

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-1238

JASON ANDREW SIMPSON,

Appellant,

L.T. No. 162002CF011026AXXXMA

vs.

STATE OF FLORIDA,

Appellee.

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

**AMICUS CURIAE BRIEF OF THE INNOCENCE PROJECT &
THE INNOCENCE PROJECT OF FLORIDA
ON BEHALF OF JASON ANDREW SIMPSON**

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IDENTITY AND STATEMENT OF INTEREST OF AMICI CURIAE

The Innocence Project and the Innocence Project of Florida are non-profit organizations that work to exonerate the wrongfully convicted through DNA testing, advocacy, and trial process reform. Since 1992, the Innocence Project has aided in the release of over 200 unjustly incarcerated individuals. Since 2003, the Innocence Project of Florida has helped to exonerate 20 individuals in Florida.

Amici have a strong interest in the outcome of this appeal. In their years of studying the causes of wrongful convictions, they have observed that the reliability of a trial is often undermined by multiple problems. Biased informant testimony, official misconduct, and inadequate legal defense are known major contributing factors to wrongful convictions. Jason Simpson's trial involved all three. Amici urge this Court to confirm and give meaning to its precedents under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Strickland v. Washington*, 466 U.S. 668 (1984), and reverse the denial of relief under Rule 3.851.

SUMMARY OF ARGUMENT

Simpson's trial was a perfect storm of error and missed opportunities. The State's star witness, George Michael Durrance, was a biased informant who likely committed perjury; the State elicited misleading testimony from him and suppressed information that would have impeached him; and Simpson's trial counsel never adequately investigated (and thus could not present) evidence that

would have supported Simpson's defense, including DNA evidence consistent with Simpson's version of events. These issues, and significant newly discovered evidence, undermine confidence in the jury's guilty verdict.

Simpson has raised numerous meritorious claims. This brief focuses on two. These two claims offer a microcosm of what went wrong in Simpson's case, and they show just how much he was prejudiced by the unfairness of his trial. Simpson's other claims lead to the same conclusion.

First, the State withheld from the defense two letters that, among other points, indicated that Durrance was a suspect in numerous homicides (which suggests an additional motive for him to curry favor with the State), that he was a serial snitch, and that he had "zero credibility with law enforcement." The letters also suggested that, contrary to Durrance's testimony at trial, the State *had* conferred a benefit on him in exchange for his cooperation against Simpson. Had Simpson been able to develop these facts, it would have been much harder for the jury to rely on Durrance's testimony. The State's suppression of these letters violated Simpson's *Brady* rights.

Second, Simpson's trial counsel rendered ineffective assistance in failing to order DNA retesting of the clothes to try to identify who else might have worn them, and in failing to call a DNA expert to testify at trial. Because the State had already found Simpson's *and other people's* DNA on the clothes, there was no risk

in retesting them. And if retesting had revealed more DNA from other people (including perhaps the identifiable DNA of another suspect), Simpson's case would have improved dramatically. Any reasonably competent counsel would have ordered retesting. Counsel's decision not to call a defense DNA expert to aid the jury in understanding the meaning of the State's DNA evidence was just as unreasonable. There was no downside to doing so, and the expert could have told the jury that the State's DNA evidence was more ambiguous than the State suggested, and that the State's theory that the person with the "major" DNA profile on the clothes was necessarily the last person to wear them had no scientific basis.

Because the circuit court denied each of Simpson's claims in isolation, it never considered the prejudice to Simpson from the totality of his claims. Here, multiple errors contributed to a verdict unworthy of confidence.

ARGUMENT

I. MULTIPLE PROBLEMS DEPRIVED SIMPSON OF A FAIR TRIAL

Under Florida law, where multiple errors combine to undermine confidence in the outcome of a criminal trial, the defendant is entitled to a new trial. *See State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996) (granting new trial based on "cumulative effect" of *Brady* and *Strickland* violations, and newly discovered evidence). *Cf. Jackson v. State*, 575 So. 2d 181, 189 (Fla. 1991) (holding that the "cumulative effect" of multiple errors may deny defendant a fair trial).

This holistic approach to assessing prejudice reflects the practical reality that erroneous convictions often stem from multiple contributing causes, not just one. According to data from the National Registry of Exonerations, among homicide defendants exonerated since 1989, 38% were originally convicted at trials involving two of the major factors that contribute to wrongful convictions, and 45% were convicted at trials involving three or more factors. Only 15% were convicted in trials involving only one contributing factor. *See* Nat'l Registry of Exonerations ["Nat'l Registry"], <http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx> (last visited May 16, 2019)¹; *see also* Ellen Yaroshefsky & Laura Schaefer, *Defense Lawyering & Wrongful Convictions* 124-25 (2014) https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1930&context=faculty_scholarship ("Research shows that *multiple* factors . . . typically play a part in an innocent defendant's conviction.").

Simpson has consistently maintained that he did not commit these murders. His trial involved at least three of the known major contributing factors of erroneous convictions—perjury by an informant with an incentive to lie, official misconduct (including the suppression of information that would have impeached the informant), and the ineffective assistance of trial counsel. *See* Samuel R. Gross

¹ The Registry tracks "cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence." *See* Nat'l Registry, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>.

& Michael Shaffer, *Exonerations in the United States, 1989-2012* [“Gross & Shaffer”], at 40-41 (June 2012), https://www.law.umich.edu/special/exoneration/documents/exonerations_us_1989_2012_full_report.pdf. These problems, in addition to significant newly discovered evidence, “put [Simpson’s] whole case in . . . a different light.” *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

The State’s case rested on two pieces of evidence: Durrance’s testimony that Simpson confessed—the State’s *only* direct evidence against Simpson—and the circumstantial evidence of Simpson’s DNA on clothes found a few days after the murder on property adjoining the victims’ home. *See State v. Simpson*, 3 So. 3d 1135, 1147-48 (Fla. 2009). The State told the jury that it should find these two pieces of evidence persuasive because they corroborated each other (T:1613-37).²

In finding a lack of prejudice, the circuit court used the same reasoning: it rejected the probability of a different outcome from Durrance’s recantation by citing the DNA; and it rejected any prejudice from counsel’s failure to order DNA retesting by citing Durrance’s testimony (App. 41, 65).³ What the court should have considered, but did not, is how the mutually reinforcing tendency of Durrance and the DNA would have weakened if Simpson’s jury had heard the evidence (presented for the first time in post-conviction) that casts substantial doubt on *both* of these issues. Doubts as to one could then no longer be allayed by reference to

² This brief follows the record citation convention used in Simpson’s initial brief.

³ “App. #” refers to the Appendix to Simpson’s initial brief.

the other, leaving only a “reasonable probability” of reasonable doubt. *Gunsby*, 670 So. 2d at 924.

Simpson has raised multiple meritorious claims. This brief addresses only two: a *Brady* claim relating to Durrance, and a *Strickland* claim relating to DNA evidence. These claims offer a microcosm of the problems at Simpson’s trial. They highlight the connection between the two aspects of the State’s case, how Simpson could have weakened this connection, and just how strongly Simpson could have defended himself at a fair trial. Simpson’s other claims lead to the same conclusion: this Court cannot have confidence in the jury’s verdict of guilt.

II. THE STATE WITHHELD MATERIAL INFORMATION THAT WOULD HAVE IMPEACHED DURRANCE

The State withheld from the defense two letters relevant to Durrance’s credibility, bias, and motive. The first was a November 2001 letter from Lieutenant Richard Graham (head of the homicide division) and Sheriff Nathaniel Glover to Durrance’s sentencing judge. Graham stated that he was writing to fulfill the State’s “agreement” with Durrance. He acknowledged that Durrance had provided information to the police that was “accurate and useful,” such as the location of Keith Cauley’s body and “information on other unsolved homicides.” He emphasized, however, that he was not advocating for leniency because Durrance had “absolutely zero credibility with law enforcement” and there was “a great likelihood” he “was involved in the disposal of [Cauley’s] body and may

have been personally involved in the actual murder” (R3:4736-37).

The second letter, from June 2006, was from Laura Starrett, who had prosecuted Durrance for drug trafficking, to the State Attorney. Starrett wrote that she was concerned the State was considering using Durrance as a witness against Simpson. She said that Durrance was “a suspect in numerous homicides” who “had always frustrated attempts to prosecute him.” Specifically, though Durrance had come forward with information about several homicides “in an attempt to lessen his sentence” (such as taking the police to Cauley’s body), Starrett and others “felt very strongly that [he] was not being truthful and was actually involved in the homicides he was discussing.” She noted that George Batch, in particular, had been “adamant that he would never be able to use Durrance in a murder prosecution because of his credibility problems” and that Durrance and his associates were suspected of violent acts of witness intimidation (R3:4818-19).

As we now show, (A) perjured informant testimony and suppression of defense-favorable information are leading causes of wrongful convictions; (B) the State had a duty to disclose the letters; and (C) its failure prejudiced Simpson.

A. Perjured Informant Testimony and Suppression of Defense-Favorable Information Are Leading Causes of Wrongful Convictions

The National Registry of Exonerations reports that since 1989, official misconduct—including the suppression of defense-favorable information—contributed to 53% of wrongful homicide convictions. *See* Nat’l Registry,

<http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx>. Where the State's case depends on unreliable evidence—such as the testimony of informants with incentives to lie—the suppression problem is even more acute, with 78% of homicide exonerations involving *both* official misconduct *and* witness perjury. *See* Nat'l Registry, <http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx>. Given that the State's *Brady* obligation exists to further the truth-seeking function of a criminal trial, these high numbers are not surprising.

Study after study has shown that biased informant testimony is a leading cause of wrongful convictions. One landmark study in 2005 found that 49.5% of wrongful convictions in capital cases involved testimony by informants with an incentive to lie—making informant perjury “the leading cause” of wrongful capital convictions. *See* Center on Wrongful Convictions, Northwestern University School of Law, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* (2005), at 3. Another study found that, of 205 murder exonerations in the data set, 56% involved convictions based on perjury, often by a witness who stood to gain from his false testimony. *See* Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 543-44 (2005); *see also, e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 76, 86 (2008) (finding false informant

testimony in 18% of the first 200 DNA exonerations).

In 2014, this Court formally recognized the correlation between informant testimony and erroneous convictions. The Court amended Florida Rule of Criminal Procedure 3.220 to require the State to disclose all benefits and “prior history of cooperation” for informants who will testify that the defendant confessed to them. *See In re: Amendments to Florida Rule of Criminal Procedure 3.220*, No. SC13-1541 (May 29, 2014) (stating that informant testimony “constitute[s] the basis for many wrongful convictions”). This amendment reflects the Court’s understanding that, where the State seeks to convict based on inherently unreliable evidence, full disclosure of potentially impeaching information is essential.

B. The State Had a Duty under *Brady* to Disclose the Graham and Starrett Letters to the Defense

Durrance had all the hallmarks of an unreliable informant: he was a serial criminal and a serial snitch, he came forward only when he needed a benefit from the State, and he showed no compunction about lying (T:891, 898). Given his importance to the State’s case, it was critical that Simpson have all material impeachment information so he could fairly challenge Durrance’s credibility.

The circuit court nevertheless found that the State had no duty under *Brady* to disclose the Graham and Starrett letters. The court considered only the actual statements in the letters themselves, and ignored their broader import (App. 26-27). But this Court has held that the *Brady* right applies to defense-favorable

information even where the information is not directly admissible, so long as the disclosure “would [have led the defense] to admissible substantive or impeachment evidence.” *Hurst v. State*, 18 So. 3d 975, 1000 (Fla. 2009). Accordingly, “courts should consider not only how the State’s suppression of favorable information deprived the defendant of direct relevant evidence *but also* how it handicapped the defense’s ability to investigate or present other aspects of the case.” *Rogers v. State*, 782 So. 2d 373, 385 (Fla. 2001) (emphasis added).

The State’s suppression of these letters unquestionably “handicapped [Simpson’s] ability to investigate” numerous leads for impeaching Durrance. Had the State disclosed the Graham letter, Simpson could have investigated the “agreement” between the State and Durrance, and would have learned that Starrett discussed Durrance’s assistance in the Crook/Kimbler murders at his sentencing (Simpson’s br. at 103-05). Simpson also could have investigated Durrance’s reputation for untruthfulness (discussed in both letters), which was so strong that it persisted even after Durrance offered “accurate and useful” information to the State. Durrance’s cooperation in the *Cauley* case could also have armed Simpson to argue that Durrance tends to give the State information that appears to corroborate other evidence, but it is a “false corroboration”—rather than corroborating his truthfulness, Durrance’s knowledge of the location of Cauley’s body was likely due to his involvement in the crime itself, which he was actively

trying to conceal. Simpson could have used this point to weaken the perceived connection between Durrance's testimony and the presence of Simpson's DNA on the clothes. Finally, the letters also indicate the State suspected Durrance of multiple other homicides—which suggests that Durrance had even more reasons to try to curry favor with the State. All of these facts, as well as his motives for testifying against Simpson, impeach Durrance's credibility (R3:10259, 10538-39).

C. The State's Failure to Disclose the Letters Prejudiced Simpson Because Durrance's Testimony Was the Only Direct Evidence Against Simpson and the Letters Reinforced His Lack of Credibility

The circuit court reasoned that the State's suppression of the letters did not prejudice Simpson because the defense had already impeached Durrance at trial (App. 27). But nothing in the *Brady* case law states that suppressed impeachment information is *per se* immaterial if the witness was already impeached. *Cf. Banks v. Dretke*, 540 U.S. 668, 702 (2004) (rejecting the argument that withheld evidence was “merely cumulative” because witness was “heavily impeached [at trial]”). Rather, materiality in such situations depends on the importance of the witness to the case and the nature of the information withheld. *United States v. Bagley*, 473 U.S. 667, 689 (1985) (“If the testimony that might have been impeached is . . . tangential, the failure to disclose the impeachment evidence could conceivably be held harmless. But when the testimony is the start and finish of the prosecution's case . . . quite a different conclusion must necessarily be drawn.”).

Durrance's testimony was the heart of the State's case. *See Rogers*, 782 So. 2d at 384 (“Whenever the government’s case depends almost entirely on the testimony of one witness, without which there can be no conviction, that witness’s credibility is an important issue in the case.”). It was the only direct evidence of Simpson’s guilt. In fact, the State was so concerned about Durrance’s credibility that it improperly “vouch[ed]” for him in closing, *see Simpson*, 3 So. 3d at 1146 n.7; and repeatedly (and misleadingly) emphasized that he had received no benefits for his testimony (T:887, 923, 1613-14). Although the defense attempted to impeach Durrance with his criminal history and potential bias against Simpson, the verdict shows that the jury nevertheless believed him. The additional impeachment from the letters likely would have tipped the balance.

This Court has found a *Brady* violation in similar circumstances. In *Floyd v. State*, 902 So. 2d 775 (Fla. 2005), the State suppressed a letter revealing that its confession witness had “sought a reduction of his robbery charge in exchange for his testimony against the defendant, and that he claimed he ‘would rather die [than] go to prison.’” *Id.* at 786. Although at trial the witness was impeached with a statement that he would “do anything to get out of jail,” his involvement as a snitch in other cases, and the resulting “favorable treatment” from the State, this Court reasoned that the suppressed information was material because it “would have increased [his] credibility problem,” thus raising doubts about whether the

defendant had confessed to him at all. *Id.* at 786-87.

Here as well, the facts Simpson could have developed from the Graham and Starrett letters would have made it much more difficult for the jury to rely on Durrance's testimony, and would likely have provided "a basis for reasonable doubt in the minds of some jurors." *Id.* at 787.

III. SIMPSON'S COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN HIS HANDLING OF THE DNA EVIDENCE ON THE CLOTHES

Any competent defense attorney would have known that to establish a reasonable doubt about his guilt, Simpson needed a credible explanation for his DNA on the clothes. Although Simpson testified that Little Archie (a key alternative suspect) had borrowed the clothes from him shortly before the murders, his lawyers inexplicably chose *not* to have the clothes retested to try to identify who else might have worn them; and also chose *not* to call a defense expert to point out the ambiguities in the State's DNA case. Counsel's unreasonable choices had devastating consequences for the defense.

As we explain below, (A) inadequate pre-trial investigation is a common cause of wrongful convictions; (B) by failing to order DNA retesting and to call a defense DNA expert, counsel performed deficiently; and (C) these errors prejudiced Simpson, both alone and in conjunction with other errors.

A. Counsel’s Inadequate Pre-trial Investigation Is a Common Cause of Wrongful Convictions

Ineffective assistance of counsel is a known “root cause[]” of wrongful convictions. *See, e.g.,* N.Y. State Bar Assoc., *Final Report of the New York State Bar Association’s Taskforce on Wrongful Convictions* [“NY State Report”], at 6 (2009), <https://www.nysba.org/wcreport/>; Gross & Schaffer, at 41 (stating that many exonerated defendants—“perhaps a clear majority—would not have been convicted in the first instance if their lawyers had done good work”).

Courts and attorney guidelines agree that reasonable professional assistance requires adequate pre-trial investigation: counsel must either reasonably investigate the case or make an “informed decision” not to. *See, e.g., Strickland*, 466 U.S. at 691; *Wiggins v. Smith*, 539 U.S. 510, 527 (2003); *Bell v. State*, 965 So. 2d 48, 62 (Fla. 2007); ABA Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases [“ABA Guidelines”], 31 Hofstra L. Rev. 913, 1018, 1020 (rev. ed. 2003) (stating counsel’s duty to “investigate . . . all possible defenses,” and “conduct appropriate analyses of all . . . available forensic evidence”).

Yet counsel’s “failure to fully investigate” potential defenses continues to be a common problem. *See* NY State Report at 6; Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, The Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 Fordham Urb. L.J. 1097, 1103 (identifying

inadequate attorney investigation as a “core cause” of wrongful convictions); ABA Guidelines, 31 Hofstra L. Rev at 1017 (listing “inadequate investigation” as a significant contributing factor to wrongful convictions).

B. By Failing to Order DNA Retesting, and Failing to Call a Defense DNA Expert, Simpson’s Counsel Performed Deficiently

When the State tested the clothes for DNA, it sampled only a few locations. There were many other areas of the clothes that had never been tested (Simpson’s br. at 150-51). The explanations of lead defense counsel Eler for *not* ordering DNA retesting of the clothes make no sense.

First, Eler’s desire not to “make DNA his sole feature at trial” was a *trial strategy* (App. 61). Setting aside the conundrum of how counsel could avoid making DNA a key feature in a trial like this, a trial strategy cannot justify counsel’s failure to *investigate* before trial, which is the gravamen of Simpson’s claim. *State v. Fitzpatrick*, 118 So. 3d 737, 755-56 (Fla. 2013) (“Decisions rendered by counsel after a less than complete investigation are only reasonable to the extent that reasonable professional judgments support the limitations on investigation.”); *Wiggins*, 539 U.S. at 521 (“[T]he deference owed such strategic judgments [is defined] in terms of the adequacy of the investigations supporting [them.]”).

Second, it is undisputed that Simpson would not have had to disclose unfavorable testing results to the State, so it is unclear how retesting could have

been “harmful” to Simpson (App. 61; Simpson’s br. at 164).

Third, Eler’s fear of an “ethical dilemma” did not exist for retesting the clothes (App. 61, R3:10416). Retesting could have yielded only one of two results: (1) just more of Simpson’s DNA (which would not disprove Simpson’s testimony because the State had already found both Simpson’s DNA *and other people’s DNA* on the clothes); or (2) more DNA from other people (including potentially the identifiable DNA of another suspect), which would have been very helpful to the defense. Where “retesting would have either produced no new harmful evidence or dramatically benefitted [the defendant’s] case,” competent counsel would order retesting. *Fitzpatrick*, 118 So. 3d at 756.⁴

Eler cannot justify his unreasonable decision based on his purported “consult[ation]” with court-appointed expert Dr. Charlotte Word (App. 59) because this consultation was not meaningful. *See id.* One cannot consult with an expert

⁴ *State v. Fitzpatrick* offers several interesting parallels. The State had DNA evidence that it argued definitively connected the defendant to the crime. 118 So. 3d at 743. The defendant offered an innocent explanation—that he had consensual intercourse with the victim earlier in the day. *Id.* at 744. At trial, the State’s forensic experts opined that the victim was raped shortly before she was attacked. This opinion was based on the State’s misunderstanding of the difference between “intact” and “motile” sperm (which a defense expert could have refuted), and the absence of Fitzpatrick’s semen in the victim’s underwear (which was later found in post-conviction retesting). *See id.* at 755, 759. This Court found counsel’s performance deficient because “[d]espite the scientific evidence that would implicate his client if not refuted, [he] failed to retain any forensic or medical experts,” and conducted only “a cursory investigation into the benefits and potential risks of retesting [the victim’s] underwear.” *Id.* at 754, 756.

meaningfully without apprising the expert of the basic facts. *See State v. Bevel*, 221 So. 3d 1168, 1180-82 (Fla. 2017) (counsel could not rely on expert evaluations where he failed to provide experts with key “background information”); *State v. Bright*, 200 So. 3d 710, 730-31 (Fla. 2016) (similar). Dr. Word’s unrebutted testimony is that *she did not know* that Simpson had explained the clothes were his but that he shared them with others. This was obviously a prerequisite to properly assessing the potential benefits and risks of retesting. Had she known this fact, Dr. Word “would definitely have recommended retesting” (R3:12161-62).

Eler’s decision not to use Dr. Word as a DNA expert was likewise unreasonable. There was no downside to doing so. Although Dr. Word told Eler that her testimony “would [likely] include corroboration” of the State’s evidence (R3:3781), she did not know that Simpson was not contesting that his DNA was on the clothes, or that he had given his counsel an explanation for that fact that was entirely consistent with his steadfast claim of innocence. Had she understood these facts, Dr. Word could have explained to Eler that her testimony could materially assist the defense by, for example, highlighting the ambiguities in the State’s DNA evidence; and explaining that the State’s “last wearer” theory lacked a sound scientific basis (Simpson’s br. at 184-93).

Eler’s decision not to call an expert was particularly problematic because of the type of DNA evidence at issue. Juries tend to assume that DNA evidence is

objective and infallible, but the interpretation of DNA mixtures is actually highly subjective. In one study, investigators gave 17 DNA experts the DNA mixture data from an adjudicated rape case. The original analyst had been told there was a statement from a co-defendant linking the defendant to the rape; this analyst concluded the defendant could not be excluded from the mixture. The new experts—who all worked at the same laboratory and under the same protocols as the original analyst—were not told about the co-defendant’s statement. Of the 17 new experts, *only one* agreed with the original analyst that the defendant could not be excluded. The other 16 opined that the evidence was either inconclusive or that the *defendant was excluded*. See Itiel E. Dror & Greg Hampikian, *Subjectivity & Bias in Forensic DNA Mixture Interpretation*, *Sci. & Justice* 51 (2011), 204-08. A defense expert could have explained to the jury how bias and subjectivity can color a scientist’s interpretation of DNA data, which would have supported Simpson’s argument that Little Archie could not be excluded as having worn the clothes.⁵

C. **Counsel’s Errors, Both Alone and in Conjunction with Simpson’s Other Claims, Prejudiced Simpson**

That counsel’s deficiencies prejudiced Simpson is clear when one compares what the jury actually heard to what it should have heard. The jury heard that: (1) there was only one DNA mixture on the clothes from which Little Archie could not

⁵ Although Eler cross-examined the State’s experts and suggested that they were relying on assumptions, he was not able to explain why their assumptions were unwarranted (T:1213-55, 1261-62, 1333-36).

be excluded, but 24% of Caucasians also could not be excluded (T:1192-94); (2) the prior fact made it an “impossibility” that Little Archie was the killer (T:1634, 1679); (3) Simpson’s was the major DNA profile, so he probably wore the clothes last (T:1331, 1678); and (4) Simpson’s testimony was unbelievable because it was “negated by the scientific testimony,” whereas “the science corroborate[d] Michael Durrance’s testimony” (T:1685-86).

Had counsel offered reasonable professional assistance, the jury instead would have heard that: (1) retesting identified 29 *additional* DNA mixtures on the clothes, including 10 *interior mixtures from which Little Archie could not be excluded* (Simpson br. at 160);⁶ (2) these mixtures provided scientific support for Simpson’s claim that Little Archie wore the clothes; (3) the State’s “last wearer” theory had no scientific basis; and (4) Simpson’s testimony that he shared the clothes with others was consistent with the many DNA mixtures found on them.

In short, as this Court stated in finding prejudice in *State v. Fitzpatrick*, had counsel acted reasonably, the defendant could have “convey[ed] to the jury that [his] version of the events, as well as his fervent assertions of innocence, were not

⁶ These numbers are based on Lynne Burley’s post-conviction testing of the clothes. Though Burley used a more advanced test kit than was available at the time of Simpson’s trial, the evidence had also degraded significantly in the intervening years (Simpson’s br. at 175-76). It is therefore reasonable to conclude that pre-trial retesting would have yielded *at least* the results that Burley found years later. Of course, pre-trial retesting could have also produced additional exculpatory results.

as farfetched as the State attempted to portray the facts.” 118 So. 3d at 755. Instead, as in *Fitzpatrick*, the jury heard that the defendant’s “version of events was scientifically impossible.” *Id.* at 754.

Adding Simpson’s other claims to the analysis magnifies the prejudice. For example, if the State had disclosed the Graham and Starrett letters to the defense, as *Brady* requires, the jury *also* would have heard significant additional facts casting doubt on Durrance’s already shaky credibility, including facts undermining the State’s argument that Durrance and the DNA should be believed because they were mutually corroborative. *See supra* Section II.B. At a new trial, the jury would also hear that Durrance recanted to Simpson’s investigator, as well as numerous facts supporting Simpson’s version of events (Simpson’s br. at 57-66, 71-83, 194-221, 225-47). Considering all these facts, at a new trial a different result is at the very least reasonably probable.

CONCLUSION

Simpson never received the “fair and impartial trial [that] is the inalienable right of all litigants in this state and this nation.” *Jackson*, 575 So. 2d at 189. For the reasons stated above and in Simpson’s initial brief, this Court should reverse the circuit court’s denial of relief under Rule 3.851.

Respectfully submitted,

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I certify that the foregoing brief complies with the font requirement of Fla. R. App. P. 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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