No. SC19-
Lower Tribunal No. 2010-CF-001608

IN THE

Supreme Court of Florida

TINA LASONYA BROWN,
Petitioner,

v.

MARK S. INCH
SECRETARY, DEPARTMENT OF CORRECTIONS,
Respondent.

On Appeal from the Circuit Court, First Judicial Circuit, in and for Escambia County, Florida

Honorable Judge Gary Bergosh
Judge of the Circuit Court

PETITION FOR WRIT OF HABEAS CORPUS

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JURISDICTIONAL STATEMENT

This is an original action under Florida Rule of Appellate Procedure 9.100(a), Article I, Section 13 of the Florida Constitution provides that, "[t]he writ of habeas corpus shall be grantable of right, freely, and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety." Ms. Brown was sentenced to death, and the instant Petition accompanies Petitioner/Appellant's Initial Brief from the lower tribunal's order on Appellant/Petitioner's denial of her 3.851 Motion for Postconviction Relief. Fla. R. App. P. 9.142(b).

This Court has jurisdiction and the inherent power to do justice. *Brown v. Wainwright,* 392 So. 2d 1327 (Fla. 1981). The ends of justice call on the Court to grant the relief sought in this case. The petition raises claims involving fundamental state and federal constitutional error. This Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional error is warranted in this action. As this petition shows, habeas corpus relief is proper on the basis of Ms. Brown's claims.

PRELIMINARY STATEMENT

The following symbols will be used to designate references to the record: "T" refers to the transcript of trial proceedings; "R" refers to the record on appeal to the

Florida Supreme Court; "PCR" refers to the postconviction record on appeal. All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Ms. Brown has been sentenced to death. Resolution of these issues will determine whether she lives or dies. This Court has allowed oral argument in other capital cases in a similar posture. Ms. Brown respectfully requests oral argument because a full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims at issue and the stakes involved.

GROUNDS FOR HABEAS CORPUS RELIEF

Ms. Brown asserts that her conviction was obtained in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution because her appellate counsel rendered ineffective assistance of counsel during this direct appeal. Appellate counsel's deficient conduct and the resulting prejudice render Ms. Brown's conviction unconstitutional.

PROCEDURAL HISTORY

The Circuit Court of the First Judicial Circuit, Escambia County, entered the judgments of conviction and sentence under consideration.

The Escambia County Grand Jury indicted Ms. Brown on April 2, 2010, for kidnapping and first-degree murder, which occurred on March 24, 2010. (R.1-2). The State subsequently dropped the kidnapping charge.

Ms. Brown's trial began on June 18, 2012, and the jury found Ms. Brown guilty as charged on June 21, 2012. (R.632). The penalty phase was held on June 25-26, 2012. (T.1231-1420). The jury recommended death by a vote of 12 to 0. (R.648). A *Spencer*[1] hearing was held on August 22, 2012 (R.897-908), and a sentencing hearing followed on September 28, 2012. (R.680-91).

The trial court followed the jury's recommendation and sentenced Ms. Brown to death. (R.694-713). The trial court found the following aggravating factors and assigned great weight to each: (1) the crime was committed during a kidnapping; (2) heinous, atrocious, or cruel (HAC); and (3) cold, calculated, and premeditated. (R.693-99). The trial court found one statutory mitigating circumstance and assigned it minimal weight: no prior criminal history. (R.699).

The trial court also found twenty-seven non-statutory mitigating circumstances: (1) Ms. Brown was the child of a teenage mother (minimal weight); (2) Ms. Brown was neglected by both parents (some weight); (3) loss of childhood due to parental neglect (some weight); (4) was abandoned by her mother (some weight); (5) had a history of family violence (some weight); (6) was exposed to drugs

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

during adolescence (some weight); (7) suffered developmental damage due to parents' use of and dependence on drugs (some weight); (8) was subjected to sexual violence inflicted by her father (some weight); (9) was betrayed by a trusted family member (i.e., her grandmother) (some weight); (10) experienced corruptive community influences and exposure to a criminal lifestyle (some weight); (11) experienced chaotic moves and transitions (little weight); (12) was a victim of domestic violence during her adult life (some weight); (13) witnessed a violent homicide and served as a State witness in a murder trial (little weight); (14) lost her family (her parental rights were terminated for her two sons, and she has no relationship with her mother or father) (little weight); (15) suffered repeated trauma throughout her life (little weight); (16) suffered from drug addiction (little weight); (17) suffered from the long term effects of chronic cocaine use on her brain (some weight); (18) was a productive citizen during periods of sobriety (little weight); (19) was living in poverty at the time at the time of the crime (minimal weight); (20) behaved well in jail (little weight); (21) conducted a bible study program (little weight); (22) exhibited good courtroom behavior (little weight); (23) has no possibility of parole (little weight); (24) showed remorse (some weight); (25) received a different sentence than that of her co-defendants (some weight); (26) had no history of prior criminal violence (moderate weight); and (27) was using cocaine on the day of the crime (moderate weight). (R.702-10).

The trial court specifically rejected the following statutory mitigators: (1) the crime was committed while the Defendant was under the influence of extreme mental or emotional disturbance; (2) the Defendant was an accomplice in the capital felony committed by another person and her participation was relatively minor; (3) the Defendant acted under extreme duress or under the substantial domination of another person; and (4) the capacity of the Defendant to appreciate the criminality of her conduct or to conform her conduct to the requirements of the law was substantially impaired. (R.700-02).

This Court affirmed Ms. Brown's conviction and sentence. *Brown v. State*, 143 So. 3d 392 (Fla. 2014). The following issues were raised in Ms. Brown's direct appeal: (1) the trial court erred in instructing the jury on and in finding the aggravating circumstance that the crime was committed in a cold, calculated, and premeditated manner; (2) Ms. Brown's death sentence is disproportionate; and (3) Florida's capital sentencing proceedings are unconstitutional under the Sixth Amendment pursuant to *Ring v. Arizona*. All three claims were denied.

The United States Supreme Court denied certiorari review on December 1, 2014. *Brown v. Florida*, 135 S. Ct. 726 (2014).

On May 1, 2017, Ms. Brown filed a third amended 3.851 motion with the following claims for relief: (1) counsel was ineffective during jury selection for (A) failure to conduct a meaningful death qualification, (B) failure to inquire about pre-

trial publicity of the case, (C) failure to inquire about racial bias, (D) failure to strike Juror Goodwin, (E) failure to strike Juror Taylor, (F) failure to strike Juror Courtney, (G) failure to educate the jury on the penalty phase process, and failure to conduct any voir dire of some jurors; (2) counsel was ineffective during the guilt phase for (A) failure to conduct an adequate investigation and prepare for trial, (B) failure to adequately challenge the State's evidence through cross-examination, (C) failure to ask for a *Richardson* hearing and move for a mistrial, (D) failure to argue the admissibility of Wendy Moye's testimony as substantive evidence and failure to object to the special jury instruction regarding her testimony, (E) failure to call Terrance Woods as a witness, (F) failure to call Darren Lee as a witness, (G) failure to call Nicole Henderson as a witness, (H) failure to refute the statutory aggravator of cold, calculated and premeditated, and (I) failure to object to prosecutor's improper closing argument; (3) counsel was ineffective during the penalty phase for (A) failure to conduct a reasonably competent mitigation investigation and to present adequate mitigation, (B) failure to consult with and present experts to explain the combined effects of polysubstance abuse, childhood trauma and mental illness on the brain, (C) failure to present evidence supporting statutory mitigators, (D) failure to object to hearsay evidence from Ricki Atwood and Sheree Sturdivant; (4) trial counsel failed to comply with Fla. R. Crim. P. 3.112; (5) prosecutorial misconduct due to (A) inflammatory statements, (B) belittling defense counsel, and (C)

expressing personal opinion; (6) the State presented false and misleading evidence in violation of *Giglio v. United States* for the (A) false testimony of Heather Lee and (B) the false testimony of Pamela Valley; (7) the State violated *Brady v. Maryland*; (8) the newly discovered evidence of Heather Lee's admissions; (9) cumulative error; and (10) Ms. Brown's death sentence violates *Hurst v. Florida* and *Hurst v. State*. (PCR.1597-862).

The circuit court granted an evidentiary hearing on Claims 2A-C, 2E-H, 3A-3D, 7, and 8. The hearing was held on May 14, 15, 16, 17, and 18, 2018, and January 29, 2019. The circuit court issued an order denying all postconviction claims on April 5, 2019. (PCR.5204-313).

Ms. Brown has timely appealed the denial of her third mended 3.851 motion and her Initial Brief was filed in Case No. SC18-1192 simultaneously with this petition for writ of habeas corpus.

ISSUE 1:

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

The prosecutor in Ms. Brown's case committed multiple acts of prosecutorial misconduct that were un-objected to by defense counsel at trial. This Court

"expect[s] and require[s] prosecutors, as representatives of the State, to refrain from engaging in inflammatory and abusive arguments, to maintain their objectivity, and to behave in a professional manner." *Cardona v. State*, 185 So. 3d 514, 516 (Fla. 2016). Appellate counsel was ineffective for failing to raise these issues on direct appeal. Ms. Brown was prejudiced by appellate counsel's failure because this Court would have reversed had the issues been raised.

I. Applicable law

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

An appellant may raise a claim of ineffective assistance of appellate counsel in a petition for writ of habeas corpus. *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000). A court must grant habeas relief based on appellate counsel's ineffectiveness if (1) counsel's omission or overt act fell measurably below the standard of competent counsel and (2) counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Freeman*, 761 So. 2d at 1069; *see also Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986).

Appellate counsel may be ineffective in failing to raise instances of fundamental error. *Smith v. Wainwright*, 484 So. 2d 31, 31 (Fla. 4th DCA 1986) (citing *Strickland v. Washington*, 466 U.S. 668 (1984).

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

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

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

Id., *citing Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *United States v. Bagley*, 473 U.S. 667, 676 (1985).

In *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), the Supreme Court set for the standard of review to use in assessing the impact of prosecutorial misconduct:

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

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

In this case, the prosecutor's improper comments during her guilt phase closing arguments made the proceedings unreliable and unfair. Given the prosecutor's numerous improper and egregious remarks to the jury in closing argument, appellate counsel's failure to allege these claims is outside the range of

professionally acceptable performance. Appellate counsel's omission compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Therefore, a new trial should be granted because a verdict of guilty would not have been obtained without the error. *See Bonifay v. State*, 680 So. 2d 413 (Fla. 1996).

II. The prosecutor in Ms. Brown's trial committed prosecutorial misconduct in her guilt phase closing argument by making multiple improper statements that resulted in fundamental error

The State's use of inappropriate and inflammatory arguments was pervasive throughout its closing argument in Ms. Brown's trial. The prosecutor's misconduct constitutes fundamental error because it was so prejudicial that it tainted the jury's verdict. *Mendoza v. State*, 964 So. 2d 121, 133 (Fla. 2007) (*citing Fennie v. State*, 855 So. 2d 597, 609 (Fla. 2003)). The prosecutor made inflammatory statements intended to inflame the passions and prejudices of the jury, belittled defense counsel, and improperly expressed her personal opinions about the credibility of witnesses.

A. The State committed prosecutorial misconduct when the prosecutor made inflammatory statements intended to inflame the passions of the jury and garner sympathy for the victim

Closing argument should "not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than a logical analysis of the evidence in light of the applicable law. *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985). During her guilt phase closing argument, the prosecutor attempted to vilify Ms. Brown and paint a picture of her as

a predator. The State argued in closing that Ms. Brown "baited" the victim "into the lion's den by telling her things were okay." (T.704). The State went on to call Ms. Brown a "cold-blooded murderer." (T.706). These statements were improper and served no purpose other than to inflame the emotions and passions of the jury and garner sympathy for the victim. It is

> a bedrock principle of our criminal justice system that every effort must be made in any trial – regardless of whether the case involves such heart-wrenching circumstances – to ensure that jurors base their decision, not on sympathy for the victim or prejudice against the defendant, but solely on the facts elicited during the trial and the law instructed by the trial court.

Cardona v. State, 185 So. 3d 514, 519 (Fla. 2016). This Court has stated that "[w]hen comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument." *Garron v. State*, 528 So. 2d 353, 359 (Fla. 1988).

These comments, un-objected to at trial, constitute prosecutorial misconduct resulting in fundamental error. Appellate counsel was ineffective for failing to raise these improper comments on direct appeal. Egregious prosecutorial misconduct, like that which occurred here, constitutes fundamental error. *Robinson v. State*, 520 So. 2d 1, 7 (Fla. 1988) ("Our cases have also recognized that improper remarks to the jury may in some instances be so prejudicial that neither rebuke nor retraction will destroy their influence, and a new trial should be granted despite the absence of an objection below or even in the presence of a rebuke by the trial judge.").

B. The State committed prosecutorial misconduct in the guilt phase when the prosecutor belittled defense counsel during her closing argument

Only one witness, Heather Lee, provided any supporting testimony that it was Ms. Brown who poured gas on the victim and lit her on fire. Ms. Lee got a deal from the State to testify against Ms. Brown. The State took the death penalty off the table and allowed Ms. Lee to plead guilty to second-degree murder in exchange for her testimony at Ms. Brown's trial. (T.511-12). Not only did Ms. Lee have a motive to portray Ms. Brown as the principal aggressor in the crime, but Wendy Moye testified at trial that Ms. Lee told her that she was the one who doused the victim with gasoline and lit her on fire. (T.640). Nevertheless, the State argued during closing, "Mr. Gontarek says his client is not guilty of first degree. Based on what? His argument? Ladies and gentlemen, your verdict is based on the evidence and the law." (T.704-05). This declaration by the State implies that defense counsel is either a liar or a fool, but either way, is entirely unbelievable.

Defense counsel was well within his rights to argue that a reasonable interpretation of the evidence and weighing of the witnesses' credibility pointed to Ms. Brown being guilty of something less than first-degree murder. The State's comments served only to prejudice the jury against defense counsel and, as a result, Ms. Brown.

C. The State committed prosecutorial misconduct when the prosecutor expressed her personal opinions in her guilt phase closing argument

During her rebuttal argument, the prosecutor argued two of its witnesses, Pamela Valley and Corie Doyle, had no motive to lie. The prosecutor asked, "[w]hat motive does she [Pamela Valley] have to make that up?" (T.710). This is an improper expression of personal opinion. It had been brought up at trial that Pamela Valley had previously tried to call Crime Stoppers on Ms. Brown because of financial motivations. Thus, there was evidence for defense counsel's argument that Pamela Valley had ulterior motives for testifying against Ms. Brown.

Second, the prosecutor argued, "[w]hat does Corie Doyle have to gain . . . How is Corie Doyle going to have that information if it didn't come from her [Ms. Brown]?" (T.710-11). In this statement, the prosecutor was clearly vouching for its witnesses and expressing her personal beliefs in the witness's credibility. The prosecutor made this remark with full knowledge that Corie Doyle had seen news stories about Ms. Brown's case prior to ever allegedly talking to Ms. Brown at the jail. During Corie Doyle's deposition taken on June 6, 2012, in which the prosecutor was present, she asked:

> Q: Before Tina Brown had told you about this, had you heard anything about this case?
>
> A: No. Oh, wait, yes, I did, on the news.
>
> Q: Okay.

A: I did on the news, in 2009.

Q: Was there anything – do you remember any specifics about what you heard on the news?

A: Uh-oh.

Q: What do you recall hearing?

A: That the girl – there was a girl that was lit on fire and that she was taken by helicopter and that before she did she said the girls' names. That's it.

(PCR.3490-91). The State was on notice that its witness had information about Ms. Brown, the victim, and specific facts of the case prior to any alleged conversation between Ms. Brown and Corie Doyle. Yet, the prosecutor argued to the jury that Corie Doyle could not have learned any information about the facts of the case apart from Ms. Brown.

It is improper and highly prejudicial for the prosecutor to vouch for and bolster the credibility of a witness because it places the prestige of the government behind the witness. This Court has stated that "[a] criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence." *Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999). The prosecutor "may not express his personal opinion on the

merits of the case or the credibility of witnesses. *Hall v. United States*, 419 F. 2 582, 584 (5th Cir. 1969).

D. The State committed prosecutorial misconduct when the prosecutor asked the jury to deliver "justice" in this case

During her argument in rebuttal during the guilt phase, the prosecutor told Ms. Brown's jury that "it is your duty to deliver justice in this case and to find Tina Brown guilty of first degree murder. (T.712). This type of comment appealing to the jurors' emotions "has been considered improper under clearly established Florida law for over three decades." *Cardona v. State*, 185 So. 3d 514, 522 (Fla. 2016). *See Davis v. State*, 136 So. 3d 1169, 1197 (Fla. 2014) (determining the argument that the victim's siblings would want to know what justice was imposed for the victim's murder was improper; *Dorsey v. State*, 942 So. 2d 983, 986 (Fla. 5th DCA 2006) ("demanding justice for the victim" was improper; *Shaara v. State*, 581 So. 2d 1339, 1341 (Fla. 1st DCA 1991) (determining that "the prosecutor's comment that the victim was asking the jury for justice" was improper); *Edwards v. State*, 428 So. 2d 357, 359 (Fla. 3d DCA 1983) (criticizing the prosecutor's argument, which included: "All I'm going to ask you for is justice. I ask you for justice both on behalf of myself and the people of the State of Florida, also on behalf of [victim's] wife and children.").

The prosecutor's appeal to the jury to deliver justice "improperly inflamed the minds and passions of the jurors." *Cardona*, 185 So. 3d at 532. This improper appeal

was exacerbated by the multitude of other improper comments that prosecutor made in her closing argument. As this Court stated in *Cardona v. State*:

> The State's burden is to prove the elements of the crime beyond a reasonable doubt. When the State instead uses closing argument to appeal to the jury's sense of outrage at what happened to the victim and asks the jurors to return a verdict that brings "justice" to the victim, the State perverts the purpose of closing argument and engages in the very type of argument that has been repeatedly condemned as antithetical to the foundation of our criminal justice system that guarantees a fair trial to every accused.

185 So. 3d at 519-20. The prosecutor in Ms. Brown's trial used her guilt phase closing argument to appeal to the jury's sense of outrage at what happened to the victim and Ms. Brown was prejudiced by her improper conduct.

III. Prejudice

Appellate counsel was deficient in his performance by failing to raise the above claims of fundamentally erroneous prosecutorial misconduct on direct appeal. *Pittman v.* State, 90 So. 3d 794, 819 (Fla. 2011), reh'g denied (June 7, 2012) (Appellate counsel fails to provide proper representation by not raising issues of prosecutorial misconduct on appeal where a prosecutor's statements were not objected to by trial counsel and the prosecutor's statements constitute fundamental error); *Smith v. Wainwright*, 484 So. 2d 31 (Fla. 4th DCA 1986) (Appellate counsel is deficient where counsel fails to raise a meritorious issue.) In addressing the multitude of improper comments, this Court should consider the cumulative effect of the comments to determine whether Ms. Brown received a fair trial. The

comments should not be looked at in isolation, but rather in the context of the whole closing argument. *Merck v. State*, 975 So. 2d 1054, 1062 (Fla. 2007).

The prosecutor made inflammatory comments with the singular purpose of inflaming the passions and prejudices of the jury and garner sympathy for the victim. The prosecutor also made numerous improper remarks belittling defense counsel and expressing her personal opinion about witnesses' credibility, as well as an improper "justice for the victim" argument. These statements resulted in fundamental error. The errors cannot be harmless. The cumulative effect of these errors denied Ms. Brown her fundamental rights under the United States Constitution and the Florida Constitution. *Brooks v. State*, 762 So. 2d 879 (Fla. 2000) (finding cumulative effect of prosecutor's improper remarks in closing argument were fundamental in nature).

These omissions and deficiencies by appellate counsel compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Therefore, a new trial should be granted. The effect of the errors at his trial individually and cumulatively created an unreliable guilt phase verdict and death sentence, in violation of Ms. Brown's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution. For all the reasons discussed herein, Ms. Brown respectfully urges this Court to grant habeas relief.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Ms. Brown respectfully urges this Court to grant habeas relief, set aside her conviction and sentence, and grant her a new direct appeal.

Respectfully submitted,

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COUNSEL FOR THE PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Habeas Corpus has been furnished via electronic service to Michael Kennett, Assistant Attorney General, on this 21st day of August, 2019.

s/ *Dawn B. Macready*
DAWN B. MACREADY

CERTIFICATE OF FONT

I hereby certify that the foregoing Petition for Writ of Habeas Corpus was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.210.

s/ *Dawn B. Macready*
DAWN B. MACREADY