10-2-2018

Severson v. State Appellant's Brief Dckt. 45780

Electronically Filed
10/2/2018 9:17 AM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

LARRY M. SEVERSON, Petitioner-Appellant, vs. STATE OF IDAHO Respondent.	)	Case No. 45780-2018 D.Ct. No: CV-2009-1408 (Elmore County)

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the Fourth
Judicial District of the State of Idaho
In and For the County of Elmore

HONORABLE LYNN NORTON
District Judge, Presiding

John R. Kormanik KORMANIK & SNEED LLP 206 W Jefferson St. Boise, ID 83702 (208) 288-1888 Electronic Service: jrk@khsidaholaw.com Attorneys for Petitioner-Appellant	Lawrence G. Wasden Attorney General State of Idaho Kenneth K. Jorgensen Deputy Attorney General PO Box 83720 Boise, ID 83720-0010 Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

A. Nature of Case

This matter is an appeal from the district court's dismissal of Mr. Severson's *Third Amended Verified Petition for Post-Conviction Relief [on Remand]* following an evidentiary hearing. R. 45780-2018, Vol. 4, pp. 514-71.[1] The district court's dismissal is contained in its *Memorandum Decision Dismissing Post Conviction Petition After Evidentiary Hearing (on Remand)*, issued January 23, 2018. R. 45780-2018, Vol. 5, pp. 832-74. Relief should be granted because contrary to the district court's findings: (1) trial counsel's representation of Mr. Severson at trial violated the standards set forth in *Strickland v. Washington*, and Mr. Severson was prejudiced thereby because of trial counsel's failure to object to prosecutorial misconduct; (2) appellate counsel's representation of Mr. Severson violates the standards set forth in *Strickland v. Washington*, and Mr. Severson suffered prejudice thereby because appellate counsel failed to raise several instances of prosecutorial misconduct or, when he did, failed to support the offending statement with argument and authority. In short, the district court abused its discretion in dismissing Mr. Severson's *Third Amended Verified Petition for Post-Conviction Relief [on Remand]*. That decision should be reversed, and Mr. Severson should be either granted a new trial or a new appeal from his convictions.

B. Course of Proceedings

The State charged Mr. Severson with poisoning his wife by tampering with her Hydroxycut® capsules, inserting Drano® into the capsules, and first-degree murder – either by

[1] In its *Order Augmenting Appeal*, dated March 2, 2018, the Idaho Supreme Court indicated certain documents from Mr. Severson's previous appeals would be included in the record of the instant appeal. Idaho Supreme Court Case No. 32128 was Mr. Severson's direct appeal from his criminal conviction in Elmore County Case No. CR-FE-2002-158. Idaho Supreme Court Case No. 40679 was Mr. Severson's appeal from the summary dismissal of his post-conviction petition. For ease of reference, the record or transcript cited will contain the Idaho Supreme Court case number.

causing Ms. Severson to overdose on Ambien® and Unisom® or by suffocating her. R. 32128, Vol. 3, pp. 377-78.

At trial, the State was unable to present evidence of a definitive cause of death; instead, its forensic pathologist concluded the cause of death was "undetermined," and the jury was not asked to return a verdict unanimously agreeing to the means of death. Tr. 32182, Vol. 2, p. 1250, LL. 9-10; p. 1318, LL. 13-17. *State v. Severson*, 147 Idaho 694, 215 P.3d 414 (2009) (hereinafter *Severson I*). Following seventeen days of evidence and testimony, the jury returned a verdict of guilty of poisoning and a general verdict of murder. *Id.*, 215 P.3d 414. The district court sentenced Mr. Severson to a term of imprisonment of fixed life on the murder conviction with a concurrent sentence of five years for the poisoning conviction. R. 32182, Vol. 10, p. 3. He appealed, and the Idaho Supreme Court, by a vote of 3-2 (Justice W. Jones and Justice *pro tem* Kidwell dissenting), affirmed the convictions. *Id.*, 215 P.3d 414. Although affirming Mr. Severson's convictions, the majority found some of the prosecutor's closing argument statements "somewhat inflammatory because they were likely designed to appeal to the sympathies and passions of the jury," *id.* at p. 719, 215 P.3d at 439, and other statements were "arguably improper," *id.* at p. 720, 215 P.3d at 440.

Justice W. Jones dissented on the following grounds:

> I disagree with the majority's analysis on whether the numerous and substantial errors committed during trial require reversal pursuant to the cumulative error doctrine … [and] the classification of the prosecutor's misconduct during closing arguments as not constituting fundamental error. I find the prosecutor's conduct relentless and a blatant abuse of power; time and time again the prosecutor continued to engage in a pattern of conduct which waivered on and over the edge of appropriate conduct.

Id. at p. 723, 215 P.3d at 443 (Jones, W., J. dissenting). Justice *pro tem* Kidwell joined in the dissent. *Id.*, 215 P.3d at 443.

On or about October 22, 2009, Mr. Severson filed, among other things, a pro-se *Petition for Post-Conviction Relief* ("*Initial Petition")* along with supporting documentation. R. 45780-2018, Vol. 1, pp. 17-36. Included in the claims contained in the *Initial Petition* was a claim of ineffective assistance of counsel for "failure to object. [sic] During trial and during closing arguments" as well as "cumulative error." R. 45780-2018, Vol.1, pp. 25, 27. On or about December 11, 2009, the district court issued a *Notice of Intent of Partial Summary Dismissal and Order Appointing Counsel*; a Conflict Public Defender was assigned. R. 45780-2018, Vol.1, pp. 37-47. On or about April 18, 2011, this time with the assistance of counsel, Mr. Severson filed an *Amended Verified Petition for Post-Conviction Relief* (hereinafter "*Amended Verified Petition*"). R. 45780-2018, Vol.1, pp. 56-66. Included in the *Amended Verified Petition*, as the "Third Cause of Action" was an allegation Mr. Severson's Sixth Amendment right to the effective assistance of trial counsel was denied because trial counsel failed to object to "improper comments by the state in closing argument." R. 45780-2018, Vol.1, pp. 64-65. Mr. Severson also included a claim of "cumulative error" as the "Fourth Cause of Action" in the *Amended Verified Petition*. R. 45780-2018, Vol.1, pp. 65-66. On or about August 5, 2011, the state filed its *Answer to Amended Verified Petition for Post-Conviction Relief*. R. 45780-2018, Vol.1, pp. 71-89.

On or about February 13, 2012, the State filed its *Motion for Order Granting Partial Summary Dismissal* along with a *Memorandum in Support*. R. 45780-2018, Vol.1, pp. 4, 98-142. A hearing was held on the State's *Motion* on May 9, 2012. Tr. 40769, Motion Hearing, May 9, 2012. During the hearing on said *Motion*, Mr. Severson informed the district court and the State he was not waiving any of the claims asserted in the pro se *Initial Petition* and those claims were in addition to the ones raised in the *Amended Verified Petition*. On or about June 8, 2012, the State

filed its *Second Motion for Summary Dismissal*. Tr. 40769, Motion Hearing, May 9, 2012, p. 6, ll. 4-18.

On or about June 29, 2012, the district court issued its *Partial Summary Dismissal of Claims Related to Ineffective Assistance of Counsel*. R. 45780-2018, Vol.1, pp. 172-206. Therein, the district court addressed, among other things, the claim of ineffective assistance of counsel for trial counsel's failure "to object to improper, prejudicial, and inflammatory remarks and statements by the Prosecutor," which was set forth in ¶ 64 of the *Amended Verified Petition*. The district court dismissed any such claims based on its application of the doctrine of *res judicata*. R. 45780-2018, Vol.1, p. 202.

On or about July 27, 2012, the district court issued its *Second Partial Summary Dismissal of Claims*. Therein, among summarily dismissing other post-conviction claims, the Court dismissed Mr. Severson's claim of cumulative error finding, because only "one" issue remained for evidentiary hearing (whether trial counsel was ineffective for prohibiting Mr. Severson from testifying at trial and/or whether Mr. Severson's constitutional right to testify was abridged by trial counsel) there could not be "cumulative error." R. 45780-2018, Vol.2, pp. 209-18.

Thereafter, the district court then held a three-day evidentiary hearing. Tr. 40769, Evidentiary Hearing, Friday, September 7, 2012; Tr. 40769, Evidentiary Hearing, Wednesday, September 19, 2-12; Tr. 40769, Evidentiary Hearing, Friday, October 5, 2012. The hearing was limited to the claims remaining following entry of the district court's two *Orders* of summary dismissal. Tr. 40769, Evidentiary Hearing, Friday, September 7, 2012, at p. 5, l. 12 – p. 7, l. 8; Tr. 40769, Evidentiary Hearing, Friday, October 5, 2012, p. 152, ll. 5-8. Mr. Severson was precluded from inquiring into any matter which the district court had previously summarily dismissed. Following that hearing, the Court issued its *Memorandum Decision Dismissing Post Conviction*

Action after Evidentiary Hearing. R. 45780-2018, Vol.2, pp. 261-86. On January 22, 2013, the Court issued its *Judgment* with an attendant "Rule 54(b) Certificate." R. 45780-2018, Vol.2, pp. 287-88.

On or about February 28, 2013, Mr. Severson timely appealed from the *Judgment*. R. 45780-2018, Vol.2, pp. 289-91. The Office of State Appellate Public Defender was appointed to represent Mr. Severson on appeal. R. 45780-2018, Vol.2, pp. 294-95. A Conflict Appellate Public Defender was appointed. Mr. Severson argued the district court erred in summarily dismissing his claim of ineffective assistance of trial counsel for failure to object to prosecutorial misconduct during closing argument based on the doctrine of *res judicata* and whether Mr. Severson had raised a genuine issue of material fact in his clam that trial counsel was ineffective for failing to object to prosecutorial misconduct in the State's closing argument.

On or about December 23, 2015, the Idaho Supreme Court issued its opinion, on a petition for review of the Idaho Court of Appeals' decision reversing the district court's summary dismissal of the claims concerning ineffective assistance of counsel for failing to object in closing argument. *Severson v. State*, 159 Idaho 517, 363 P.3d 358 (2015) ("*Severson II*"). The Court vacated "the district court's summary dismissal of Severson's claims for ineffective assistance of counsel relating to the alleged improper statements (by the prosecutor during closing argument) that were not raised on direct appeal." *Id*., at 522, 363 P.3d 363. Of note, the Court declined to "take it upon itself to decide [whether Severson adequately raised a genuine issue of material fact concerning this claim] on the record presented, the better course of action is to remand for the district court to consider this question." *Id.*, 363 P.3d at 363. The Court also invited Mr. Severson to add any potential claims of ineffective assistance of appellate counsel when it stated: "This approach also gives the district court the opportunity to address any claims Severson may present regarding

appellate counsel's failure to raise on direct appeal those statements which the dissent noted but which the majority did not address." *Id.*, 363 P.3d at 363. The Supreme Court issued the *Remittitur* on January 19, 2016. R. 45780-2018, Vol.2, p. 325.

Justice W. Jones filed a special concurrence and dissent in part in which Justice *Pro Tem* Kidwell concurred. Justice W. Jones and Justice Pro Tem Kidwell had also dissented in the direct appeal from Mr. Severson's conviction and would have granted him a new trial based on prosecutorial misconduct. *See, Severson I*, 147 Idaho at 723, 215 P.3d at 443 (Jones, W., J. dissenting). Again, Justice W. Jones emphasized "again that the prosecutor's remarks, while perhaps not all individually worthy of reversal, amounted to an unfair trial and fundamental error when considered in the aggregate. I again note that the cumulative error doctrine supports a finding of fundamental error in this case." *Severson II*, 159 Idaho at 523, 363 P.3d at 364.

On or about March 9, 2016, this district court issued its *Order Appointing Counsel for Evidentiary Hearing on Remand* and directed the Elmore County Public Defender "to find conflict counsel to represent Mr. Severson at an evidentiary hearing on the issue remaining on remand to the District Court related to ineffective assistance of counsel because his counsel failed to object to statements not addressed by the majority which are in the dissent of the direct appeal." R. 45780-2018, Vol.2, pp. 362-28. On March 31, 2016, district court entered its *Order Appointing Conflict Public Defender*. R. 45780-2018, Vol.1, p. 9.

Eventually, Mr. Severson filed a *Third Amended Verified Petition for Post-Conviction Relief (on Remand)* ("*Third Petition*").[2] R. 45780-2018, Vol.4, pp. 514-38. The State filed its *Answer to the Third Amended Verified Petition*. An evidentiary hearing on the *Third Petition* was

[2] Mr. Severson had previously lodged with the district court a *Second Amended Verified Petition for Post-Conviction Relief*; the district court refused to accept it as drafted and, for the purposes of the record, Mr. Severson determined it was appropriate to label the *Third Amended Verified Petition for Post-Conviction Relief* as he did.

held on or about August 16, 2017. Tr. 45780-2018, March 30, 2018. Eric Fredericksen, Mr. Severson's counsel on direct appeal testified. *Id.*

Pursuant to the schedule provided by the district court, on or about September 29, 2017, Mr. Severson submitted the *Petitioner's Written Closing Argument Following Evidentiary Hearing on Remand*. R. 45780-2018, Vol.5, pp. 793-812. On or about November 17, 2017, the State submitted *Respondent's Written Closing Argument Following Evidentiary Hearing on Remand*. R. 45780-2018, Vol.5, pp. 815-23. On or about December 7, 2017, Mr. Severson submitted the *Petitioner's Written Rebuttal Closing Argument Following Evidentiary Hearing on Remand*. R. 45780-2018, Vol.5, pp. 824-31.

On or about January 23, 2018, the district court issued its *Memorandum Decision Dismissing Post Conviction Petition After Evidentiary Hearing (on Remand)*. R. 45780-2018, Vol.5, pp. 832-72. Therein, the district court denied Mr. Severson any relief and dismissed his claims of ineffective assistance of counsel against both trial and appellate counsel. R. 45780-2018, Vol.5, p. 869. On that same date, the district court issued its *Final Judgment* dismissing, with prejudice, all claims raised by Mr. Severson in his *Third Amended Verified Petition for Post-Conviction Relief [on Remand]*. R. 45780-2018, Vol.5, p. 873.

On or about February 9, 2018, Mr. Severson filed his *Notice of Appeal* from the *Final Judgment*. R. 45780-2018, Vol.5, pp.875-80. The district court appointed the Idaho State Appellate Public Defender to represent Mr. Severson in this appeal. R. 45780-2018, Vol.5, pp.881-82. On or about February 15, 2018, the *Clerk's Certificate of Appeal* was filed. On or about March 2, 2018, the Supreme Court entered its *Order Augmenting Appeal*, providing the record on appeal in this matter be augmented to include the following: (1) "the Clerk's Record and Reporter's Transcripts filed in prior appeal No. 40769, *Severson v. State* (Elmore County Case No. CV-2009-1408); and

(2) "the Transcript of the Trial in *State v. Severson*, Elmore County CRFE-2002-158, previously filed with this court in Supreme Court Docket No. 32128."

C. Statement of Facts

A. Facts from *Severson I.*

The following facts are taken from the Court's decision in *Severson I*:

> Larry and Mary Severson met in Colorado in 1995. After dating for a little over one year, the couple married and moved to Mountain Home, Idaho. By 2001, Severson and Mary began experiencing marital problems. Then, in August 2001, the couple separated after Mary learned that Severson was having an affair with a younger woman. Upon learning of the affair, Mary left Severson and returned to Colorado to stay with her mother.
>
> Initially, Mary and Severson planned on getting an uncontested divorce. Less than four months after the couple separated, however, Mary changed her mind. Instead of going forward with the divorce, Mary decided to return to Idaho and work on her marriage. In the meantime, Severson continued to see his younger girlfriend, Jennifer Watkins. Severson told Watkins that he and Mary were still getting divorced and even asked Watkins to marry him. Watkins initially accepted Severson's proposal but ended up breaking off the relationship before Mary returned to Idaho.
>
> Mary arrived back in Idaho in December 2001. Once she returned, she and Severson went to the local GNC store so she could purchase some Hydroxycut pills. Mary had started taking Hydroxycut while she was in Colorado in order to help her lose weight. During that time, the pills did not cause her to suffer any adverse side effects. Shortly after Mary began taking the pills she purchased with Severson, however, she started experiencing stomach pain and vomiting blood. This prompted Mary to inspect the pills and, upon doing so, she noticed that they were discolored and warm to the touch. Mary immediately quit taking the pills and scheduled an appointment with her doctor. At the doctor's office, Mary was diagnosed with an ulcer and given a prescription for Prevacid. During a follow-up examination, she also received a prescription for the sleep aid Ambien.
>
> On February 14, 2002, Severson called Mary's doctor and requested a refill of Mary's Ambien prescription. The doctor authorized the refill and Severson picked up the prescription later that same night. The next morning, at approximately 3:00 a.m., Severson purportedly discovered Mary lying on the couch not breathing. Upon finding his wife, Severson called his son and daughter-in-law, Mike and Nora, who immediately rushed to Severson's house. Once there, Nora called 911 and Mike began performing CPR on Mary. Before long, the paramedics arrived and transported Mary to the hospital. Efforts to resuscitate Mary continued in the ambulance and at the hospital, but were ultimately unsuccessful. Mary was pronounced dead at the hospital at approximately 4:15 a.m. that same morning. An

> autopsy revealed that Mary had ingested significant amounts of the sleep aids Ambien and Unisom, however, her cause of death was listed as "undetermined."
>
> Less than one day passed before the police began investigating Severson's role in Mary's death. Searches of Severson's home and workplace revealed several pieces of evidence including a cardboard tray with broken pieces of Hydroxycut capsules, a pharmacy receipt for Ambien, Ambien pills under a couch cushion where Mary was discovered, a plastic baggie containing Unisom pills that was hidden inside a hat with the word "dad" printed on it, Unisom tablets in Mary's bathroom and car, and an empty Ambien prescription bottle. Additionally, two bottles of Hydroxycut and an envelope containing some contaminated pills were recovered from Severson's [civil] attorney, Jay Clark.

147 Idaho at 700-01, 215 P.3d at 420-21.

B. State's Closing Argument.

Mr. Severson's trial lasted seventeen (17) days. *Severson I* at 701, 215 P.3d at 421. Closing arguments occurred on or about November 8, 2004. Tr. 32128, Vol.2, p. 3981-4146. During the State's closing argument, the prosecutor made the following improper statements,[3] none which were objected to by Mr. Severson's trial counsel:

a. "Her [Mary's] mouth opened easily. No one else in this courtroom has testified in front of you, that was there, that they injured Mary Severson's face." Tr. 32128, p. 4136, ll. 14 – 17.

b. "It [the decision to return to Mountain Home in an attempt to save the marriage] didn't go over too well. On December 18th, she [Mary] came back for Christmas to stay, left her mom's house and came back, drove back for Christmas, her last Christmas with her family." Tr. 32128, p. 3983, ll. 6-10.

c. "During this time frame [when Mary is in Colorado with her mother] the defendant is out gallivanting around with Jennifer. Some people are even saying, 'Oh, I didn't know you had a daughter.' 'Well, it's my fiancée.' He says it's his fiancée." Tr. 32128, p. 4001, ll. 11-15.

d. "And as the phone is ringing and as she [Nora Law] is talking to one of Mary's friends, Teresa Mallea, she is not breathing, she is not moving, "Come back to us, Mary, come back to us." Tr. 32128, p. 3986, ll. 10-13.

e. "So, Mary gets to come home in October to find that this 21-year-old tramp has gone inside her house and painted her guest bathroom." Tr. 32128, p. 4003, ll. 5-7.

[3] These statements were identified as being improper by the dissent in *Severson I*.

f. "Yeah, she [Mary] had some mild depression. Who wouldn't, after finding out your husband is screwing some 21-year-old, having an affair with some 21-year-old girl, and you're getting shipped back to Colorado. Who wouldn't be a little depressed about that, as a young woman?" Tr. 32128, p. 4039, l. 23-p. 4040, l. 3.

g. "Could that have happened? I suppose, in the same way that there are little green aliens could be coming to us from Mars or something. It is possible in one way, shape, or form that that's exactly what somebody did." Tr. 32128, p. 4052, ll. 2-6.

h. "I would love to talk to Mary Severson and find out, on the early-morning hours of February 15th, how she was feeling. How did the meal make her feel? How did it feel to go to dinner with her husband, and not be able to order the food you want? … How many sleeping pills did she take? Why did she take them? If she took them, did she know how many she took? I don't get to do that. I don't get to ask those questions. Nobody does." Tr. 32128, p. 4125, ll. 6-16.

i. "All we know is that according to Dr. Dawson, the State's expert in this case – I think a very credible individual, with nothing to lose in this matter – gave you a good answer as to how he figured out the totals [number of pills ingested by Mary]." Tr. 32128, p. 4125 16-21.

j. "Mike Severson didn't see them [bruises on Mary's face]. He wasn't doing that much. That's force. That's effort. That's putting your hand, at least plausibly, in somebody's face and making sure the breath is out of there. And making sure you have done the job right, because by God that woman just won't die. She's strong; she is the strong one. Tr. 32128, p. 4058, ll. 9-15.

k. "Please don't hold that fact, that Mr. Howen may have said she [Mr. Severson's girlfriend Jennifer] was nineteen instead of the ripe old age of 21. Or, she still looks like she is about 19." Tr. 32128, p. 4119, ll. 20-23.

l. "And I guess all the witnesses say that they saw Larry running around with a girl they thought was his daughter, who was a teenager, who was all of age 18 or 19. That may have been playing in his [the other prosecutor's] mind." Tr. 32128, p. 4119, l. 24-p. 4120, l. 3.

m. "We are done. Mr. Frachiseur and I, and Mr. Matthews and Mr. Howen. Our job here before you is complete. Innocent until proven guilty, yes. Today ends that preposition. There is no innocence in this courtroom except the innocence of Mary Severson. She didn't have to die. The only reason she did was the lust and greed of the defendant to get out of a marriage rather than divorce so he could get all the money and then some; and he could pursue his other women, not this fat woman that he saw in front of him who refused to give him the divorce." Tr. 32128, p. 4145, l. 24-p. 4146, l. 10.

C. Direct Appeal.

Eric Fredericksen represented Mr. Severson in the appeal from his criminal conviction and testified at the evidentiary hearing on remand. Tr. 45780-2018, p. 12, ll. 14-22. According to Mr. Fredericksen, he identified "quite a bit of prosecutorial misconduct" in the trial record. Tr. 45780-2018, p. 14, ll. 17-18; p. 15, l. 4. Indeed, Mr. Fredericksen raised **some** instances of prosecutorial misconduct on direct appeal. R. 45780-2018, Exhibit Vol.2, p. 160, pp. 247-55. He did not, however, raise **all** issues identified as prosecutorial misconduct by the dissent in *Severson I* in the briefing despite the fact a "cumulative error" argument was presented to the Court. R. 45780-2018, Exhibit Vol.2, pp. 255-56. Additionally, Mr. Fredericksen failed to support a portion of the argument for reversal of Mr. Severson's conviction based on prosecutorial misconduct with either argument or authority and, thus, the Court did not consider it. *Severson I*, 147 Idaho at 719 n.33, 215 P.3d at 439 n.33.

ISSUE PRESENTED ON APPEAL

Did the District Court Erred in Dismissing Mr. Severson's *Third Amended Verified Petition for Post-Conviction Relief [on Remand]* following an evidentiary hearing.

ANALYSIS

I. Standard of Review

As recently stated in *Icanovic v. State*:

> Post-conviction proceedings are civil in nature and therefore the applicant's allegations must be proven by a preponderance of the evidence. When appellate review of a district court's denial of post-conviction relief follows an evidentiary hearing, rather than a summary dismissal, the evidence must be viewed most favorably to the trial court's findings. On review, this Court will not disturb the district court's factual findings unless they are clearly erroneous. However, this Court exercises free review of the district court's application of the relevant law to the facts. If a district court reaches the correct result by an erroneous theory, this

> Court will affirm the order upon the correct theory. Additionally, constitutional issues are pure questions of law over which this Court exercises free review.

159 Idaho 524, 528-29, 363 P.3d 365, 369-70 (2015) *citing Murray v. State*, 156 Idaho 159, 163-63, 321 P.3d 709, 713-14 (2014).

II. Argument

A. Applicable Standards.

1. *Uniform Post-Conviction Procedure Act.*

The Uniform Post-Conviction Procedure Act states, in relevant part: "Any person who has been convicted of, or sentenced for, a crime and who claims: That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state" can petition for relief. Idaho Code § 19-4901(a)(1).

2. *Prosecutorial Misconduct.*

> Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial.

State v. Perry, 150 Idaho, 209, 227, 245 P.3d 961, 979 (2010).

> It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury." *State v. Christiansen*, 144 Idaho 463, 469, 163 P.3d 1175, 1181 (2007) (quoting *State v. Irwin*, 9 Idaho 35, 44, 71 P. 608, 611 (1903)). Prosecutors, therefore, should not "exert their skill and ingenuity to see how far they can trespass upon the verge of error, [because] generally in so doing they transgress upon the rights of the accused." *Id*. Prosecutorial misconduct occurs "[w]here [the] prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence[.]

State v. Lankford, 162 Idaho 477, 494, 399 P.3d 804, 821 (2017).

3. *Ineffective Assistance of Counsel*.

Mr. Severson alleged both his trial and appellate counsel were constitutionally ineffective and that there is a reasonable probability the outcome of his trial and/or appeal would have been different had his respective counsel not been ineffective. A defendant in a criminal case is guaranteed the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment has been incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the individual states. *Powell*, 287 U.S. 45, 73 (1932).

In general, a claim of ineffective assistance of counsel, whether based upon state or federal constitutional principles, is analyzed under the familiar and well-established standards set forth in *Strickland*, 466 U.S. 668 (1984). *State v. Matthews*, 133 Idaho 300, 306, 986 P.2d 323, 329 (1999). To prevail under *Strickland*, a petitioner must prove: (1) counsel's performance was deficient in that it fell below standards of reasonable professional performance; and (2) this deficient performance prejudiced the petitioner. *Strickland*, 466 U.S. at 689. The prejudice prong of *Strickland* is satisfied if there is a reasonable probability a different result would have been obtained had the attorney acted properly. *Id.* "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

Although challenges to counsel's "strategic" or "tactical" decisions will not generally satisfy the first *Strickland* prong, simply labeling a decision "strategic" or "tactical" does not insulate those decisions from review. The touchstone of any decision by trial counsel is reasonableness: "The relevant question is not whether counsel's choices were strategic, **but**

whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000) (emphasis added).

It is well settled that "even the best attorney may render ineffective assistance" on occasion. *United States v. DeCoster*, 487 F.2d 1197, 1202 n. 21 (D.C. Cir. 1973); *United States v. Winsor*, 675 F. Supp. 2d 1069, 1073 (D. Or. 2009). Under the Fourteenth Amendment of the United States Constitution, U.S. CONST. amend. XIV, criminal defendants have a right to counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387, 388 (1985). Of course, the right to appellate counsel includes the right to the effective assistance of that counsel. *Id.* at 396-97. Ineffective assistance by appellate counsel violates the Fourteenth Amendment to the United States Constitution.

An ineffective appellate counsel claim requires proof of deficient performance and prejudice. *Mitchell v. State*, 132 Idaho 274, 277, 971 P.2d 727, 730 (1998); *Baxter v. State*, 149 Idaho 859, 863, 243 P.3d 675, 679 (Ct. App. 2010). Counsel's performance must fall below an objective standard of reasonableness sufficient to show a "**reasonable probability** that, but for counsel's errors, the result would have been different." *Mitchell* at 277, 971 P.2d at 730 *citing Strickland*, 466 U.S. 668 (emphasis added). Thus, the test to evaluate ineffective assistance of appellate counsel claims is the same familiar *Strickland* standard of deficient performance and prejudice that governs ineffective assistance of trial counsel claims. *Mitchell* at 277, 971 P.2d at 730. The touchstone of a claim of ineffective assistance of appellate counsel is, of course, reasonableness. *Flores-Ortega*, 528 U.S. at 482.

B. The District Court Erred In Finding Certain Statements Were Considered On Direct Appeal.

The district court incorrectly found two statements made by the prosecutor in closing argument, which form the bases of some of Mr. Severson's ineffective assistance of trial and

appellate counsel claims, were considered on direct appeal. The prosecutor's statements that the district court found had been previously "considered" or determined are:

> "[Mary's] mouth opened easily. No one else in this courtroom has testified in front you, that was there, that they injured Mary Severson's face."
>
> "So, Mary gets to come home in October to find that this 21-year-old tramp has gone inside her house and painted her guest bathroom."

The district court abused its discretion in making its findings with regard to these statements.

"To determine whether a trial court has abused its discretion, this Court considers whether it correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its decision by an exercise of reason." *State v. Rawlings*, 159 Idaho 498, 504, 363 P.3d 339, 345 (2015) *citing Reed v. Reed,* 137 Idaho 53, 57, 44 P.3d 1108, 1112 (2002).

Although not utilizing the words "issue preclusion" or "*res judicata*," the district court nevertheless appears to have applied those concepts to some of Mr. Severson's claims. Under Idaho law, issue preclusion bars an issue from being relitigated if, *inter alia,* "the issue decided in the prior litigation was identical to the issue presented in the present action" and "the issue sought to be precluded was actually decided in the prior litigation." *Severson II*, 159 Idaho at 521, 363 P.3d at 362.

The district court found the *Severson I* Court's analysis of the statement "[t]his is a circumstantial case, because nobody was in that house that night but Mary and Larry. Nobody knows, that has testified, what happened between them," was, apparently, similar enough to the statement "[Mary's] mouth opened easily. No one else in this courtroom has testified in front you, that was there, that they injured Mary Severson's face" to warrant its finding that the "Supreme

Court considered this statement on direct appeal." Thus, the district court determined it "[would]not reconsider the statement." R. 45780-2018, Vol.4, p. 843.

The district court found the *Severson I* Court's analysis of the statements "21-year-old tramp" two months before Mary's death and that he was "screwing some 21-year-old," *Severson I*, 147 Idaho at 720-21, 215 P.3d at 440-41, was sufficiently similar to the statement "So, Mary gets to come home in October to find that this 21-year-old tramp has gone inside her house and painted her guest bathroom" to warrant its finding that the second statement "was addressed on direct appeal." R. 45780-2017, Vol.4, p. 846-47. This is, simply, incorrect and an abuse of the district court's discretion.

The district court abused its discretion in its finding. Each statement referenced in this section was identified by the **dissent** in *Severson I* but was not addressed by the majority opinion. *See Severson I*, 147 Idaho 694, 215 P.3d 414. Accordingly, the district court's dismissal of the *Third Amended Verified Petition for Post-Conviction Relief* must be reversed.

C. The District Court Erred In Concluding Statements It Found Constituted Prosecutorial Misconduct Did Not Amount To Fundamental Error.

The district court found a remarkable number of instances of prosecutorial misconduct during the State's closing argument – five – but, inexplicably determined none of the misconduct constituted fundamental error. R. 45780-2018. Vol.4, p. 851 ("[t]he Court finds the prosecutor's statement was improper and constituted error"); p. 854 ("the Court finds the statement[s] … were improper as they serve no purpose but to enflame the passion and prejudice of the jury"); p. 854 (the Court incorporates its previous findings finding statement was made to enflame the passion and prejudice of the jury); p. 857 ("Because the comment on Mary's innocence was improper, the Court finds the statement constitutes prosecutorial misconduct."); and p. 858 ("the form of the

prosecutor's argument undoubtedly enflamed the passion and prejudice of the jury."). The offending statements are:

> "All we know is that according to Dr. Dawson, the State's expert in this case – I think a very credible individual, with nothing to lose in this matter – gave you a good answer as to how he figured out the totals [number of pills ingested by Mary]."
>
> "Please don't hold that fact, that Mr. Howen may have said she [Mr. Severson's girlfriend Jennifer] was nineteen instead of the ripe old age of 21. Or, she still looks like she is about 19."
>
> "And I guess all the witnesses say that they saw Larry running around with a girl they thought was his daughter, who was a teenager, who was all of age 18 or 19. That may have been playing in his [the other prosecutor's] mind."
>
> "There is no innocence in this courtroom except the innocence of Mary Severson. She did not have to die."
>
> "The only reason she did [die] was the lust and greed of the defendant to get out of a marriage rather than divorce so he could get all the money and then some; and he could pursue his other women, not this fat woman that he saw in front of him who refused to give him a divorce."

The district court erred.

"It is improper to misrepresent or mischaracterize the evidence in closing argument." *State v. Rothwell*, 154 Idaho 125, 133, 294 P.3d 1137, 1145 (Ct. App. 2013). "Indeed, the prosecutor has a duty to avoid misrepresentation of the facts and unnecessarily inflammatory tactics." *State v. Moses*, 156 Idaho 855, 871, 332 P.3d 767, 783 (2014). "Prosecutorial misconduct occurs "[w]here [the] prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence[.]" *Lankford*, 162 Idaho at 494, 399 P.3d at 821.

Accordingly, the district court was correct in concluding the above-referenced statements constituted prosecutorial misconduct. It erred, however, in its fundamental error analysis.

> Prosecutorial misconduct during closing arguments will constitute fundamental error only if the comments were so egregious or inflammatory that any consequent

> prejudice could not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded. 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. at 497, 399 P.3d at (internal quotations and citations omitted).

Prosecutorial misconduct in closing argument will be considered a fundamental error when it is "calculated to inflame the minds of jurors and arouse passion or prejudice against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence." *State v. Ortiz*, 148 Idaho 38, 42, 218 P.3d 17, 21 (Ct. App. 2009) *citing State v. Porter,* 130 Idaho 772, 785, 948 P.2d 127, 140 (1997) and *State v. Kuhn,* 139 Idaho 710, 715, 85 P.3d 1109, 1114 (Ct. App. 2003).

Objectionable statements made during closing argument pose a **special risk** because they are some of the last things jurors hear before retiring to deliberate. *Zapata v. Vasquez*, 788 F.3d 1106, 1116 (9th Cir. 2015). "The presentation of improper material at the end of trial magnifies its prejudicial effect because it is freshest in the mind of the jury when it retires to deliberate." *Id.* at 1122; *see also State v. Irwin*, 9 Idaho 35, 42, 71 P. 608, 610 (1903).

Here, there is no dispute the prosecutor's statements, which the district court deemed to be prosecutorial misconduct, occurred during closing argument, or, worse, in rebuttal. Although the district court correctly concluded the prosecutor committed misconduct in each of these five instances, it apparently did not consider the fact the misconduct occurred in closing argument and did not address the "special risk" it posed to Mr. Severson's Fourteenth Amendment right to due process.

The complained-of statements undoubtedly constitute fundamental error. Where a prosecutor engages in a "relentless and blatant abuse of power," *Severson I*, 147 Idaho at 732, 215 P.3d at 443 (Jones, W., J. dissenting), for "the sole purpose of appealing to the passions of the

jury," *id.*, 215 P.3d at 443 (Jones, W., J. dissenting), fundamental error must be found. If not, it is difficult to imagine what blatant acts of prosecutorial misconduct would.

Further, the district court mistakenly concluded some of these improper statements were cured by the trial court's jury instructions. R. 45780-2018, Vol.5, p. 851. In close cases, such as Mr. Severson's, standard jury instructions are not always sufficient to cure a prosecutor's misconduct. *See United States v. Combs*, 379 F.3d 564, 575 (9th Cir. 2004). In fact, even where a timely objection **is** made, a "quick statement that 'the jury will disregard'" the prosecutor's comment is oftentimes insufficient to cure improper vouching. *United States v. Alcantara-Castillo*, 788 F.3d 1186, 1197 (9th Cir. 2015). The district court erred and should be reversed.

D. The District Court Erred In Concluding The Prosecutor's Comment On Mr. Severson's Fifth Amendment Right To Silence Did Not Constitute Fundamental Error.

The district court found the statement "[Mary's] mouth opened easily. No one else in this courtroom has testified in front of you, that was there, that they injured Mary Severson's face" "did not constitute fundamental error." R. 45780-2018, Vol.4, p. 843. The district court erred.

Pursuant to the U.S. CONST. amend. V and amend. XIV, as well as Idaho CONST. Art. 9, § 13, no person shall be compelled, in any criminal case, to be a witness against himself. "It is clearly erroneous for a prosecutor to introduce evidence of the defendant's postarrest silence for the purpose of raising an inference of guilt." *State v. Hodges*, 105 Idaho 588, 591, 671 P.2d 1051, 1054 (1983) *citing State v. White*, 97 Idaho 708, 551 P.2d 1344 (1976) and *Miranda v. Arizona*, 384 U.S. 436 (1966). Likewise, it is erroneous for the "prosecutor to comment to the jury on the defendant's failure to testify at trial." *Hodges*, 105 Idaho at 591, 671 P.2d at 1054 *citing Chapman v. California*, 386 U.S. 18 (1967). The prosecutor is forbidden from "either direct or indirect comment upon the failure of the defendant to take the witness stand. The rule, however, does not extend to comments on the state of the evidence or on the failure of the defense to introduce

material evidence or call logical witnesses." *Hodges*, 105 Idaho at 592, 671 P.2d at 1055 *quoting People v. Jackson*, 618 P.2d 149, 169 (Cal. 1980).

The district court relied on the *Severson I* Court's analysis of the statement "[t]his is a circumstantial case, because nobody was in that house that night but Mary and Larry. Nobody knows, *that has testified*, what happened between them" in support of its analysis. R. 45780, Vol.4, p. 842-43 (original italics). The district court's analysis is fatally flawed, however, because it ignores a critical passage in the *Severson I* Court's analysis of the previously raised statement. The *Severson I* Court specifically based its conclusion concerning the previously challenged statement on the fact that "the statement was a single, isolated comment." *Severson I*, 147 Idaho 719, 215 P.3d at 439.

Given the **actual** fact there was not one, but, two comments on Mr. Severson's right to remain silent, it was error for the district court to rely on the *Severson I* Court's analysis of the issue. Instead, the district court should have conducted a new, independent analysis, taking into consideration the fact the prosecutor made multiple comments on Mr. Severson's right to remain silent. It did not, and it erred.[4]

E. The District Court Erred In Concluding Certain Statements Did Not Constitute Prosecutorial Misconduct.

The district court concluded numerous statements by the prosecutor during closing argument did not amount to prosecutorial misconduct. For example, it found the statement "And as the phone is ringing and as she [Nora Law] is talking to one of Mary's friends, Teresa Mallea, she is not breathing, she is not moving, 'Come back to us Mary, come back to us'" was not prosecutorial misconduct. R. 45780-2018, Vol.5, pp. 845-46. The district court also concluded the

[4] As argued later, by failing to raise the now-challenged statement on direct appeal, appellate counsel was constitutionally ineffective, and Mr. Severson was prejudiced.

statement "You have a difficult decision to make. There's people in this courtroom who have been here the entire time that you have heard from. Mary Severson isn't a body. Mary Severson isn't a picture of bruises." R. 45780-2018, Vol.5, p. 862-63. It erred.

> Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial.

Perry, 150 Idaho at 227, 245 P.3d at 979. "Prosecutors … should not exert their skill and ingenuity to see how far they can trespass upon the verge of error, because generally in so doing they transgress upon the rights of the accused. *Lankford*, 162 Idaho at 494, 399 P.3d at 821 (internal quotations and citation omitted).

The district court properly found the prosecutor's statement "[c]ome back to us, Mary, come back to us" was not included in the evidence submitted to the jury. It, however, erroneously classified it as a "slight misstatement" of the evidence resulting in it being harmless error. R. 45780-2018, Vol.5, p. 846. Given the fact the *Severson I* Court found comments by the prosecutor concerning Mary "speaking from her grave" to be "somewhat inflammatory," 147 Idaho at 719-20, 215 P.3d at 439-40, the district court's failure to classify the now-challenged statement as another such statement by the prosecutor is an abuse of discretion. It should go without saying: The more the prosecutor "trespassed on the verge of error" by using language akin to the victim "speaking from the grave," the more likely it is for Mr. Severson's Fourteenth Amendment right to a fair trial to be violated.

The prosecutor improperly and impermissibly pointed the jury to Ms. Severson's family in a blatant appeal to the jury's passion and prejudice. The district court found the statement "was designed to inflame the passion and prejudice of the jury," R. 45780-2018, Vol.5, p. 31, and that the statement "was … inflammatory to point out that the family sat through the trial and were

awaiting the jury's verdict," R. 45780-2018, Vol.5, p. 32. Such statements amount to prosecutorial misconduct because, by making such statements, the prosecutor is seeking to obtain a conviction in violation of Mr. Severson's Fourteenth Amendment right to a fair trial. *Perry*, 150 Idaho at 227, 245 P.3d at 979.

The district court also found the statements "Could [somebody else have tampered with the Hydroxycut bottle]? I suppose, in the same way that there are little green aliens could be coming to us from Mars or something. It is possible in one way, shape, or form that that's exactly what somebody did," fell outside of "the recognized exceptions permitting latitude in making closing argument." R. 45780-2018, Vol.5, p. 848. Therefore, the district court should have concluded the statement constituted prosecutorial misconduct. It did not. It erred.

If this Court presumes, based on its further analysis the district court did find the statement was prosecutorial misconduct, its conclusion that Mr. Severson failed to satisfy his burden of demonstrating the failure to object as not due to "inadequate preparation, ignorance of the law, or other shortcoming surrounding trial defense counsel's performance," R. 45780-2018, Vol.5, p. 848, was erroneous.

Simply classifying trial counsel's failure to object as "strategic" or "tactical" does not end the inquiry. *See Flores-Ortega*, 528 U.S. at 482. Instead, the district was required to analyze whether trial counsel's failure to object was **reasonable**." *Id.* The district court did not do so because, in light of all of the other statements constituting prosecutorial misconduct, such a conclusion could not stand.

As the district court found, both of Mr. Severson's trial counsel are deceased. R. 45780, Vol.5, p. 841. Given, however, trial counsel's abject failure to object to multiple statements the

district court found constituted prosecutorial misconduct, Mr. Severson contends he satisfied his burden concerning the offending statement.

F. The District Court Erred In Concluding There Was No Cumulative Error Because Of Trial Counsel's Failure To Object To Statements Which It Found Constituted Prosecutorial Misconduct.

The district court determined that, because it did not find **any** fundamental error, the cumulative error doctrine did not afford Mr. Severson any relief. R. 45780-2018, Vol.5, pp. 863-64.

> Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial. However, a necessary predicate to the application of the doctrine is a finding of more than one error.

Perry, 150 Idaho at 230, 245 P.3d at 982 (internal citations omitted). In order for unobjected-to errors to be considered under the cumulative error doctrine, they need to satisfy the fundamental error doctrine. *Id.*, 245 P.3d at 982.

As demonstrated above, the district court erred in failing to conclude the prosecutorial misconduct it identified did not constitute fundamental error. Because the district court erred in so concluding, it also erred in determining there was no cumulative error. There were and Mr. Severson should be afforded relief.

The prosecutor's "relentless and blatant abuse of power" can, and in this case, did, violate Mr. Severson's due process right to a fair trial under the United States Constitution. Here, the prosecutor's misconduct, coming during closing argument and rebuttal "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Parker v. Matthews*, 567 U.S. 37, 45 (2012). This standard was, or should have been, well known to trial counsel at the time of Larry's trial. It was first announced in 1974 and reaffirmed as the standard in 1986. *Donnelly v. DeChristoforo*, 416, U.S. 637 (1974); *Darden v. Wainwright*, 477 U.S. 161, 181 (1986).

"The role of a prosecutor is to see that justice is done. It is as much a prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Connick v. Thompson*, 563 U.S. 51, 71 (2011) (internal quotations and citations omitted).

There were multiple fundamental errors committed during the prosecutor's closing argument in Mr. Severson's trial. The district court erred in concluding otherwise. Further, the district court erred in concluding cumulative error during Mr. Severson's trial did not result in a trial that was fundamentally unfair in violation of the Fourteenth Amendment.

G. Trial Counsel's Failure To Object To The Prosecutor's "Relentless And Blatant Abuse Of Power" Satisfies The Strickland Standard. Mr. Severson Received Ineffective Assistance Of Trial Counsel.

The district court found "[a] review of the statements found to be inflammatory together does show the State committed prosecutorial misconduct during closing argument. Therefore, the Court does find counsel was deficient for failing to object to the accumulated inflammatory statements." The district court concluded, however, Mr. Severson suffered no prejudice because each of the individual statements it deemed improper would not have changed the outcome of the trial. *See, e.g.,* R. 45780-2018, Vol.5, p. 851 ("Severson failed to show … the outcome of Severson's trial was prejudiced."). The district court erred.

"[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart*, 506 U.S. at 369.

By myopically focusing on whether trial counsel's failure to object to the statements the district court found amounted to prosecutorial misconduct, the district court's analysis ran afoul of

the warning in *Lockhart*. Mr. Severson's trial was rendered fundamentally unfair because of the prosecutor's misconduct during closing argument. Therefore, Mr. Severson was prejudiced.

H. The District Court Erred In Concluding Mr. Severson Is Not Entitled To Relief On His Claims Of Ineffective Assistance Of Appellate Counsel.

1. *The district court erred in dismissing Mr. Severson's ineffective assistance of appellate counsel claim for the failure to raise all instances of prosecutorial misconduct on appeal.*

The district court found "appellate counsel was deficient" for failing to raise, on appeal, three of the statements the district court concluded amounted to prosecutorial misconduct. R. 45780-2018, Vol.5, p. 867. Because it incorrectly concluded that the statements did not amount to fundamental error, the district court found Mr. Severson suffered no harm. *Id.* Again, the district court erred.

As set forth above the district court erroneously concluded five statements it determined amounted to prosecutorial misconduct did not also constitute fundamental error. Because of this error, the district court erroneously dismissed Mr. Severson's claim for relief based on the ineffective assistance of appellate counsel.

2. *The district court erred in dismissing Mr. Severson's ineffective assistance of appellate counsel claim for the failure to support an appellate issue with argument or authority.*

The district court correctly concluded appellate counsel's performance was deficient for failing to support, with argument or authority, the argument that the following statement amounted to prosecutorial misconduct:

> "We are done. Mr. Frachiseur and I, and Mr. Matthews and Mr. Howen. Our job here before you is complete. Innocent until proven guilty, yes. Today ends that preposition. There is no innocence in this courtroom except the innocence of Mary Severson. She didn't have to die. The only reason she did was the lust and greed of the defendant to get out of a marriage rather than divorce so he could get all the money and then some; and he could pursue his other women, not this fat woman that he saw in front of him who refused to give him the divorce."

It is well settled: any issue before Idaho appellate courts not supported with argument and authority will not be considered. *State v. Zichko*, 129 Idaho 259, 923 P.2d 966 (1996). Mr. Fredericksen freely admitted he failed to support the statement with either argument or authority and, more importantly, that he was familiar with *Zichko* at the time he worked on Mr. Severson's direct appeal. Tr. 45780-2018, p. 38, l. 10-p. 39, l. 6. Of course, the *Severson I* Court refused to consider the statement on direct appeal. *Severson I*, 147 Idaho at 719 n.33, 215 P.3d 439.

The district court, however, erred in determining Mr. Severson suffered no prejudice on appeal. R. 45689-2018, Vol.5, p. 868. Again, the district court based its conclusion on the fact it found no fundamental error. *Id.* at p. 869. As set forth above, the district erred in failing to conclude the prosecutorial misconduct constituted fundamental error and that Mr. Severson suffered prejudice. According, the district court's conclusion here is incorrect and should be reversed.

CONCLUSION

For the reasons set forth above, the district court's *Final Judgment*, dismissing, with prejudice, all claims in the *Third Amended Verified Petition for Post-Conviction Relief (On Remand)* must be reversed and Mr. Severson awarded a new trial.

There were multiple fundamental errors arising from prosecutorial misconduct during closing argument. Trial counsel should have objected to the prosecutor's blatant trampling on Mr. Severson's Fifth and Fourteenth Amendment rights and was constitutionally ineffective for failing to do so. Mr. Severson suffered prejudice because of trial counsel's deficient performance.

Additionally, Mr. Severson is entitled to a new trial by virtue of appellate counsel's ineffective assistance which resulted in prejudice in Mr. Severson's appeal.

DATED this 2nd day of October 2018.

Kormanik & Sneed LLP

/s/ John R. Kormanik
John R. Kormanik
Counsel for Larry M. Severson

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing instrument was served upon the following by the method indicated:

Lawrence G. Wasden Attorney General State of Idaho Kenneth K. Jorgensen Deputy Attorney General PO Box 83720 Boise, ID 83720-0010 ecf@ag.idaho.gov	_____ Hand Delivered _____ U.S. Mail _____ Fax _____ Email __x__ ICourt Efile & Serve _____Other: Attorney General's mailbox at the Idaho Supreme Court

DATED this 2nd day of October 2018.

/s/ John R. Kormanik
for KORMANIK & SNEED LLP