IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY, FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA
Plaintiff,
vs.
BRIAN S. BURKEEN
Defendant.
_____/

CASE NO: 312018CF000406A
JUDGE: MEADOWS

DEFENDANT'S AMENDED SWORN MOTION FOR POST CONVICTION RELIEF
(Amended as to Ground Four)

The Defendant, Brian S. Burkeen, ("Defendant" or "Burkeen"), by and through undersigned counsel, files this sworn motion for postconviction relief pursuant to Rule 3.850, *Fla. R. Crim. P.*[1] ("motion"), and, respectfully moves this postconviction court, after careful and deliberate consideration of the grounds presented herein, to grant Defendant's relief sought; namely, the reassignment of this case to a different judge for an evidentiary hearing, entry of an order vacating the first resentencing order dated February 19, 2021, and entry of an order granting a second *de novo* resentencing[2].

In support of this sworn motion, Defendant states as follows:

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1 Constitutional claims for ineffective assistance of counsel concerning a judgment ***or*** sentence are appropriate for consideration in a 3.850 motion for postconviction relief. *See Meeks v. State,* 382 So. 2d 673, 675 (Fla. 1980).

2 This motion is timely filed according to Rule 3.850{b), *Fla. R. Crim. P.* Burkeen has 2 years from the date his Judgment and sentence become final to file a 3.850 motion. Burkeen's sentence became final on April 22, 2022.

STATEMENT OF CASE AND FACTS

A brief statement of the facts and other conditions relied upon in support of this motion[3] is as follows:

Burkeen was charged with first degree grand theft pursuant to §812.014, Florida Statutes[4].

He was convicted after he entered a no contest plea on March 2, 2020[5] and a judgment entered on that date.

Burkeen was originally sentenced on July 16, 2020, resulting in a 30-year split sentence of 12-years prison, followed by 18-years probation.

The current sentence under attack, however, involves a new sentence entered after a successful appeal was taken by Burkeen.

Burkeen's *de novo* resentencing occurred on February 19, 2021.

The court that rendered the foregoing judgment and sentence in the Indian River Circuit Court, Circuit Judge Dan L. Vaughn presiding[6]. *See* copy of the resentencing transcript attached hereto and marked as Exhibit "A" and cited herein as "(T. atP._, L.__)".

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3 Required by Rule 3.880(c)7), Fla. R. Crim. P; further, all rules cited herein regarding Rule 3.850 and any other rules of criminal procedure shall be in reference to the Florida Rules of Criminal Procedure (2022).

4 This offense is punishable by a maximum sentence of 30-years imprisonment where the offense is a felony of the first degree and no statute provides otherwise. *See* §775.082, *Florida Statutes* (2018).

5 This statement is required by Rule 3.850(c)(2).

6 This statement is required by Rule 3.850(c)(1).

At the time of his original sentencing, the scoresheet erroneously reflected a total of 92 points[7] ("erroneous scoresheet'), resulting in an incorrect lowest permissible sentence ("guideline sentence") of 48 months.

This scoresheet error ("scoresheet error') resulted in an appeal to the Fourth District Court of Appeals Case No.: 4D21-0882[8].

The scoresheet error was conceded by the State after Burkeen filed a 3.800(b)(2) motion while his appeal was pending.

The result of his appeal (opinion dated January 20, 2021), was a reversal and remand to the trial court for correction of the erroneous scoresheet at a *de novo* resentencing ("resentencing" or "hearing")[9].

A first mandate was issued on February 5, 2021.

On February 19, 2021, at a resentencing, the scoresheet error was addressed, reflecting a corrected score of 56 points[10], resulting in a revised

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7 This scoresheet was based solely on the fact that the offense was erroneously classified as a Level 9 offense, which equals 92 points on the scoresheet. The Defendant had no additional offenses, no victim injury, no prior record, no legal status violations, no community sanction violations no firearm/semi-automatic or machine gun involvement, no prior serious felony and no enhancements which would add to this score.

8 This statement is required by Rule 3.850(c)(3).

9 This statement is also required by Rule 3.850(c)(3).

10 This corrected scoresheet was based solely on the fact that the offense was now correctly classified as a Level 7 offense on the scoresheet, which equals 56 points. Again, the Defendant had no additional offenses, no victim injury, no prior record, no legal status violations, no community sanction violations no firearm/semi-automatic or machine gun involvement, no prior serious felony and no enhancements on the corrected scoresheet. The only item corrected was the level of offense, resulting in a significantly lower point total and a significantly reduced lowest permissible sentence. *See* corrected scoresheet.

guideline sentence of 21 months, instead of 48 ("corrected scoresheet').

The scoresheet error was significant in that Burkeen's original erroneous scoresheet, presumably taken into consideration by the trial court at the time of -his original sentencing, reduced his guideline sentence by well over 50%, from 48 months to 21 months, a staggering difference.

Notwithstanding, Burkeen was re-sentenced to the same exact 30-year split sentence[11], despite the significantly revised scoresheet.

The imprisonment portion of the sentence-12 years-was nearly 7 times harsher than Burkeen's of 21 month guideline sentence and his overall 30-year sentence was 17 times harsher.

A second appeal was taken, arguing that (1) the trial court had a policy against downward departures and that it failed to give the proper weight to the scoresheet and PSI; and (2) there was a lack of PSI for the resentencing.

This appeal was *per curiam* affirmed, resulting in a second mandate

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11 A trial court is not bound by a scoresheet during sentencing in Florida, thereby resulting in wildly inconsistent and inequitable sentences for similarly-situated defendants throughout Florida, so much so that such sentencing disparities between similarly-situated defendants potentially violate the equal protection clause ~ to the U.S. Constitution, as opposed to federal sentencing guidelines which, despite being advisory, are adhered to more consistently due to congressional intent pursuant to 28 USC(b)(1)(B)(Congress' basic sentencing intent is "to provide certainty and fairness in meeting the purposes of sentencing [while] avoiding unwarranted sentencing disparities with similar records who have been found guilty of similar conduct while maintaining sufficient flexibility to permit individualized sentences where warranted."), thereby resulting in a far more equitable sentencing outcome at the federal level. Florida has not expressed any such legislative intent. This case represents a Florida trial court's unfettered ability to subjectively sentence a defendant to the same sentence without regard to a corrected, significantly reduced guideline scoresheet, thereby effectively rendering the entire statutory guideline scoresheet process toothless as it can, and does, yield to a court's personal whims, biases and prejudices concerning a particular defendant.

issuing on April 22, 2022.

Therefore, Burkeen's sentence became final on April 22, 2022.

During the resentencing, there was no explanation on the record for why such a harsh 30-year sentence was imposed on a first-time offender in the face of such a significant downward revision in the guideline scoresheet from 48 to 21 months.

There was also no explanation on the record for why the sentence remained exactly the same in the face of such a staggering difference in the scoresheet.

There can only be one (1) logical explanation: prejudice.

The judge in this case, at the time of resentencing, made the following comment on the record:

"One other comment. In the appellate opinion, the appellate court wrote, moreover, the record does not conclusively show that the same sentence would have been imposed using a correctly computed scoresheet. The Court cited Anderson, 905 So.2d 115, requiring reversal of a sentence. If an appellate court, quote, cannot determine conclusively, conclusively from the record that the trial court would have imposed the same sentence despite the erroneous scoresheet, unquote. *If there is any further appellate review of this case and any other scoresheet errors detected by the appellate process or conceded by the State, this court can announce for the record that would impose the same sentence notwithstanding any erroneous scoresheet errors that may be detected based on the criteria I've referenced above.*" ("comment") (T. at P. 30, L. 18-25 and P. 31, L. 1-7). [*Emphasis added*].

The judge revealed his prejudice towards Burkeen at the re-sentencing

hearing in making this comment[12].

Consistent with this comment, the trial court kept Burkeen's sentence exactly the same.

In addition, this trial court considered[13] a massive amount of inadmissible hearsay at the resentencing, none of which would be allowed under any exception to the hearsay rule, and none of which was ever introduced into evidence, including a criminal arrest affidavit[14], a presentence investigation (PSI) prepared for the original sentencing 8 months earlier, hearsay statements from witnesses who were never called to testify, and psychological reports and information contained in the court file, including medical reports detailing his physical and mental condition, none of which were objected to by defense counsel[15].

In addition, improper comments were made by the assistant state attorney

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12 *See Serna v. State*, 264 So. 3d 999 (Fla. 4" DCA 2019)("Determining an appropriate sentence is the most important matter upon which a judge is called to judge."). When a judge prejudges a defendant's sentence, he relinquishes his most important duty.

13 Rule 3.720(b) requires the court to "entertain submissions and evidence by the parties that are relevant to the sentence". Failure to comply with this rule is reversible error. See Compere v. State, 262 So. 3d 819 (Fla. 4 DCA 2019). Under this rule, defendants are allowed to make a statement to the court (*id.*), as well as present evidence concerning mitigating circumstances (*see* §921.185). Other than death penalty cases, which allow for testimony as to aggravating factors (*see* §921.141(6)), unless there is a rule or statute allowing for aggravating factors in non-death penalty cases other than when the factors constitute an element of the crime itself, testimony concerning mitigating factors is wholly appropriate, while testimony concerning aggravating factors may not. While the rule does not specifically address which submissions or what evidence is ultimately admissible in a sentencing proceeding, Burgess v. State is informative on this point *(see* n. 27).

14 The actual name of the document is "Warrant Affidavit".

15 It appears from the record that the trial court took judicial notice of the entire court file.

Evans ("ASA Evans" or "prosecutor") in his closing that were not based on any testimony or evidence introduced at the hearing, resulting in a unfair sentencing : hearing, all without objection from defense counsel.

Nor did defense counsel investigate, depose or call any victim witnesses, who were actually available to testify concerning Burkeen's downward departure ground under §921.0026(2)(e), *Florida Statutes*, which concerns weighing a victim's need for restitution against the need for a prison sentence.

As a result, there was cumulative error by defense counsel in failing to move to disqualify the trial judge, failing to object to inadmissible hearsay, failing to object to improper comments made by the prosecutor and failing to investigate, depose and present competent, substantial evidence at the resentencing by way of available witnesses in support of a downward departure, all of which collectively deprived Burkeen of a fair resentencing.

No previous 3.850 motion or motions for postconviction relief have been filed[16].

No other motions, petitions, and/or applications have been filed

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16 This statement is required by Rule 3.850(c)(4); notably, several 3.800(b)(2) motions were filed challenging the sentence as follows: (1) A 3.800(b)(2) motion to correct sentencing error after Defendant's original sentencing. was filed on 08.31.2020, resuiting in a reversal on appeal due to a scoresheet error and ordering a de novo resentencing; (2) after defendant's resentencing, a 3.800(b)(2)(A) motion to 'correct - sentencing error was filed on 07.16.2021 based on the lack of a PSI prepared for the resentencing hearing, which was denied by the trial court; (3) lastly, there was a 3.800(b)(2)(A) motion to correct sentencing error was filed on 08.19.2021 renewing, inter alia, the same argument made in Defendant's previous motion concerning the lack of a PSI prepared for the resentencing hearing, which was "deemed denied" by the trial court after it failed to rule on the motion within 60 days as required by rule. *See* Rule 3.800(b)(2)(B), *Fla. R. Crim. P.*

challenging the judgment and conviction in this case[17]. (*See, also*, n. 16).

The nature of the relief sought is that this postconviction court enter an order reassigning this case to a different judge to be set for an evidentiary hearing in order for the Defendant to demonstrate an entitlement to the ultimate relief sought at a second *de novo* resentencing, enter an order vacating the first resentencing order dated February 19, 2021, and enter an order: granting a second de novo resentencing after the evidentiary hearing is held[18] [19].

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17 This statement is required by Rule 3.850(c)(5).

18 This statement is required by Rule 3.850(c)(6).

19 "Triple Sentencing Jeopardy". Assuming this motion is granted, this will now be the third time that Burkeen will be sentenced. It is a "third bite" at the proverbial apple for the State to introduce evidence against Burkeen which, in and of itself, is fundamentally unfair. There should be a limit. It also militates against the doctrine of finality. Rarely in Florida jurisprudence do litigants get two opportunities to "get it right" in any court proceeding, Jet alone three. Multiple resentencings due to the State's failure to introduce evidence at a sentencing should have its limits. A remedy and/or sanction should be imposed, either by amendment to the Florida Constitution, Florida Statutes (via legislative action) or by promulgation of a rule by the Florida Supreme Court that includes, but is not limited to, mandatory imposition of a guideline sentence, release of a defendant with credit for time served or discharge of the information and release of defendant, as would typically occur in a double jeopardy situation.

GROUND ONE

DEFENSE COUNSEL WAS INEFFECTIVE IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION BECAUSE SHE FAILED TO TIMELY DISQUALIFY THE PRESIDING JUDGE BASED ON A PREJUDICIAL COMMENT MADE AT BURKEEN'S RESENTENCING HEARING.

Burkeen was originally sentenced by this court to a 30-year split sentence of 12-years prison, followed by 18-years probation.

At the time of his original sentencing, an erroneous scoresheet reflected an incorrect guideline sentence of 48 months.

This was based on a significantly incorrect offense level on the scoresheet from a Level 9 to a Level 7 offense (*see* n.7 & 10), which the judge presumably took into account in rendering his sentence[20].

An appeal was taken by Burkeen, which resulted in a reversal and remand to the trial court for correction of the erroneous scoresheet and resentencing.

At resentencing, the corrected scoresheet error resulted in a lowest permissible sentence ("guideline sentence") of 21 months (T. at P. 3, L. 4-7), rather than the original erroneous 48 months, reducing the guideline sentence

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20 A similar error was seen in *State v. Anderson*, 905 So. 2d 111 (Fla. 2005), where the: defendant appealed the trial court's decision not to change his sentence after a scoresheet error. The scoresheet erroneously scored defendant's offense at Level 9, instead of Level 8. The Florida Supreme Court, in reversing and remanding, recognized that it is "undoubtedly important for the trial court to have the benefit of a properly calculated scoresheet when making a sentencing decision." (quoting *State v. Mackey*, 719 So. 2d 284, 284 (Fla. 1998)).

significantly by over 50%.

At the time of resentencing, the judge in this case demonstrated prejudice against Burkeen on the record when he made the following comment:

> "One other comment. In. the appellate opinion, the appellate court wrote, moreover, the record does not conclusively show that the same sentence would have been imposed using a correctly computed scoresheet. The Court cited Anderson, 905 So.2d 115, requiring reversal of a sentence. If an appellate court, quote, cannot determine conclusively, conclusively from the record that the trial court would have imposed the same sentence despite the . erroneous scoresheet, unquote. *If there is any further appellate review of this case and any other scoresheet errors detected by the ; appellate process or conceded by the State, this court can announce for the record that | would impose the same sentence notwithstanding any erroneous scoresheet errors that may be detected based on the criteria I've referenced above*." (T. at P. 30, ; L. 18-25 and P. 31, L. 1-7). [*Emphasis added*].

Consistent with the trial court's above comment at the time of sentencing, , the trial court kept Burkeen's sentence exactly the same.

The only logical reason the trial court made it clear on the record that any future scoresheet error would never make a difference is because the judge prejudged Burkeen's sentence at the time of resentencing.

This judge apparently wanted to send a message on the record to all parties concerned, including the appeals court which rendered its ruling on the matter that *regardless of any future corrections to the scoreesheet*[21], this judge

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21 This comment encompasses scoresheet errors that warrant a nonstate prison sanction if the point total fell below 22 points on a corrected scoresheet, which could technically result in an illegal sentence pursuant to §775.082(10) if the judge were to impose the same 30-year sentence in this case, unless additional written findings are made. *See Hutto v. State*, 50 So. 3d 85 (Fla. 1 DCA 2010).

would *never* change his sentence under *any circumstance*.

This is prejudice.

While the comment could reasonably be interpreted to mean that the trial court was simply making it clear on the record that any future sentence this judge might impose would be the same regardless of any further scoresheet errors so as to save the Defendant the time and expense of another appeal, it could also reasonably be interpreted to mean that the judge had a preconceived and fixed view as to the sentence Burkeen should receive post-reversal in any subsequent appeal, regardless of any significant scoresheet error made that could result in another successful appeal and another resentencing.

In either case, this comment made at the time of sentencing demonstrates that the judge prejudged the outcome of Burkeen's resentencing[22].

Prejudice is a valid basis for a motion to disqualify[23].

Accordingly, at that time, defense counsel should have timely moved to disqualify the judge based on this comment, but failed to do so[24].

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22 *Thompson v. State*, 990 So. 2d 482, 490-91 (Fla. 2008)("We find that Thompson demonstrated the requisite prejudice. Thompson relies on the statements made by the judge at the hearing on counsel's motion to withdraw: " With a first degree punishable by life, | don't think we need to be worrying about the guidelines"; and "If he's convicted ... he will be in prison for the rest of his life.").

23 Rule 2.330(d)(1), *Fla. R. Gen. Prac. & Admin.*, provide for the disqualification of a judge on the ground "that the party fears he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge."

24 Canon 3(B)(5) of the Code of Judicial Conduct (2022) states that "A judge shall perform judicial duties without bias or prejudice."

As a result, Burkeen was prejudiced by defense counsel's deficient performance in failing to move to disqualify this judge. *Id*. at 489-90.

Burkeen's fear that he did not receive a fair sentencing hearing by this judge was objectively reasonable and well-founded.

Not only did Burkeen develop this fear, but family members and friends present in the courtroom at the time also developed the same fear and believed that testifying in Burkeen's defense would be a futile exercise.

This supports the reasonableness of Burkeen's fear in that it was not just Burkeen that developed this fear, but others who were present in the courtroom who also observed this judge first-hand.

Notably, the trial court, "[I]n determining what a proper sentence is...", went through an exhaustive list of evidence reviewed on the record (see T. atP. 28,L. 3-25 and P. 29, L. 1-2), none of which included consideration of the corrected scoresheet and most of which included inadmissible hearsay.

The Sixth Amendment to the U.S. Constitution provides that the accused shall have the right to effective assistance of counsel in all criminal prosecutions.

In *Strickland v. Washington*, 466 U.S. 688, 670, 687 (1984), the U.S. Supreme Court interprets the Sixth Amendment by setting forth a 2-part test for

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Canon 3(E)(1) of the Code of Judicial Conduct (2022) further states "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might be reasonably questioned including, but not limited to, instances where ... (a) the judge has a personal bias or prejudice concerning a party ...".

analyzing ineffective assistance of counsel cases:

(1) Whether defense counsel's performance was deficient;

(2) Whether defendant was prejudiced by counsel's performance.

Strickland is the proper standard for evaluating ineffective assistance of counsel claims alleging that defense counsel failed to timely file a motion to disqualify. (*See* n. 21).

As a result of this. deficiency, "the result of the [resentencing] proceeding was rendered unreliable [in light of the prejudicial comments made by the judge at the time of resentencing] and confidence in the outcome of the [resentencing] \ proceeding has been undermined by counsel's deficiency". *Id*. at 490-491.

There is a reasonable probability that the outcome of Burkeen's sentence would be different before a different judge.

This claim is facially sufficient, supported by case law, and the constitutional error complained of is not conclusively refuted by the record[25].

Therefore, Defendant requests that this postconviction court enter an order directing the clerk to reassign this case to a different judge[26] to conduct an evidentiary hearing, vacate the February 19, 2021, resentencing order and order a second de novo resentencing.

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25 *See Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000). Each claim for post conviction relief must be examined to determine if it is legally sufficient, and if so, whether it is conclusively refuted by the record. Absent an evidentiary hearing, factual allegations made by the *Defendant must be accepted as true to the extent that they are not refuted by the record. [Emphasis added].*

26 *See Goines v. State of Florida*, 708 So. 2d 656 (Fla. 4" DCA 1998)(After an evidentiary hearing on defendant's postconviction motion claiming ineffective assistance of counsel, the appellate court reversed and remanded for a new trial before a different judge based upon the failure of his original defense counsel to move for disqualification of the trial judge at trial.)

GROUND TWO

DEFENSE COUNSEL WAS INEFFECTIVE IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION BECAUSE SHE FAILED TO OBJECT TO THE TRIAL COURT'S CONSIDERATION OF INADMISSIBLE HEARSAY CONTAINED IN THE COURT FILE IN DETERMINING WHAT A PROPER SENTENCE SHOUD BE.

A sentencing hearing is an evidentiary hearing[27].

Relevant testimony, along with relevant documentary evidence, which can be introduced by either party, are to be taken into consideration by a trial court in rendering an appropriate sentence.

The trial court may also take judicial notice of certain matters enumerated in §90.202, *Florida Statutes* (2021)[28].

However, just because a trial court may take judicial notice of court records pursuant to §90.202(6), it does not follow that this provision permits the wholesale admission and consideration by the trial court of improper hearsay statements contained within those court records[29].

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27 Rule 3.720(b) states: "The court shall entertain submissions and evidence by the parties that are relevant to the sentence."

28 Judicial notice may be taken of "[F]acts that are not subject to dispute because they are either generally known within the territorial jurisdiction of the court" or "...because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned." (*See* §90.202(11) and §90.202(12)).

29 *See Burgess v. State*, 831 So. 2d 137, 141 (Fla. 2002)(During his sentencing proceeding, the defendant was sentenced as a habitual felony offender based on inadmissible hearsay after judicial notice was taken of the court file. The Florida Supreme Court held in Burgess that " ... hearsay cannot be considered *merely because it is part of the court file.") [Emphasis added].

Further, testimony as to the contents of those records is improper unless and until certain documents from those records have first been authenticated and actually introduced into evidence[30].

This includes evidence presented at a sentencing hearing (*see* n. 28).

And yet, that is exactly what happened in this case.

To the contrary, documents contained in a court file, *even if that court file is judicially noticed*, are still subject to the same rules of evidence to which all evidence must adhere[31].

"Documents" are defined as any pieces of paper with information on it. *See Black's Law Dictionary*, 11" Ed. (2019).

This definition encompasses a criminal arrest affidavit, PSI, psychological reports and medical reports and other documents contained in the court file.

Defense counsel was, therefore, deficient pursuant to *Strickland* in failing to object to the trial court's consideration of inadmissible hearsay in the court file after it was judicially noticed and then considered by the trial court as evidence despite there being no exception to the hearsay rule and without it ever first

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30 *See DiGiovanni v. Deutsche Bank National Trust Company*, 226 So. 3d 984, 989 (Fla. 2d DCA 2017)(Improper for a court to consider a judicially noticed document without the document first being introduced into evidence. "Judicially noticed documents must otherwise be admissible [before they can be considered by the trial court]. Here, the document was simply printed from the internet. It was never authenticated or shown to . fall within an exception to the rule against hearsay.")

31 *Id.* (quoting *Stoll v. State*, 762 So. 2d 870, 876-77 (Fla. 2000)(The Florida Supreme Court made it clear that that "We have *never* held that such otherwise inadmissible documents are automatically admissible just because they were included in a judicially noticed court file.") [*Emphasis added*].

being introduced into evidence[32, 33].

This prejudiced Burkeen pursuant to *Strickland* because there is a reasonable probability that the outcome of the resentencing would have been different and that Burkeen would have received a less harsh sentence before a different judge without the consideration of the inadmissible hearsay by the trial court.

As a result of this deficiency, the result of the resentencing proceeding was rendered unreliable at the time of resentencing and confidence in the outcome of the resentencing proceeding was undermined by counsel's deficiency.

This claim is facially sufficient, supported by case law, and not conclusively refuted by the record.

To the contrary, this claim is actually supported by the record as follows: "In determining what a proper sentence is..." the trial court took judicial notice of the court file[34], "*specifically that is the allegations contained in the*

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32 The request for judicial notice was made by the prosecutor, Mr. Evans: "Your Honor, | would just ask that you take judicial notice of the, the arrest affidavit in this case, which ! know you already have ... " (T. at P. 8, L. 8- 11).

33 Defense counsel was also ineffective in failing to object to the trial court's violation of Rule 3.720(a) when it failed to "ask the defendant whether there is any legal cause to show why sentence should not be pronounced" as well as defense counsel's failure to ensure a correct judicial determination as to Cost of Prosecution ($517.66 per prosecutor, not $717.66), as well as Cost of Investigation ($100.00 per statute, not $200.00)(*see* §938.27), resulting in a $150.00 error to Burkeen's detriment (T. at P. 26, L. 18-24); however, these two (2) issues are not being challenged. *See, also*, Order on Charges/Costs/Fees dated Feb. 19, 2021.

34 It is apparent from the record that the court took judicial notice of the entire court file in light of further comments made by the trial court in stating "I've also considered psychological reports and information *contained, that's contained in the court file*." (T. at P. 28, L. 15-16). [*Emphasis added*].

affidavit in support of the warrant that was obtained for Mr. Burkeen's arrest." ('criminal arrest affidavit"). (T. at P. 28, L. 3-6). [*Emphasis added*].

Consideration of the criminal arrest affidavit, however, was clearly improper in light of *Burgess* as it is inadmissible hearsay[36], nor did it fall within any exception to the hearsay rule.

Further, this document was never introduced into evidence and was not objected to by defense counsel, thereby "opening the door' for a valid ineffective assistance of counsel claim on this issue. (*See* n.29).

The trial court's consideration of inadmissible hearsay, however, did not end there.

The trial court also improperly considered "the number of instances each incident of the offenses occurred over a significant period of time" (T. at P. 28, L. 9-10), even though there was no testimony or evidence adduced at the resentencing concerning the number of instances involved.

Additionally, the trial court considered "the information contained in the PSI

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35 "This limitation [on considering a judicially noticed criminal arrest affidavit] is based on the belief that observations by officers at the scene of a crime or when a defendant is arrested are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between police and the defendant." *Burgess* at 140-141 (quoting Charles W. Earhardt, *Florida Evidence* §803.8).

36 Nor does the criminal arrest affidavit fall within. any exceptions to the hearsay rule. *See* §90.803(8) (2018)(criminal arrest affidavit is not admissible into evidence as a public record exception to the hearsay rule because this exception expressly excludes "in criminal matters observed by a police officer or other law enforcement personnel.")

that was originally presented by the Department of Corrections...", even though - the PSI regurgitated the criminal arrest affidavit (*see* PSI at Pages 2-6[37] and Page 8 (4th paragraph under "Employment Summary")) without objection by defense counsel, even though the PS! itself also contains inadmissible hearsay because it was written by a correctional probation officer from the Florida Department of Corrections, who is a law enforcement officer[38, 39].

The PSI also contained "double hearsay" in the form of several 1- paragraph hearsay statements from Edward Halsey, Indian River County Auditor (PSI at page 6)[40], as well as Tom Germain, Store Manager for Goodyear (PSI at pages 7 & 11 under "Assessment and Recommendation")[41], none of whom testified at the resentencing and each of whom made prejudicial statements against Burkeen in the PSI (*see* n. 4 & 41) that the trial court improperly considered as inadmissible hearsay, without any exception to the hearsay rule

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37 The PSI is 12 pages.

38 Admission of a PSI cannot be used as an end-run around *Burgess*; to do so would vitiate the entire holding of *Burgess* that "documents contained in a court file, even if that court file is judicially noticed, are still subject to the same rules of evidence to which alf evidence must adhere". It's admission would also run afoul of §90.803(8).

39 See §784.07(d), *Florida Statutes* (" "Law enforcement officer" includes ... a correctional probation officer).

40 Statement: "It is my hope as the Internal Audit Director that the court will decide on a prison sentence strict enough to act as a strong deterrent. The prison sentence will send a message to any would be fraudster that the consequence of being caught committing a fraud against Indian River County is so harsh as to make the attempt not worthwhile."

41 Statement: "Mr. Burkeen should not be permitted to profit for crimes at our expense."

and without objection by defense counsel.

The PSI also included a 1-paragraph statement from ASA Evans based on hearsay evidence that was never subsequently admitted at the resentencing[42], nor was it part of Brown's testimony at the resentencing. (PSI at page 11).

The resentencing, as a de novo proceeding, was supposed to be a "clean slate" (T. at P. 18, L. 24-25 — P. 19, L. 1-11).

The trial court acknowledged as much. (T. at 27 L. 22-25 — P. 28, L. 1-2).

However, the resentencing was anything but a "clean slate", with a trial considering a criminal arrest affidavit, PSI, out-of-court statements from a prosecutor and witnesses and medical reports that were never introduced into evidence.

The PSI also contained a summary of a psychological report in the Physical and Mental Health section, prepared by a third-party medical professional, despite it being inadmissible hearsay, without any exception under the hearsay rule, and without objection from defense counsel. (PSI at page 10).

The trial court "also considered the psychological reports and information contained, that's contained in the court file" (T. at P. 28, L. 14-16), prepared by third-party medical professionals, despite being inadmissible hearsay, without

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42 "…At least once Burkeen would take his county-provided truck, on county time, to local Goodyear stores to steal tires. He charged 1,455 tires to the county…Burkeen would return to his office where on county time, he used social media accounts to sell the tires on a county-provided computer…"

any exception under the hearsay rule, without ever being admitted into evidence and without any objection from defense counsel.

The trial court also considered medical reports detailing Burkeen's physical and mental condition, prepared by third-party medical professionals, "that'll all be made part of the court file" (T. at P. 28, L. 20-21), again, as inadmissible hearsay, without any exception under the hearsay rule, without ever being admitted into evidence and without objection from defense counsel.

Lastly, the trial court considered improper comments from ASA Evans presented on behalf of the State, which are the subject of the next ground herein, without objection from defense counsel.

Therefore, based on the vast amounts of inadmissible hearsay considered at the resentencing by the trial court without objection by defense counsel, combined with the judge's prejudicial comment, Defendant requests that this court enter an order directing the clerk to reassign this case to a different judge to conduct an evidentiary hearing and, upon Defendant meeting his burden of proof at the evidentiary hearing, vacate the first resentencing order from February 19, 2021, and order a second *de novo* resentencing before a newly-assigned judge.

GROUND THREE

DEFENSE COUNSEL WAS INEFFECTIVE IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION BECAUSE SHE FAILED TO OBJECT TO IMPROPER COMMENTS MADE BY THE PROSECUTOR IN CLOSING AT BURKEEN'S RESENTENCING HEARING.

A claim of ineffective assistance of counsel for failing to object to improper comments made by a prosecutor is an appropriate ground for postconviction relief pursuant to Rule 3.850, Fla. R. Crim. P.[43].

It is well-settled that a prosecutor must confine his closing argument to evidence in the record and must not make comments outside that record which could not be reasonably inferred from the actual evidence presented[44].

And yet, that is exactly what the prosecutor did here.

Defense counsel was, therefore, deficient pursuant to Strickland for failing to object to numerous improper comments made by the prosecutor in closing at the time of the resentencing as further specified herein.

This is particularly so where defense counsel has a duty to object to

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43 *See Goswick v. State*, 658 So. 2d 1215, 1216-17 (Fla. 1st DCA 2000)(Summary denial of 3.850 motion for postconviction relief reversed and remanded for an evidentiary hearing on the issue of whether defense counsel was ineffective for failing to object to certain [improper] comments made by the prosecutor.)

44 *See Thompson v. State*, 318 So. 2d 549, 551 (Fla. 4" DCA 1975) (quoting *Blanco v. State*, 7 So. 2d 333, 339 (Fla. 1942).

improper comments made by a prosecutor[45].

The comments prejudiced Burkeen in accordance with Strickland because they inflamed the sensibilities of the trial court, thereby influencing the trial court to impose a harsher sentence on the Defendant.

These comments, therefore, resulted in an unfair sentencing proceeding[46].

They contained improper testimony by the prosecutor to facts that were not in evidence, as well as several false and misleading statements made to the trial court concerning a competency hearing that never took place and stating there is case law suggesting that the sentence should not be altered, none of which were objected to by defense counsel[47].

Therefore, there is a reasonable probability that the outcome of the resentencing would have been different.

As a result of defense counsel's deficiency, the result of the resentencing was rendered unreliable in light of the prejudicial comments made by both the judge and prosecutor at the time of Burkeen's resentencing, combined with the vast amounts of hearsay improperly considered by the trial court.

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45 *See Eure v. State*, 764 So. 2d 798, 801 (Fla. 2D DCA 2000)(" ... defense counsel has the duty to object to improper comments by the State ... ").

46 *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986)("The touchstone of due process analysis in these cases of alleged prosecutorial 'misconduct is the fairness of the trial [or hearing], not the culpability of the prosecutor.")

47 Based on the resentencing record, a copy of which is attached hereto as Exhibit "A", defense counsel did not make a single requisite objection during the entire proceeding.

Confidence in the outcome of the resentencing proceeding was undermined by this deficiency.

This claim is facially sufficient, supported by case law, and not conclusively refuted by the record.

To the contrary, this claim is actually supported by the record.

In closing (T. at P. 24, L. 6-25 — P. L. 1- 24), the prosecutor, ASA Evans, who was neither a fact witness, nor an expert witness in this case, made the following comments, none of which derived from his witness', Mr. Brown's, testimony, nor did they derive from any other actual evidence introduced at the hearing by either party:

Comment #1:

MR. EVANS: "*... Mr, Mr. Burkeen was issued a pickup truck from the fire department, trusted him with that, that pickup truck. He took that pickup truck and almost on a weekly basis went to Goodyear with a trailer owned by the fire department, loaded the pickup truck and the trailer with tires that the charged to the people of, of Indian River County and sold on the internet while he was working for the fire department."* (T. at 24, L. 8-14).

This comment came directly from the criminal arrest affidavit, which was not admitted into evidence and not objected to by defense counsel.

Comment #2:

MR. EVANS: "*... this was dozens if not hundreds of bad decisions*." (T. at 24, L. 18-19).

There was no evidence presented at the hearing to support this comment, nor was there any objection to the comment by defense counsel.

Comment #3:

MR. EVANS: "*He had good money, a huge pension waiting for him*." (T. at 24, L. 21-22).

There was no evidence presented at the hearing to support this comment, nor was there any objection by defense counsel.

Comment #4:

MR. EVANS: '*He's not, you know, someone whose brain is not developed*." (T. at 24, L. 22-25).

There was no evidence presented at the hearing to support this comment, nor was there any objection by defense counsel. The comment also calls for expert witness testimony, nor was the prosecutor competent to testify to such a matter.

Comment #5:

MR. EVANS: "*... he made bond almost immediately upon being arrested. And we heard that he was working all during that time*." (T. at 25, L. 1-3).

There was no evidence presented at the hearing to support this comment, nor was there any objection to the comment by defense counsel.

Comment #6:

MR. EVANS: "*The reasonable thing to do when you have*

overwhelming evidence against you is to start paying or at

least create a fund to start paying back the people that he stole from.

Not a dime came back, came back to the people." (T, at 25, L. 3-7).

There was no evidence presented at the hearing as to this comment, nor was there any objection by defense counsel.

Further, Article 1, §19 of the Florida Constitution, clearly states that "No person charged: with a crime shall be compelled to pay costs before a judgment of conviction becomes final." Therefore, this comment was irrelevant[48] because Burkeen's judgment was not yet final.

Regardless, Burkeen did not "open the door" to such a comment by testifying to any degree of payment of restitution as a mitigator allowed by §921.185, *Florida Statutes*.

Comment #7:

MR. EVANS: "*With regard to his medical claims, again,*

he's made a remarkable recovery from what, what you saw

in court today versus what you saw in his claims that he couldn't

stand trial because of brain damage in, what was it, 2000-- late 2019." (T. at 25, L. 10-13).

There was no evidence presented at the hearing as to this comment either, nor was there any objection by defense counsel. This comment also calls

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48 §921.185, *Florida Statutes*, states, in relevant part, that "...the court, in its discretion, shall consider any degree of restitution a mitigation of the severity of an otherwise appropriate sentence." However, where Burkeen did not argue payment as a mitigating factor, the prosecutor's comment in this regard arguing non-payment as an aggravating factor was not authorized by any rule or statute, was inflammatory, prejudicial, contained no probative value.

for expert witness testimony, nor was the prosecutor competent to testify to such matters.

Comment #8:

MR. EVANS: " *... the, the, the people of, of Indian River County will do much better paying for his incarceration than the, what we see he's, he is like when he's not incarcerated."* (T. at 25, L. 16-19).

There was no testimony as to this comment. Therefore, the prosecutor _. improperly interjected his own personal opinion into the matter; nor was there any objection by defense counsel to this comment.

The reason these foregoing comments by ASA Evans are so significant is based *not* on what his single witness testified to at the resentencing, *but what his witness did not testify to*.

It is the absence of testimony that is so significant in this case.

Comment #9:

In addition to the foregoing, the prosecutor made a false and misleading statement earlier in the proceeding concerning a competency hearing that did not take place, nor was it objected to by defense counsel:

MR. EVANS: "…*the hearing that we had on the, on the psychological issues before*." (T. at P. 8, L. 10-11).

At the resentencing, Jason Brown's testimony from the record is summarized as follows:

* He testified to his professional background; that

* Burkeen violated the public trust;

* Stole nearly $300,000;

* "[A]nother ambulance" could have been purchased;

* There was a "significant impact" on county employees; and

* A "strong penalty" should be imposed.

(T. at P. 4, L. 4-25 -P. 7, L. 1-6).

No other testimony was adduced by the State. Nor was any other documentary evidence introduced.

Therefore, based on this limited testimony, the prosecutor "went off the rails', improperly testifying to numerous facts that were not in evidence, rather than limiting himself to the actual evidence adduced at the hearing.

His **only** proper comment in closing based on Brown's testimony (T. at P. 5, L. 14-15), was the fact that Burkeen violated the public trust (T. at P. 24, L. 19- 20).

He then incorrectly characterized Brown's testimony by stating "I think the county wants the maximum penalty". However, Mr. Brown testified that a "strong penalty" should be imposed. He did not testify that the "maximum penalty" should be imposed.

Comment #10:

ASA Evans also incorrectly characterized the law with the following comment:

MR. EVANS: "*As you know, the case law is against you, if you deviate from your, your prior sentence*." (T. at P. 25, L. 21-23).

This statement is simply not true.

This was a *de novo* resentencing. It is a new proceeding.

There is no case law that says a trial court should not deviate from its prior sentence at a resentencing; otherwise, there would never be a need for a resentencing.

Therefore, the trial court was well within its discretion not only to lower the sentence[49], but also to impose a downward departure after presentation of additional evidence by defense counsel at the resentencing.

ASA Evans' suggestion to the trial court that if the trial court changed the sentence, the judge could potentially be reversed on appeal was simply a false and misleading statement. This false suggestion may well have influenced the trial court to keep the sentence the same, particularly in light of the fact that there was no objection made to this statement by defense counsel.

As a court officer and prosecutor, ASA Evans duty is to do justice to a case, not testify to facts not in evidence, interject personal opinion, and make false and misleading statements to the trial court concerning a hearing that

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49 *See Trotter v. State*, 826 So. 2d 362 (Fla. 2002)(In most cases, a presumption of vindictiveness arises when a judge imposes a more severe sentence on remand; however, because the sentence imposed on remand in Trotter was less than the original sentence, this presumption did not arise.)

never took place and make an incorrect characterization of the law that the length of Burkeen's sentence should not be changed.

ASA Evans was not a witness in this case. Nor was he under oath. He was an advocate for the State.

His duty in this regard was to take the facts that were *actually introduced into evidence* and summarize them for the court, not testify to facts that were not in evidence in order to inflame the sensibilities of the trial judge to "win" a harsher sentence.

And yet, at nearly every turn in his closing, this is exactly what ASA Evans did.

Notably, neither the trial court nor defense counsel ever took issue with any of the prosecutor's above-described comments and readily accepted facts that were not in evidence.

The record could not be more clear in this regard.

Burkeen's defense counsel sat silently while the closing argument took , place, never once making any requisite objection.

This is clearly ineffective advocacy on behalf of a defendant. It is also ineffective assistance of counsel that violates the Sixth Amendment.

Accordingly, based on the judge's prejudice, the vast amounts of inadmissible hearsay considered at the resentencing by the trial court without objection by defense counsel, combined with a significant number of improper comments made by the prosecutor, Defendant requests that this court enter an order directing the clerk to reassign this case to a different judge to conduct an evidentiary hearing and, upon Defendant meeting his burden of proof at the evidentiary hearing, vacate the first resentencing order from February 19, 2021, and order a second *de novo* resentencing before a newly-assigned judge.

GROUND FOUR (AMENDED)

THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION WAS VIOLATED WHEN DEFENSE COUNSEL FAILED TO INVESTIGATE, DEPOSE AND CALL VICTIM WITNESSES AT BURKEEN'S RESENTENCING TO TESTIFY IN SUPPORT OF BURKEEN'S DOWNWARD DEPARTURE GROUND THAT THE NEED FOR RESTITUTION OUTWEIGHS THE NEED FOR A PRISON SENTENCE (§921.0026(2)(e).

Florida law authorizes a downward departure from a guideline sentence in certain situations[50].

This may well have been one of those situations; however, for the foregoing reasons, and due to defense counsel's ineffectiveness, the only way we will ever know if a downward departure was warranted in this case is if there is a second resentencing.

This is because defense counsel failed to investigate, depose and call any witnesses on Burkeen's behalf, which were available to support a potentially meritorious downward departure ground.

§921.0026(2)(e), Florida Statutes (2021), permits the consideration of restitution as a mitigating factor to justify a downward departure sentence where competent, substantial evidence shows the need for restitution outweighs the

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50 §921.0026(1), *Florida Statutes*, states, in relevant part, that "A downward departure from the lowest permissible sentence ... is prohibited unless there are circumstances or factors that reasonably justify the downward departure."

need for incarceration.

In weighing these needs, the trial court must consider a victim's need for restitution[51].

Thus, to satisfy this test, there must have been some evidence of record introduced at the resentencing by the defense as to victim need.

There was not.

Defendant, in recognizing this ground ("downward departure ground', "departure" or "ground"), advised his defense counsel, who brought only case law to the hearing to argue in support of this ground. (T. at 19, L.12-25 — P. 22, L.1-2).

Notably, defense counsel stated in her closing argument that "[T]he defendant must present some evidence of the victim's needs in order to qualify for downward departure." (T. at P. 20, L. 14-15).

And yet, she failed to do so.

Defense counsel was aware of the names of the victims, several.of whom gave statements to the probation officer for the PSI[52].

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51 *See State v. Kunkemoeller*, 46 Fla. L. Weekly D 2369, No. 1D20-2209 (quoting Demoss v. State, 843 So. 2d 309, 312 (Fla. 1* DCA 2003)("The test is the victim's need, not a victim's desire or preference.")

52 (1) Edward Halsey, Internal Audit Director of Indian River County Clerk of the Circuit Court and Comptroller's Internal Audit Division for Indian River County Board of County Commissioners; (2) Tom Germain, Store Manager, Goodyear Store #6626 for Goodyear Tire and Rubber Company ("Goodyear Tire"); and (3) Hanover Insurance Company, whose address is 333 W. Pierce Road, Suite 300, Itasca, IL 60143; Claim #00-00036964 (who would designate a corporate representative with knowledge)("Hanover Insurance").

And yet, defense counsel failed to investigate, depose and call any of these witnesses on Burkeen's behalf, all of which were available to support this ground, in order to properly determine whether their need outweighed the need for Burkeen's incarceration[53].

Without doing so, the evidentiary burden of proving this downward departure ground was impossible to meet.

Therefore, because these witnesses were available[54] and because defense counsel was aware of the need to present evidence concerning a victim's needs, but failed to do so, her performance was irrefutably deficient in this regard. (T. at 19, L.12-25 — P. 22, L.1-2).

To the defendant's best knowledge and belief, the following witnesses were available to testify at the sentencing hearing and would have testified as follows:

A representative of Hartford Insurance would have testified that the company's need for restitution outweighed the need for the lengthy incarceration of defendant.

Tom Germain, Goodyear Store Manager, would have testified that the company's need for restitution outweighed the need for the lengthy incarceration of defendant.

Edward Halvey, Internal Audit Director of the Indian River County Clerk of Court would have testified that the county's need for restitution outweighed the need for the lengthy incarceration of defendant.

Accordingly, counsel was ineffective in this regard[55].

Strickland is the proper standard for evaluating ineffective assistance of counsel claims alleging counsel's failed to investigate, depose and call witnesses who were available to potentially support his position in this regard at

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53 Nor did defense counsel question Mr. Brown on this issue at resentencing, who was there on behalf of Indian River County.

54 At least one of these witnesses, a Goodyear corporate representative, was present at the hearing but released by the State without being called to testify.

55 *See Morales v. State*, 308 So. 3d 1093, 1099 (Fla. 1%* DCA 2020)(quoting *Mendoza v. State*, 81 So. 3d 579, 581)("...the failure to reasonably investigate ... witnesses can often serve as a colorable claim of ineffective assistance of counsel.").

the resentencing[56].

As a result of defense counsel's deficiency, Burkeen was prejudiced due to this failure because there was a reasonable probability that the outcome of the proceeding would have been different in that, at a minimum, Hanover Insurance and Goodyear Tire, the 2 largest victims concerning the issue of restitution[57] could have testified that their need for repayment outweighed the need to incarcerate.

There could have been competent, substantial evidence to support this ground, despite the judge's stated preference that "I like not to depart from the minimum guideline sentence, although I recognize I have the authority if I "consider it appropriate"[58], (T. at P. 29, L. 17-19).

The resentencing proceeding was rendered unreliable as a result and confidence in the outcome of the resentencing proceeding was undermined by the deficiency. This claim is facially sufficient, supported by case law, and not conclusively refuted by the record.

To the contrary, this claim is actually supported *by* the record. Therefore, Defendant requests that this court enter an order directing the clerk to reassign this case to a different judge to conduct a prompt evidentiary hearing and, upon Defendant meeting his burden of proof at the evidentiary hearing, vacate the February 19, 2021, resentencing order due to this judge's prejudice and order a second *de novo* resentencing before a newly-assigned judge.

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56 *See Downs v. State*, 227 So. 3d 694, 696 (5"" DCA 2017)(quoting Honors v. State, 752 So. 2d 1234, 1235-36 (Fla. 2d DCA 2000) (quoting Strickland).

57 By agreement of the parties, Hanover Insurance was awarded $287,125.87; Goodyear Tire was awarded $26,477.45; and Indian River County, whose representative, Mr. Brown, testified at the resentencing, was awarded $5,000 in restitution.

58 Despite the potentially prejudicial nature of this comment in telegraphing this judge's attitude towards downward departures, this judge did leave the door open for granting a departure by indicating he would still be willing to do so" ... if I consider it appropriate".

GROUND FIVE

THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION WAS VIOLATED BASED UPON THE CUMULATIVE EFFECT OF THE FOREGOING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS BECAUSE DEFENSE COUNSEL FAILED TO TIMELY DISQUALIFY THE PRESIDING JUDGE, FAILED TO OBJECT TO INADMISSIBLE HEARSAY, FAILED TO OBJECT TO IMPROPER COMMENTS BY THE PROSECUTOR IN CLOSING AND FAILED TO INVESTIGATE, DEPOSE AND CALL AVAILABLE WITNESSES TO THE RESENTENCING HEARING.

In the final issue in this postconviction motion, Burkeen argues that multiple errors, viewed cumulatively, mandate a second *de novo* resentencing because Burkeen was deprived of a fundamentally fair resentencing hearing in violation of the Sixth Amendment to the U.S. Constitution.

It is appropriate to evaluate claims of error cumulatively to determine whether the errors collectively warrant a new hearing[59].

The following errors collectively establish that Burkeen did not receive a fair resentencing hearing:

(1) Defense counsel failed to object to a biased comment by the trial judge;

(2) Defense counsel failed to object to a biased trial judge's improper consideration of vast amounts of inadmissible hearsay; and

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59 *See Rodriguez-Olivera v. State*, 328 So. 3d 1080, 1088-89 (Fla. 2d DCA 2021)('The Florida Supreme Court has explained that [w]here multiple errors are discovered, it is appropriate to review the cumulative effect of those errors because even with competent, substantial evidence ... and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny defendant a fair and impartial [hearing] that is the inalienable right of all litigants in this state and this nation." (quoting *Smith v. State*, 320 So. 3d 20, 33 (Fla. 2021).

(3) Defense counsel failed to object to numerous improper comments made by the prosecutor in the form of testifying to facts not in evidence and making false and misleading statements to a biased judge;

(4) Defense counsel failed to investigate, depose and call available victim witnesses to support Burkeen's downward departure ground that the need for restitution outweighs the need for incarceration[60].

It is difficult, if not impossible, to consider each the foregoing errors in a vacuum.

These errors are inextricably intertwined because they involve improper conduct by a judge and prosecutor in the face of ineffective defense counsel all of whom were involved in the resentencing.

Therefore, these errors all dovetail each other.

The judge's prejudicial comment, combined with the prosecutor's improper comments, combined with vast amounts of hearsay, overlaid by defense counsel's failure to object, together with defense counsel's failure to put on testimony concerning a potentially meritorious downward departure ground, resulted in an unfair resentencing and a sentence that was 17 times harsher than the recommended guideline sentence.

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60 *See Kunkemoeller v. State*, 46 Fla. L. Weekly D 2369 (1*' DCA November 3, 2021)(The burden to prove a downward departure ground rests with the defendant by competent, substantial evidence.)

This is a black eye for the Indian River court system and a dark moment in Florida's criminal justice system.

It must be corrected.

Therefore, because there was such a systemic, wholesale failure by defense counsel to object to the judge's and prosecutor's comments, as well as vast amounts of inadmissible hearsay, and failure to present any evidence as to a potentially meritorious downward departure ground, this deprived Burkeen of a fundamentally fair resentencing hearing in violation of the Sixth Amendment to the U.S Constitution.

The entire criminal justice system, from top-to-bottom, from judge to prosecutor to defense counsel, failed Burkeen, thereby rendering the hearing fundamentally, and unconstitutionally, unfair.

The only fair solution would be to have a second *de novo* resentencing before a different judge.

It was defense counsel's job to safeguard Burkeen against such improprieties, but she failed to do so.

Accordingly, based on the judge's prejudice, the vast amounts of inadmissible hearsay considered at the resentencing by the trial court without objection by defense counsel, combined with a number of improper comments by the prosecutor, together with defense counsel's failure to call available victim witnesses to testify to Burkeen's downward departure ground, this postconviction court should enter an order directing the clerk to reassign this case to a different judge to conduct an evidentiary hearing and, upon Defendant meeting his burden of proof at the evidentiary hearing, vacate the first resentencing order from February 19, 2021, order a second *de novo* resentencing before a newly-assigned judge.

CONCLUSION

For the foregoing reasons, and because the grounds herein are facially sufficient and not conclusively refuted by the record, a prompt[61] evidentiary hearing should be granted, followed

by the granting of this motion vacating the Defendant's current sentence and ordering a second *de novo* resentencing before a different judge.

I HEREBY CERTIFY that a true copy of the foregoing was furnished via e-service to the Office of the State Attorney (SA19eService@sao19.org) on this 28th day of June, 2023.

Respectfully submitted,

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61 *See* Rule 3.850(8)(A)('if an evidentiary hearing is required, the court shall grant a prompt hearing ...").