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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC17-1538

Lower Tribunal No.: 2009-CF-8160

THOMAS THEO BROWN

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS…………………………………………… 3

PRELIMINARY STATEMENT……………………………………. 4

STATEMENT OF THE CASE AND FACTS……………………… 4

SUMMARY OF ARGUMENT……………………………………... 13

ARGUMENT WITH REGARD TO EACH ISSUE………………… 14

Issue 1: The trial court erred in not finding ineffective assistance of trial counsel in trial counsel's failure to object to State guilt-phase closing argument which misquoted the Defendant's final words to the victim ……………………. 14

CONCLUSION……………………………………………………. 19

CERTIFICATE OF SERVICE…………………………………….. 20

CERTIFICATE OF COMPLIANCE………………………………. 21

TABLE OF CITATIONS

CASES

Brown v. State
126 So. 3d 211 (Fla. 2013)…………………………………….. 6, 17

Brown v. State
846 So. 2d 1114 (Fla. 2005)………………………………….... 14

Hurst v. Florida,
577 U.S. _____, 136 S. Ct. 616 (2016)……………………….. 4, 5, 10

Hurst v. State,
202 So. 3d 40 (Fla. 2016)……………………………………… 4, 5, 10

Spencer v. State
645 So. 2d 377 (Fla. 1994)…………………………………….. 14

Strickland v Washington
466 U.S. 668 (1984)…………………………………………… 14

Walls v. State
926 So. 2d 1156 (Fla. 2006)……………………………………. 14

CONSTITUTIONS

Amend. 6, U.S. Const………………………………………………. 19

Amend. 8, U.S. Const………………………………………………. 19

Amend 14, U.S. Const……………………………………………… 19

Art. 1, Section 16, Fla. Const……………………………………...19

Art. 1, Section 17, Fla. Const……………………………………...19

Art 1, Section 22, Fla. Const………………………………………19

COURT RULES

Rule 3.851, Fla. R. Crim. P.. 4

STANDARD JURY INSTRUCTIONS

Fla. Stand. Jury. Instr., Crim. 7.2... 18

PRELIMINARY STATEMENT

The Appellant is variously referred to as "Appellant" or "Defendant" or "Brown" in this brief. This brief contains references to the record on appeal created in connection with the subject post-conviction motion proceedings. They are designated by "PCR," followed by the applicable record volume number (there is only one Volume), followed by the applicable record page numbers. The brief also contains references to the record of the original jury trial proceedings. They are designated by the letter "R" followed by the applicable record volume number, followed by the clerk's record-on-appeal page numbers (bottom of page).

STATEMENT OF THE CASE AND FACTS

Defendant was sentenced to death for first-degree murder. This is an appeal of a partial denial of Appellant's Rule 3.851, Fla. R. Crim. P. initial motion for post-conviction relief and for correction of an illegal death sentence in a death-penalty case. PCR1, p. 397-466. Such motion was brought in the wake of Hurst v. Florida, 577 US. _____,136 S. Ct. 616 (2016) and Hurst v State, 202 So. 3d 40 (Fla. 2016). A copy of the subject motion and its supporting Exhibits and

Memorandum of Law, appear at PCR1, p. 1-196 of the Record on Appeal for *this* appeal.

For ease of reading, such partially denied, initial motion for postconviction relief is most commonly referred to simply as the "subject motion." In it, Defendant advanced numerous "ineffective assistance of trial counsel" claims.[1] R1, p. 6-41. Defendant also argued that his death sentence was illegal in the wake of the Hurst, decisions, *supra*. 2d PCR1, p. 42-46.

The undersigned was the second attorney appointed to represent the Defendant in the subject, postconviction-motion proceedings. During the pendency of such proceedings, counsel for both sides as well as the trial court agreed that the Defendant is entitled to a new penalty phase pursuant Hurst v. Florida, 577 U.S. _____, 136 S. Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016). This mooted all of the "penalty phase" postconviction-motion claims, leaving only guilt-phase postconviction claims for evidentiary hearing and adjudication. PCR1, p. 401-402.[2]

Postconviction investigation and expert input led to decisions to abandon most of the remaining, penalty-phase postconviction claims. The net effect was

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[1] The undersigned was the second attorney appointed to represent the Defendant in postconviction-motion proceedings. Defendant's first postconviction attorney filed a first-draft postconviction motion that raised fifteen separate postconviction claims. Nearly all of these claims were subsequently abandoned when the undersigned's work on the case revealed them lacking in needed factual or legal support. R1, p. 19, 38, 401-402.

[2] Such new penalty phase is currently "on hold" while awaiting the disposition of this appeal.

that the case proceeded to evidentiary hearing and adjudication on only three guilt-phase postconviction-motion claims: *Claim 3*, ineffective assistance of trial counsel in failing to bring a motion to suppress self-incriminating statements in a spiral notebook found in a green Honda Accord automobile (R1, p 15-19); *Claim 5*, ineffective assistance of trial counsel in connection with the lesser-included offense of second-degree murder (R1, p. 19-22); *Claim 6*, ineffective assistance of trial counsel in failing to object and move for mistrial in response to the State's misquoting the Defendant as having said, " . . . I told you I'd kill you; I had it in my mind to kill you; I've wanted to kill you for several days. I wanted to kill someone to take out my frustration" R1, p. 23-24 and R1, p. 402. It is the trial Court's denial of these three guilt-phase, ineffective-assistance-of-trial-counsel claims are the subjects of this appeal.

This Florida Supreme Court set forth the key facts of the underlying homicide in its original direct-appeal Opinion in Brown v. State 126 So. 3d 211 (Fla. 2013) as follows:

> Ms. Miller and Brown were both co-workers at a Wendy's restaurant in Jacksonville, Florida. It is clear that they did not get along with each other. On Sunday, June 14, 2009, Ms. Miller poured ice and salt down Brown's back. Brown, who was twenty-seven years old at the time, became visibly upset and told Ms. Miller that he did not want her to bother him. The following day (Monday), Brown and Ms. Miller were both present at a meeting held at the restaurant. At or around the time of the meeting, Ms. Miller called Brown a "p*ssy n*gger," which offended Brown. Angelette Harley, who was both Brown's girlfriend and a Wendy's manager, testified that she thought

Ms. Miller and Brown were both “written up.” Brown and Ms. Miller's work hours were “cut.” Brown, who was upset, wondered why he was in trouble.

Mike Emami, the Wendy's franchisee, testified that it was brought to his attention that there was a conflict between Brown and Ms. Miller. Emami said he discussed the issue with Brown in a fairly calm manner. Emami maintained that no one was reprimanded for the ice incident. Emami was told that everything was okay between Brown and Ms. Miller. While Ms. Miller and Brown did not work together on Tuesday and Wednesday, they both worked at Wendy's on Thursday, the day Ms. Miller was killed.

On Thursday, Wendy's employees testified that they did not notice any problems between Brown and Ms. Miller. At around 11:00 a.m., Brown made a telephone call to Ms. Harley, desiring to know why his work hours were “cut.” Emami testified that a manager informed him that Brown was upset regarding his work hours. According to Emami's testimony, Brown could not keep up with the work demand and was consequently moved to perform a different task.

At approximately 12:15 p.m., Emami observed Brown working very slowly and looked unhappy. As a result, Emami pulled Brown to the back of the restaurant in order to talk with him. Emami asked Brown what was wrong and questioned Brown about his attitude. Brown became “very, very upset.” Brown and Emami were first arguing inside an office and then proceeded to argue outside of the office. Brown asked why his hours were “cut”; Emami responded that Brown would need to discuss his hours with a manager, not Emami. Brown pointed his hand in Emami's face and said, “[Y]ou don't f*cking know me ... it ain't going to be no more Wendy's.” Brown was yelling and screaming.

Emami and Brown were “fussing” loudly at each other in what was described as a “heated exchange.” Both men were mad and frustrated. An employee testified that Brown told Emami that “someone was going to kick his a* *.” Emami testified that he told Brown to leave Wendy's at least five or six times and that if he did not leave, the police would be called; Emami, in fact, did call 911. Brown

casually walked out of Wendy's and drove off in his vehicle. An employee testified that Emami said “don't come back,” however, Emami denied making such statement. Emami also maintained that he never told Brown that he was fired.

Ms. Harley testified that she received a telephone call from Brown's mother, which prompted Ms. Harley to “keep an eye out” for Brown. Ms. Harley arrived at Wendy's at about 1:30 p.m. Shortly thereafter, Brown returned to the restaurant. While in the parking lot, Ms. Harley told Brown, who was still in his work uniform, that she wanted to talk to him. Brown declined and said, “[S]he [is] the reason why I don't have my job.” Ms. Harley tried to stop Brown from going inside the restaurant. An employee of Wendy's testified that Brown was upset, given his facial expressions. When Brown was inside the restaurant, he asked where Emami was; Emami was no longer there. Ms. Miller was ordering her lunch at the register, while standing on the customer-side of the counter. Ms. Harley testified that it appeared that Brown had no issue with Ms. Miller. Brown left the restaurant, got into his car, and put the car in reverse.

Brown then got out of his car. Ms. Harley again attempted to stop Brown from coming back inside Wendy's. Brown pushed her aside and went back inside the restaurant. Ms. Miller, who had her back to the door, did not see Brown come inside. Brown proceeded to walk toward Ms. Miller. Brown, who was not trying to conceal his identity, reached under his shirt, into his waistband, and pulled out a .40 caliber Smith and Wesson semi-automatic firearm. From a range of two to three feet, Brown fired a shot at Ms. Miller. Brown then asked, “[W]here the f*ck Mike [Emami] at[?]” Brown fired more shots at Ms. Miller. Brown then walked toward the door and pushed the door open a little. Brown turned around and walked back to Ms. Miller, who was lying on the floor. Brown stood over Ms. Miller, and angrily said, “I told you I would kill you, you f*cking b*tch.” Brown fired his final shot at Ms. Miller. Before leaving Wendy's and driving off, Brown said, “Now, you can go and tell Mike, tell Mike thanks.” There were about ten customers inside of the restaurant at the time of the shooting. In describing Brown, witnesses testified that he snapped, was agitated, angry, focused, pissed-off, and had a mad and blank look on his face.

The next day (Friday), Brown was taken into custody after law enforcement located his vehicle at a Jacksonville hotel. A .40 caliber Smith and Wesson semi-automatic firearm was discovered on a dresser inside of the hotel room where Brown was apprehended. Testimony established that four shell casings recovered from the crime scene were fired from the Smith and Wesson pistol. A notebook was discovered inside Brown's vehicle. In the notebook, there was a passage titled "My life!!!" which stated, in pertinent part:

I've lost the only two jobs I've had in my life for no reason at all, but do people care? No!! The only time people in this world care, is when a person is a threat ... I just offed a B*tch cause she was the cause of my life being f*cked up, this time. If she ain't dead, then she will learn how serous [sic] words can be. I wanted "Mike the owner" to be there, but I guess it ain't his time yet.

The medical examiner testified that Ms. Miller received injuries to her arm, back, neck, lungs, trachea, aorta, rib, kidneys, and abdomen. The medical examiner found that Ms. Miller was also shot in the back of her head, but was unable to determine whether the head wound was inflicted as the final injury. The medical examiner opined that Ms. Miller bled to death, suffering from multiple organ and vascular perforations with hemorrhage.

After the State rested, Brown moved for a judgment of acquittal, claiming that there was no evidence of premeditation. The trial judge denied the motion. The defense did not present a case. Brown then renewed his motion for judgment of acquittal, which the trial court again denied. The jury, which was instructed on only first-degree premeditated murder, convicted Brown of first-degree murder.[3]

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[3] Actually, Defendant's jurors *were* correctly instructed on all the elements of first-degree murder as well as the elements of the lesser-included offenses of second-degree murder (which the defense had argued was all that Defendant was guilty of) and well as manslaughter. R17, p. 702. Obviously, the jurors concluded that the State had indeed met its burden of proving all of the elements of first-degree murder.

The evidentiary hearing for the subject motion was conducted on May 9, 2017. PCR1, p. 276. At that evidentiary hearing, the undersigned counsel announced that the defense had no new witnesses or evidence to present in support of the remaining postconviction-motion claims. The undersigned announced that the defense would be relying exclusively on pre-existing, record evidence. PCR1, p. 282-285, 295. Also, the undersigned vigorously cross-examined the two evidentiary hearing witnesses called by the State on the off chance that such cross-examination might yield something supportive of Defendant's remaining postconviction claims.[4] PCR1, p. 291-294, 305-306. At the conclusion of the evidentiary hearing, counsel for both sides submitted lengthy, written closing arguments. PCR1, p. 315-370 and p. 377-393. The trial court subsequently entered a lengthy order granting defendant's claim for a new penalty phase pursuant to *Hurst* but denying the Defendants remaining guilt-phase claims 3, 5 and 6.

In *Claim 3*, Defendant alleged that his trial counsel was ineffective in failing to move to suppress the Defendant's self-incriminating statements that Defendant

[4] The Defendant has a significant history of mental illness and prescribed psychiatric medications both before and after the subject homicide. Throughout postconviction proceedings, the undersigned was assisted by a court-appointed pharmacologist named Dr. Daniel Buffington and a court-appointed neuropsychologist named Dr. Michael Gamache. They were not able to provide any testimony of benefit to any guilt-phase postconviction-motion claims. However, they will almost certainly be called by Defendant's new penalty phase counsel unless the case is resolved in some other fashion which obviates the need for such new penalty phase.

wrote in a spiral notebook (a diary, of sorts) that the police found in Defendant's girlfriend's Honda automobile (R1, p 15-19). More specifically, Defendant alleged that the police had tricked automobile owner Dominique Young into unwittingly signing a consent form that authorized the police to search her notebook-containing vehicle. R1, p. 16-17. Ms. Young's testimony was crucial to this claim.

During the evidentiary hearing, the undersigned attorney, in conformance with his ethical duty of candor toward the tribunal (Rule 4-3.3, Fla. R. Prof. Cond.), informed the court that efforts to procure supporting testimony of car owner Dominique Young had been unavailing, and that the defense would proceed with the evidentiary hearing without her. R1, p. 295. Subsequent cross-examination of the State's police witness on the question of the voluntariness of Ms. Dominique Young's consent to the police search failed to elicit any police testimony in support of this claim. R1, p. 291-294.

The trial court stated its reasons for denying Claim 3 in its written denial order. R1, p. 404-410. The lack of supportive testimony of car owner Dominique Young is among these reasons. R1, p. 404-405. The undersigned, Court-appointed counsel for the Defendant has carefully reviewed the entire record, including the denial order on this point and cannot now make any good-faith argument that the trial court erred in denying Claim 3.

In *Claim 5*, of his subject motion, Defendant alleged that he received ineffective assistance of trial counsel in connection with the lesser-included offense of second-degree murder (R1, p. 19-22). The defense trial strategy –which Defendant consented to in advance and on the record-- was to concede that Defendant had committed only second-degree murder and was in no way guilty of premeditated, first-degree murder. In his subject motion, Defendant alleged, in essence, that his trial counsel could have done a better job of presenting evidence and argument that the Defendant had certain mental weaknesses and had actually "snapped" and killed the victim in the spontaneous manner that is the hallmark of second-degree murder and Defendant had not engaged the kind of reflected-upon-in-advance killing required for a premeditated, first-degree murder conviction. *Id.*

The postconviction court went to great length to explain why it denied this postconviction Claim 6. PCR1, p. 410-423. The counsel for Appellant has carefully re-reviewed the record in light of this denial order and cannot in good faith now dispute any of these reasons. Even though the undersigned would have likely presented a somewhat different closing argument, the undersigned must now concede that the jury trial transcripts evidence a strong defense argument that the facts support only a second-degree murder conviction, not a first-degree murder conviction. R17, p. 677-690. For all of these reasons, the undersigned cannot, in good faith, now argue that the trial court erred in denying Claim 5.

The undersigned can and does, however, argue in good faith that the trial court erred in denying this postconviction *Claim 6*. This is the only trial-court error pursued in this appeal. This is a claim (PCR1, p. 23-24) that Defendant's trial counsel was ineffective in failing to move for a mistrial when the State misquoted the Defendant during its guilt-phase closing argument as follows:

> Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. Even for a moment, ladies and gentlemen, if you didn't believe that shots No.1, No.2 and No.3 were premeditated murder, that last shot alone has to be where he stops, turns, comes back and says, *I told you I'd kill you, I had it in my mind to kill you, I've wanted to kill you for several days. I wanted to kill someone to take out my frustration.* That's what the decision being present in his mind at the time of the killing means. But the State of Florida submits to you that that decision was formed when he first walked into the store with that fully loaded gun looking for Mike Emami.
>
> (R17 p. 659; parenthesis added to identify the misquoted words).

SUMMARY OF ARGUMENT

The trial court erred in not finding ineffective assistance of trial counsel in trial counsel's failure to object to State guilt-phase closing argument that misquoted the Defendant's final words to the victim. The trial court erred in deeming "reasonable" Defendant's trial counsel's decision not to object to the State's incorrectly quoting the Defendant as having said to the victim, " I told you I'd kill you, I had it in my mind to kill you, I've wanted to kill you for several

days. I wanted to kill someone to take out my frustration." R1, p. 425-426. The trial court erred in not finding such false quote was of sufficient magnitude to warrant a new trial. R1, p. 426-427.

ARGUMENT WITH REGARD TO EACH ISSUE

Issue 1: The trial court erred in not finding ineffective assistance of trial counsel in trial counsel's failure to object to State guilt-phase closing argument, which misquoted the Defendant's final words to the victim.

Standard of Review: With regard to complaints of improper remarks to the jury, the reviewing courts determine whether the improper remarks were so prejudicial as to corrupt the whole trial. The reviewing courts engage in a Strickland v. Washington, 466 U.S. 668 (1984) type of analysis to decide whether the improper remarks were of sufficient magnitude to undermine confidence in the outcome of the trial. Brown v. State, 846 So. 2d 1114 (Fla. 2003).

To obtain a new trial based on improper prosecutorial comments, the prosecutor's comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise. Walls v. State, 926 So. 2d 1156, 1167 (Fla. 2006) [quoting Spencer v. State, 645 So.2d 377 (Fla. 1994)].

In its guilt-phase closing argument, the State misquoted the Defendant as saying, " I told you I'd kill you, I had it in my mind to kill you, I've wanted to kill you for several days. I wanted to kill someone to take out my frustration." R1, p. 425-426. The following discussion indicates how wrong this misquotation was.

What Defendant actually said to the dying victim appears in the trial testimony of various eyewitnesses present inside the Wendy's restaurant at the time of the subject shooting. The first was Wendy's restaurant customer David Boyd. David Boyd did not hear Defendant say anything during the shooting. However, shortly afterward, as Defendant Brown stood over victim Juanese Miller's body, David Boyd heard Defendant Brown say, "I told you I'd kill you, bitch." R16, p. 502. According to David Boyd, the Defendant sounded angry when he made this statement and left the restaurant soon after doing so. R16, p. 505. Another restaurant occupant named Terrance Cherry testified that he saw the Defendant shoot victim Juanese Miller at least three times, followed by Defendant starting to leave the restaurant, followed by Defendant turning around and walking back to where victim Juanese Miller lay on the ground, followed by Defendant telling her, "I told you I was going to kill you," followed by Defendant firing his gun at her again. R 16, p. 516.

Another restaurant customer named Greg Skeen heard several gunshots and saw Defendant standing over the top of victim Juanese Miller. Mr. Skeen observed

Defendant with a gun in his hand (R16, p. 526). Mr. Skeen testified that, as Defendant stood over victim Juanese Miller, Defendant told her, “I told you I would kill you, you fucking bitch.” R 16, p. 527.

Another restaurant customer named Brett Thomas heard multiple gunshots and observed the Defendant standing over victim Juanese Miller saying “motherfucker,” followed by Defendant shooting her again as she laid on the ground. R16, p. 533.

In essence, all of these witnesses quoted the Defendant as saying things indicating that he had previously told the victim he would kill her and indicating that he was angry with the victim at the time that he shot her in the Wendy’s restaurant. This much is indisputable.

It is also indisputable that, when the Defendant first returned to the restaurant armed with a gun and in a state of anger, the target of his anger was Wendy’s Restaurant Franchisee Mike Emami, not restaurant employee Juanese Miller.

Wendy’s employee Alona Bush testified that when the Defendant returned to the restaurant, it was Wendy’s franchisee Mike Emami that Defendant came looking for, not Juanese Miller. R16, p. 422-423.   Ms. Alona Bush also testified that, after Brown finished shooting victim Juanese Miller, he said, “Now, you can

go and tell Mike (Emami), tell Mike thanks" (R16, p. 427) "or something like that." R16, p. 435.

As this Florida Supreme Court observed in its original, direct appeal Opinion in Brown v. State 126 So. 3d 211 (Fla. 2013), the Defendant's diary was subsequently found in a car and seized by the police. It contained the words: " . . . I just offed a b*tch cause she was the cause of my life being f*cked up, this time. If she ain't dead, then she will learn how serous [sic] words can be. I wanted "Mike the owner" to be there, but I guess it ain't his time yet."

This much is clear: The Defendant was angry at his Wendy's co-worker Juanese Miller for pouring ice down his back. This set in motion a series of events that Defendant came to believed cost him his Wendy's restaurant job. Defendant's topmost Wendy's supervisor Wendy's franchisee Mike Emami. Mike Emami spoke with Defendant about the ice incident. On Thursday, June 18, 2009, the Defendant returned to the Wendy's restaurant to confront --or perhaps even kill-- Mike Emami. Upon arriving back at the Wendy's restaurant and learning that Mike Emami was not present, the Defendant shot and killed Juanese Miller instead.

Defendant's jurors undoubtedly perceived the Defendant as someone of unsound mind. The last-moment change in focus from Mike Emami to Juanese Miller confirmed that the Defendant had not been "thinking things through" on the

day of the murder. There was substantial evidence to support a conviction of unpremeditated, impulsive, second-degree murder instead of premeditated, first-degree murder.

What distinguishes "premeditated" first-degree murder (which Defendant was wrongfully convicted of) from all other types of murder is premeditation. Premeditation requires reflection. That is, premeditation exists only where the assailant stops himself and takes some time, however brief, to reflect upon whether or not he really wants to go through with the killing. Florida Standard Jury Instruction, Crim. 7.2.

Defendant' Brown's prosecutor wrongly told the Defendant's guilt-phase jurors that the Defendant " . . . stops, turns, comes back and says, 'I told you I'd kill you, I had it in my mind to kill you, I've wanted to kill you for several days. I wanted to kill someone to take out my frustration and says, I told you I'd kill you, I had it in my mind to kill you, I've wanted to kill you for several days. I wanted to kill someone to take out my frustration.'" This powerfully false quote wrongfully informed Defendant's jurors that Defendant had admitted to carrying out a pre-planned, premeditated killing of Wendy's co-worker Juanese Miller. However, as explained in this brief, there actually was no such admission.

By failing to object to the misquote and obtain either a curative instruction or mistrial, the scales of justice were hopelessly tipped against the Defendant. He

was wrongfully convicted of premeditated, first-degree murder –which he did not commit-- rather than the second-degree murder, which he admitted to. The lack of objection and mistrial motion deprived the Defendant of his right the effective assistance of counsel as secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution. It also deprived the Defendant of his right to a fair jury trial as secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Sections 16 and 22 of the Florida Constitution. It also placed the Defendant at risk of receiving the death penalty for a non-capital offense (second-degree murder) in violation of the Eighth Amendment to the U.S. Constitution and Article 1, Section 17 of the Florida Constitution.

CONCLUSION

The trial court erred in declined to find ineffective assistance of trial counsel for trial counsel's failure to object and move for mistrial when the State misquoted Defendant's statements during guilt-phase closing argument. The trial court has already granted the Defendant a new penalty phase pursuant to the Hurst rulings. Such new penalty phase is currently "on hold" awaiting the disposition of this appeal. The Appellant respectfully requests that this reviewing court enter its order, Opinion and Mandate reversing the trial court's July 18, 2017 partial denial of Defendant's Third Amended Motion for Postconviction Relief. Appellant

respectfully requests that this reviewing court enter its Opinion finding that the Appellant received ineffective assistance of counsel during the guilt phase of his trial and remand the case for a new guilt phase in addition to the new penalty phase that the trial court has already granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Court E-Filing Portal system which will send notice of electronic filing to Assistant State Attorney Mark Caliel and to Assistant Attorney general Christina Z. Pacheco, B.C.S. I also served a copy of this brief by regular, first-class, U.S. Mail addressed to the Defendant at Thomas T. Brown, DC# D30662, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in Times New Roman 14-point font and thus complies with the font requirement of Rule 9.210, Fla. R. App. P.

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