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Severson v. State Appellant's Reply Brief Dckt. 45780

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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 REPLY 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

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ARGUMENT IN REPLY

A. The District Court Erred in Dismissing Mr. Severson's *Third Amended Verified Petition for Post-Conviction Relief on Remand*.

In his *Opening Brief*, Mr. Severson set out why the district court erred in its various conclusions and, ultimately, why it erred in dismissing Mr. Severson's *Third Amended Verified Petition for Post-Conviction Relief on Remand* ("*Petition*"). Mr. Severson provided both argument and authority for why the district court erred in dismissing the *Petition*, both as it concerned the claims against trial counsel and those related to appellate counsel.

The State asserts the district court was correct in its dismissal of the *Petition* because, in its view, Mr. Severson failed to demonstrate trial counsel was objectively deficient and Mr. Severson failed to demonstrate prejudice as required by *Strickland v. Washington*, 466 U.S. 668 (1984) and *State v. Matthews*, 133 Idaho 300, 986 P.2d 323 (1999). It goes further, however, and posits a "right result/wrong reason" argument for supporting the district court's dismissal because, in the State's view, the district court erroneously concluded that statements by the prosecutor amounted to misconduct. The State also argues, for the first time on appeal, that any allegations of ineffective assistance of appellate counsel are barred because such claims were, somehow, outside the scope of the Court's remand in *Severson v. State*, 159 Idaho 517, 363 P.3d 358 (2015) (*Severson II*). Finally, the State contends the district court's dismissal of Mr. Severson's claims of ineffective assistance of appellate counsel warranted dismissal, even if within the purview of the district court on remand.

For the reasons set forth in Mr. Severson's *Opening Brief*, as well as those set forth below, the State is wrong for several reasons. At the end of the day, the district court erred in dismissing Mr. Severson's claims of ineffective assistance of counsel against both trial and appellate counsel.

B. The District Court Correctly Concluded Five Statements By the Prosecutor Constituted Misconduct, But Erred In Concluding Those Statements Did Not Constitute Fundamental Error.

The State argues the district court erred in finding the following statements constituted prosecutorial misconduct:

> "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."

Respondent's Brief, pp. 8-10.

> 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).

Here, the district court properly concluded the aforementioned statements constituted prosecutorial misconduct. 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."). As argued in the *Opening Brief*, however, the district court erred in its conclusion that each of the five statements did not amount to fundamental error.

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, the district court seemed to ignore the timing of the prosecutorial misconduct in its analysis of whether there was fundamental error. Where a prosecutor engages in a "relentless and blatant abuse of power," *State v. Severson*, 147 Idaho 694, 732, 215 P.3d 414, 443 (2009) (*Severson I*) (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.

C. The State's Contention That Mr. Severson "Failed To Present Evidence Of Any Objective Shortcomings By Counsel" Fails.

The State asserts, regardless of the numerous instances of prosecutorial misconduct the district court found in the State's closing argument, Mr. Severson failed to present evidence that the failure to object was unreasonable. The State relies on the presumption that objecting to a prosecutor's closing argument is "a strategic decision," *State v. Hall*, 163 Idaho 744, 826, 419 P.3d 1042, 1124 (2018); *State v. Payne*, 146 Idaho 548, 566 n.8, 199 P.3d 123, 141 n.8 (2008) and argues "there was no evidence presented indicating that any lack of objection to any of the statements not addressed on the first appeal was the result of objective shortcoming[s]." *Respondent's Brief*, p. 11. The State's argument ignores several, salient facts: (1) the district court found trial counsel was, indeed, "deficient for failing to object to the accumulated inflammatory statements," R. 45780-2018, Vol.5, p. 864; and (2) the sheer number of instances of prosecutorial misconduct in closing argument.

In *Severson I*, the dissent found "the prosecutor's conduct relentless and a blatant abuse of power." *Severson I* at 723, 215 P.3d at 443 (Jones, W., J. dissenting). Justice W. Jones found this even in the absence of a challenge to the statements the trial court here found to be prosecutorial misconduct. The State continues to recognize the case against Mr. Severson was "circumstantial." *Respondent's Brief*, p. 10. The State ignores the circumstantial nature of the case against Mr.

Severson when it is inconvenient for it to do otherwise. It also pays little attention to the timing of the State's blatant misconduct. There is no objective reason for trial counsel to have **not** objected to the "relentless and blatant abuse of power."

D. The State's Argument That Mr. Severson "Failed To "Show Prejudice" Is Incorrect.

The State contends Mr. Severson's claims of ineffective assistance of trial counsel fail because he failed to satisfy the second *Strickland* prong – prejudice. *Respondent's Brief*, pp. 14-16. The State seems to focus solely on whether the outcome of Mr. Severson's trial would have been different. The State's argument misses the mark.

First, "an 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). The State would have this Court require Mr. Severson **prove** the outcome of his trial would have been different. That is not the test to be applied. Instead, given the "relentless and blatant abuse of power" by the prosecutor during closing argument, the test identified in *Lockhart* is satisfied here. Mr. Severson's trial was rendered fundamentally unfair because of the prosecutor's misconduct during closing argument. Therefore, Mr. Severson was prejudiced.

E. The State Contends The Cumulative Error Doctrine Does Not Apply To Trial Courts; The Doctrine, However, Can, At A Minimum, Be Applied In The Post-Conviction Context To Determine Whether A Defendant's Criminal Trial Was Fundamentally Fair.

The State argues Mr. Severson "has failed to show how that appellate standard [for cumulative error] could, or should have, been invoked by trial counsel. *Respondent's Brief*, p. 17. The State misses the point.

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.

State v. Perry, 150 Idaho, 209, 230, 245 P.3d 961, 982 (2010) (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. Notably, the district court **did not** conclude the cumulative error claim was not properly before it.

A district court considering a post-conviction claim of ineffective assistance of counsel can, and should, utilize the cumulative error doctrine. First, the district court is essentially sitting in an "appellate" capacity vis-à-vis trial counsel's actions. Second, applying the cumulative error analysis assists in determining whether the *Lockhart* standard of fundamental fairness and reliability has been satisfied. For example, the failure of trial counsel to object to a single instance of prosecutorial misconduct may, or, given the gravity of the misconduct, may not, result a trial that is fundamentally unfair. The more instances of un-objected-to prosecutorial misconduct, the more likely it is that the trial is fundamentally unfair. This is common sense.

F. The State's Argument That The District Court Lacked Jurisdiction To Consider Mr. Severson's Claims Of Ineffective Assistance of Appellate Counsel Should Be Rejected Out-Of-Hand.

The State argues for the first time on appeal the district court lacked "jurisdiction to consider new claims of ineffective assistance of appellate counsel" when the case was remanded following the decision in *Severson II*. The State relies on the holding of *State v. Hosey*, 134 Idaho 883, 11 P.3d 1101 (2000), wherein the Court reiterated the general rule that "on remand, a trial court has authority to take actions it is specifically directed to take, or those which are subsidiary to the actions directed by the appellate court." 134 Idaho at 886, 11 P.3d at 1104 *citing Walters v. Indust. Indem.Co.*, 130 Idaho 836, 838, 949 P.2d 223, 225 (1997). The State's argument fails.

Initially, it must be noted: The State is forced argue the timeliness of the claims of ineffectiveness of appellate counsel not based on the timelines set forth in the Uniform Post-Conviction Procedure Act itself but, instead, based on the strained logic of its current "jurisdictional" argument. This is so for two reasons. First, the timelines set forth in the Uniform Post-Conviction Procedure Act have been deemed to not be jurisdictional. *See Anderson v. State*, 133 Idaho 788, 796-97, 992 P.2d 783, 791-92 (Ct. App. 1999); *Hoffman v. State*, 124 Idaho 281, 282, 858 P.2d 820, 821 (Ct. App. 1993). Second, because the State did not argue the timeliness of the issues concerning ineffective assistance of counsel before the district court, this Court will not consider that argument on appeal. *Anderson*, 133 Idaho at 792, 992 P.2d at 792.

Thus, the State is left to argue the issues of appellate ineffective assistance of counsel fell outside the *Severson II* Court's specific directions to the district court on remand or were subsidiary to those actions. *Hosey*, 134 Idaho at 886, 11 P.3d at 1104. Even here, though, the State's argument misses the mark. Indeed, the State ignores the plain language of the *Severson II* Court's direction to the district court on remand.

In *Severson II*, the Court stated its decision to remand the matter to the district court "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 [*Severson I*] noted but which the majority did not address." *Severson II*, 159 Idaho at 522, 363 P.3d at 363. Mr. Severson did so. Therefore, the State's argument that the district court was without jurisdiction to entertain Mr. Severson's claims of ineffective assistance of appellate counsel fails.

G. The State's Contention That Mr. Severson Failed To Demonstrate Prejudice For His Claims Of Ineffective Assistance Of Appellate Counsel Fails.

The State argues that Mr. Severson failed to demonstrate prejudice as a result of appellate counsel's deficient performance. The State's contention collapses under any reasonable analysis.

As argued in Mr. Severson's *Opening Brief*, 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. The district court erred, however, in concluding those statements did not amount to fundamental error. The State does not even take the opportunity to argue in the alternative, meaning that if the statements **do** constitute fundamental error, then Mr. Severson was prejudiced by the failure to raise them on appeal.

Additionally, the State contends appellate counsel's deficient performance in failing to cite argument or authority in support of an appellate argument should, for all intents and purposes, be ignored because prejudice was not shown.

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."

The district court analyzed this statement by breaking it down to its constituent parts. It found several of them to constitute prosecutorial misconduct. R. 45780-2018, Vol.5, pp.857-58.

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). Appellate counsel 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(s) not supported by argument or authority on direct appeal. *Severson I*, 147 Idaho at 719 n.33, 215 P.3d 439 n.33.

Again, the State appears to argue for a "results-oriented" analysis of the prejudice prong of *Strickland*; a position that has been soundly rejected. Appellate counsel's deficient performance in the failure to support, with argument and authority, why certain statements by the State constituted fundamental error, led to prejudice in Mr. Severson's appeal.

CONCLUSION

For the reasons set forth above, as well as in Mr. Severson's *Opening Brief*, 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 21st day of January 2019.

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:

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DATED this 21st day of January 2019.

/s/ John R. Kormanik

for KORMANIK & SNEED LLP