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

REPLY BRIEF OF APPELLANT

Christopher J. Anderson, Esquire
Florida Bar No.: 0976385
2217 Florida Boulevard, Suite A
Neptune Beach, FL 32266
(904) 246-4448
chrisaab1@gmail.com
Court-Appointed Attorney
for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT IN RESPONSE AND REBUTTAL TO ARGUMENT PRESENTED IN THE ANSWER BRIEF

1. Response and rebuttal to appellee's argument that this Florida Supreme Court lacks jurisdiction to adjudicate the subject guilt-phase claims because the Defendant has been granted a new penalty phase pursuant to Hurst v. State, 202 So. 3d 40 (2016)

In the "Preliminary Statement" portion of Appellee's Answer Brief, Appellee states that, "Given that Brown's death sentence has been vacated, the State questions this Court's (Florida Supreme Court's) jurisdiction of the case." In support of this "question," Appellee cites Capehart v. State, 35 So.3d 909 (Fla. 2010) as an example of this Florida Supreme Court " . . . dismiss(ing) the defendant's appeal of his guilt-phase postconviction claims and remand(ing) the case to the circuit court to proceed with the new penalty phase." Capeheart was an appeal that had been transferred by the Second District Court of Appeal to the Florida Supreme Court. The Florida Supreme Court then dismissed the appeal *without prejudice* and remanded the case to the trial court with instructions to proceed with the new penalty phase as expeditiously as possible. In other words, in Capeheart, the Florida Supreme Court decided –for reasons not stated—that the new penalty phase should be completed before the Florida Supreme Court considered the Defendant's guilt-phase claims. Moreover, Justice Cannady dissented in the Capeheart, opining that the Florida Supreme Court should proceed as it did in Maharaj v. State, 778 So. 2d 944 (Fla. 2000). In Maharaj, the Florida

Supreme Court stayed the new penalty phase while it adjudicated the appeal of the guilt-phase issues.

Appellee also cites Trepal v. State, 754 So. 2d 702 (Fla. 2000). Trepal is a case in which a death-sentenced Defendant involved in postconviction proceedings sought Supreme Court review of a postconviction-court discovery order that would have necessarily resulted in the disclosure of confidential information. Trepal supports Florida Supreme Court jurisdiction in the present appeal. In Trepal, the Florida Supreme Court affirmed its jurisdiction to review the trial court's discovery order in a death penalty case, saying, "However, this court in fact reviews interlocutory discovery orders in capital collateral proceedings." *See,* Sims v. State, 750 So. 2d 622, 623 n. 3 (Fla.1999).

In Trepal, the Florida Supreme Court further noted that, "With respect to our ultimate jurisdiction in postconviction cases where the death sentence **has been** (emphasis Appellant's) imposed, we reasserted our jurisdiction in *State v. Matute-Chirinos*, 713 So.2d 1006 (Fla.1998), by elaborating that:

> In addition to our appellate jurisdiction over sentences of death, we have exclusive jurisdiction to review all types of collateral proceedings in death penalty cases. This includes cases in which this Court has vacated a death sentence and remanded for further penalty proceedings. However, our jurisdiction does not include cases in which the death penalty is sought but not yet imposed, *State v. Preston*, 376 So.2d 3 (Fla.1979), or cases in which we have vacated both the conviction and sentence of death and remanded for a new trial."

In other words, this Florida Supreme Court has jurisdiction in this appeal because the Defendant has been sentenced to death and remains at risk of receiving the death penalty in the new penalty phase which is "on hold" during the pendency of this appeal.

2. Response and rebuttal to Appellee's argument that Appellant waived his claim of ineffectiveness by failing to present supporting evidence at the evidentiary hearing

In its Answer Brief, Appellee cites Teffeteler v. Dugger, 734 So. 2d 1009, 1023 (Fla. 1999) for the proposition that postconviction claims of improper closing argument can only be raised on direct appeal. (Answer Brief, p. 9). However, the Teffeteler court's literal ruling is as follows:

> Claims 12 and 13 allege that the prosecutor made a number of improper comments during both the guilt and penalty phase proceedings and that counsel was ineffective in failing to raise proper objection to these comments. As noted above, the substantive claims are procedurally barred as they either should have been raised on direct appeal or were raised and found to be without merit. Furthermore, allegations of ineffective assistance of counsel cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal. *See Medina,* 573 So.2d at 295. When viewed in context, we find nothing improper in the comments and conduct challenged by Teffeteller. Trial counsel cannot be deemed ineffective for failing to raise meritless claims or claims that had no reasonable probability of affecting the outcome of the proceeding. *See Strickland.*

(Teffetler, at p. 1023)

Appellee seems to have forgotten that only issues that have been properly "preserved" for appeal --either by motion or objection—can be subsequently reviewed on appeal. A defendant's attorney's *failure to object* to an improper prosecutorial remark or question can always be raised in a postconviction motion as a claim of ineffective assistance of counsel. Cardenas v. State, 993 So. 2d 546 (Fla. 1st DCA 2008).

Appellee further argues that Appellant waived his claim of ineffectiveness in connection with the prosecutor's closing-argument misquote by "failing to present evidence at the evidentiary hearing." (Answer Brief, p. 9). Appellee confuses "testimony" with "evidence." Although the Appellant did not subpoena any witnesses to give evidentiary hearing *testimony* on this claim of ineffectiveness, there is ample *record* evidence. To begin with, during guilt-phase opening and closing arguments, Appellant's trial counsel informed the jurors that the only guilt-phase issue for them to decide was whether this was a premeditated, first-degree murder or a "heat of passion" second-degree murder. R15, p. 338-339, R17, p. 678-679.

Throughout the jury trial, evidence was presented which would support a conviction of *either* a spontaneous, second-degree murder *or* a reflected-upon-in-advance, premeditated, first-degree murder. This Florida Supreme Court accurately summarized such guilt-phase evidence in its original direct-appeal

Opinion in Brown v. State, 126 So. 3d 211 (Fla. 2013). Given that this was a case in which premeditation was the only issue and was an issue the jury could "go either way" on, there is no justification for Appellant's counsel's failure to object to the prosecutor falsely quoting the Appellant 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." R17, p. 659. The lack of objection to this false quote effectively conceded premeditation and first-degree murder. Given this, no further evidentiary hearing testimony was required. However, even if additional evidentiary hearing testimony was required, Appellant's counsel supplied it by cross-examining the State's witnesses during the evidentiary hearing. PCR1, p. 281-284, 291-284, 305-306. The undersigned counsel also represented Appellant in the underlying postconviction proceedings. The State told the undersigned beforehand that the State would have the lead detective and Defendant's trial counsel present at the evidentiary hearing.

Once a defendant presents competent, substantial evidence supporting his ineffectiveness claim, the burden shifts to the State to present contradictory evidence. Williams v. State, 974 So. 2d 405 (Fla. 2d DCA 2007). Allegations in a postconviction motion must be accepted as true to the extent they are not refuted by the record. Kirkland v. State, 41 So. 3d 1048 (Fla. 1st DCA 2010). The entire record is relevant and admissible in adjudicating postconviction claims. Pace v.

State, 826 So. 2d 996 (Fla. 3d DCA 2001, Foster v. State, 810 So. 2d 910 (Fla. 2002).

The Appellee essentially argues in its Answer Brief that meritorious postconviction claims which are amply supported by record evidence but which are not subsequently augmented with additional, defendant-called live testimony at the evidentiary hearing are somehow waived. There is no authority for this. Indeed, some acts of counsel –such as admitting guilt to a charged offense-- are so clearly wrong that they are deemed *per se* ineffective, without the need for any further proof of inquiry whatsoever. Nixon v. Singletary, 758 So. 2d 618, 621 (Fla. 2000).

The State falsely quoted 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." By not objecting, Defendant's trial counsel effectively admitted to premeditation and first-degree murder. Defendant has suffered and has been prejudiced by ineffective assistance of trial

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of March, 2018, 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.

/s/ Christopher J. Anderson
CHRISTOPHER J. ANDERSON, ESQUIRE
Florida Bar No. 0976385
2217 Florida Blvd., Suit A
Neptune Beach, Florida 32266
(904) 246-4448
chrisaab1@gmail.com
Court-Appointed Counsel for Appellant

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.

/s/ Christopher J. Anderson
CHRISTOPHER J. ANDERSON, ESQUIRE
Florida Bar No. 0976385
2217 Florida Blvd., Suit A
Neptune Beach, Florida 32266
(904) 246-4448
chrisaab1@gmail.com
Court-Appointed Counsel for Appellant