jury believed, as suggested by Salazar, that the victim and co-defendant were lying about Salazar's acts during the crime, then he needed to be found not guilty. This argument was appropriate in light of its context.

Moreover, even if this comment can be considered an improper comment on the burden of proof, Appellee submits that it still doesn't amount to fundamental error. The argument was merely a restatement of Salazar's defense – that is, if they agreed that the two witnesses consistently lied, and were continuing to lie, about Salazar's involvement as a part of a cover-up than he needed to be found not guilty. Coupled with the fact that the State was clear in its closing argument that the burden of proof stayed with the State (R. Vol. 19, 1990)("The law says that the State has to prove this to you beyond a reasonable doubt."), Salazar cannot demonstrate that any impropriety with the State's argument vitiated the entire trial. Accordingly, appellate counsel cannot be deemed ineffective for failing to raise this error, if indeed an error, where it was not fundamental.

To the extent that Salazar seems to take issue, as he did on direct appeal, with the State's argument that a deal was made with co-defendant Hatcher where without his testimony, Salazar "would walk. He could have walked out of here." (R Vol. 18, 1969), Salazar again fails to demonstrate entitlement to relief. Indeed, Salazar does not explain why the argument was improper. Instead, he seems to contend that the argument exacerbated the effect of the alleged burden shifting as it emphasized the importance of the State's eyewitnesses. As there was no initial error to exacerbate, the State's argument that a deal with Hatcher was made in order to strengthen their case was not improper either on its own, or coupled with the State's other arguments.

In sum, this record is absolutely devoid of any evidence that appellate counsel was ineffective in his representation of Salazar. Hence, this petition must be denied.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court deny all relief based on the merits.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Response to the Petition for Writ of Habeas Corpus has been furnished by EMAIL to Rick Sichta at rick@sichtalaw.com this 14th day of August, 2014.

/s/ Leslie Campbell
LESLIE CAMPBELL

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this brief is 14 point Times New Roman, a font that is not proportionally spaced.

/S/ Leslie Campbell
LESLIE CAMPBELL